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THE PRIVATE PROVISION OF ESSENTIAL FINANCIAL SERVICES AND THE CORPORATE SOCIAL RESPONSIBILITIES OF BANKS AND INSURANCE COMPANIES

THERESE WILSON*

Lack of access to both basic credit and basic insurance products have been recognised as two key aspects of financial exclusion in Australia. The neoliberal, or economic liberal, approach to corporate regulation, focusing on profit maximisation, free markets, and limited regulatory intervention, has led to suboptimal social outcomes. This is because of the impacts of financial exclusion, and in this article an argument is made for requiring some profit sacrifice by banking and insurance corporations, to provide basic financial services — as essential services — in accordance with their corporate social responsibilities. The article considers regulatory reform to support such profit sacrifice.

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I INTRODUCTION

This article will explore the corporate social responsibilities of private corporations, which are providing what should be regarded as essential services in the context of a modern consumerist society. Those services are the provision of basic credit and basic insurance products for financially excluded Australians. The article asks whether private corporations (such as banks and insurance companies) should bear these costs on the basis that they enjoy the privilege of being licensed to provide essential services to predominantly profitable customers. Also, and alternatively, this article will ask whether the government should compensate these private corporations (at least in part) for the economic loss they suffer as a result of having to provide unprofitable services. The article also considers regulatory reform to support the provision of potentially unprofitable services.

Given that the exercise of corporate social responsibility by banks and insurance companies in providing these essential services might involve some profit sacrifice, this article considers the extent to which profit sacrifice by private corporations might be justified in the interests of a broader stakeholder group (beyond shareholders). There has been much debate in recent years as to whether Australian corporate law should be amended to explicitly permit directors to take into account broader stakeholder interests in their corporate decision-making.¹ Some argue that the debate has been unnecessary as directors already do take into account broader stakeholder interests, and further, that directors are free to do so because courts will not interfere with directors' judgments so long as directors are not acting in their own self-interest.² Over a decade ago, two government inquiries determined that corporate social responsibility should be voluntary as it is 'not possible to mandate good corporate behaviour,' and that there was no need for regulation to encourage or require corporate social responsibility as corporations have sufficient basis to behave responsibly under a 'business case'.³ There was a clear sense in the reports coming out of those inquiries that while corporations

¹ See, eg, Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *UNSW Law Journal* 291; See, eg, Philip Lynch, 'Human Rights and Corporate Social Responsibility: An Australian Perspective' (2005) 1(4) *The Corporate Governance Law Review* 402.

² Marshall and Ramsay, above n 1, 316.

³ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (1 December 2006) 7, 78; Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 35-36.

may choose to engage in profit sacrificing activity where this is relevant to their business interests, 'this is not to suggest that companies bear some form of obligation to tackle wider problems facing society, regardless of the relevance of those problems to their own business'.⁴ I argue below, however, that such an obligation does arise where private actors are enabled to provide essential services.

The question of law reform is revisited here in considering the imposition of obligations upon corporations to meet the credit and insurance needs of potentially unprofitable customers. As recognised by Braithwaite in the context of a responsive regulatory approach, 'we need tough-minded regulatory institutions that can shift to a hard-headed approach when virtue fails, as it often will'.⁵ The neoliberal approach to corporate regulation, focusing on profit maximisation, free markets and limited regulatory intervention in the operation of those markets,⁶ has led to suboptimal social outcomes as exemplified by the global financial crisis. The neoliberal approach which supports financial firms whose conduct caused the global financial crisis, is said to perpetuate because of the significant continued economic and political power and influence of those firms.⁷ The neoliberal approach is also a factor in those aspects of financial exclusion attributable to access exclusion, whereby unprofitable consumers are excluded from access to products or services;⁸ therefore an argument is made for requiring some profit sacrifice by banking and insurance corporations to provide basic financial services. That is, as essential services, in accordance with their corporate social responsibilities. This article will explore what reform might be effective to provide banking and insurance corporations with what has elsewhere been termed 'the authority to do good'.⁹

The article commences with a description of financial exclusion in Australia and its consequences. As will be noted, vulnerable, low-income Australians are most likely to experience financial exclusion, particularly in regard to a lack of access to basic small

⁴ Corporations and Markets Advisory Committee, above n 3, 78.

⁵ John Braithwaite, 'Responsive Business Regulatory Institutions' in Charles Sampford and Tony Coady (eds), *Business, Ethics and the Law* (1993) 83, 85.

⁶ Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press, 2011) 98.

⁷ Ibid 175.

⁸ Andrew Leyshon and Nigel Thrift, 'Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States' (1995) 20(3) *Transaction of the Institute of British Geographers, New Series* 312, 314.

⁹ Stephanie Moulton, 'The Authority to Do Good: Publicly Responsible Behavior among Private Mortgage Lenders' (2012) 72(3) *Public Administration Review* 430, 430.

amount credit products, and basic, appropriate home contents and car insurance. Financial exclusion with regard to both credit and insurance can exacerbate the disadvantaged and vulnerable and can have significant social and economic consequences.

Basic credit and insurance products can be conceptualised as essential services, adopting the European approach to ‘services of general economic interest’.¹⁰ It is argued that people should not be denied access to such services on the basis of price. Deference to the “free market” under neoliberal doctrine is questionable where goods or services are essential for financial and social inclusion, and the market fails to deliver those goods or services in a manner which is accessible to, and appropriate for, all people. There is also an argument that a right to ‘services of general economic interest’ should be regarded as a human right. This is premised on an argument that human rights extend beyond the protection of civil and political rights to economic and social rights, satisfying what Habermas describes as the ‘moral promise to respect the human dignity of every person equally’.¹¹

What role, then, should banks and insurance companies play in ensuring the provision of essential credit and insurance services to potentially unprofitable customers? The article will conclude with an overview of possible strategies to effectively address the problem of financial exclusion with regard to basic credit and insurance products in Australia, involving contributions to be made by banks and insurance companies in accordance with their corporate social responsibilities.

II FINANCIAL EXCLUSION AND ITS CONSEQUENCES

In Australia, according to the most recent and apparently the last of a number of comprehensive annual studies measuring financial exclusion in Australia, as of 2013, 16.9 per cent of the Australian adult population were either fully excluded or severely excluded from financial services. Fully excluded individuals (who made up 1 per cent) had no financial services products whereas severely excluded individuals (who made up

¹⁰ Thomas Wilhelmsson, ‘Services of General Interest and European Private Law’ in Charles Rickett and Thomas Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 149, 154–155.

¹¹ Jurgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41 *Metaphilosophy* 464, 469.

the balance 15.9 per cent) had only one financial services product.¹² The three basic financial services products considered in the relevant study were: a day-to-day transaction account, access to a moderate amount of credit, and basic insurance. Being able to access a 'moderate amount of credit' was defined in the study as having ownership of a credit card, without stipulating a particular amount of credit.¹³ While measuring access to credit by reference to access to a mainstream credit card is clearly not a perfect measure, the authors of the study note that 'if a consumer has a credit card, they would generally qualify for other forms of mainstream credit. The rate of credit card ownership closely tracks the general rate of mainstream credit use in Australia'.¹⁴ Only 2.3 per cent of the population were without a day-to-day transaction account, whereas a total of 56.7 per cent were without access to basic mainstream credit and a total of 18.7 per cent were without access to basic insurance.¹⁵ Clearly, a lack of access to basic credit is the greatest concern in Australia, while a lack of access to insurance is a reasonably large concern.

The position where one in six people in Australia were either fully or severely excluded from access to basic financial services has remained the case between 2006 and 2013 and, most likely, beyond.¹⁶ Those who were fully or severely financially excluded were predominantly low income and disadvantaged — for example being unemployed, having had low levels of education, and higher than average incidences of mental illness.¹⁷ While the usual characteristics of financially excluded people have been identified, the causes of financial exclusion are complex and variable. One recognised cause is 'access exclusion', which relates to the providers' decision not to offer products or services to unprofitable consumers, while another is 'price exclusion' where products are priced so as to be beyond the reach of some consumers.¹⁸ It is likely that access exclusion is at play in relation to a lack of access to mainstream credit, while price exclusion is a factor that

¹² Chris Connolly, *Measuring Financial Exclusion in Australia* (Centre for Social Impact, University of New South Wales, for National Australia Bank, 2014) 5.

¹³ *Ibid* app 2.

¹⁴ *Ibid*.

¹⁵ *Ibid* 9.

¹⁶ Kristy Muir, Axelle Marjolin and Sarah Adams, *Eight Years on the Fringe: What Has It Meant to Be Severely or Fully Financially Excluded in Australia?* (Centre for Social Impact, University of New South Wales, for National Australia Bank, 2015) 5.

¹⁷ *Ibid*.

¹⁸ Leyshon and Thrift, above n 8, 314.

leads to exclusion from basic insurance products and also raises concerns regarding the appropriateness of products currently on offer.

What are the consequences of exclusion from access to basic, appropriate credit and insurance products? With respect to credit, it is noted that credit is widely used in modern consumerist societies and equality of access to such credit is an important goal in that context. Financially excluded consumers will often be on low incomes and need access to small amount credit in order to purchase or replace essential household items or to meet emergency bills.¹⁹ Where people cannot meet their credit needs by accessing services from mainstream providers, they will rely on informal networks or turn to high cost alternative credit providers that may fail to adhere to responsible lending obligations.²⁰ This can exacerbate financial distress and over-indebtedness and can sometimes lead to mental health problems, violence, and crime. This in turn can have significant social and economic consequences, including burdening public health and legal aid systems.²¹ There are also clear links between financial exclusion pertaining to credit access, and social exclusion, resulting for example from an inability to purchase a computer for a child to do homework on, or to buy suitable clothing, or to pay for transport to attend a job interview.²² Essentially, a lack of access to appropriate credit can exacerbate disadvantage, both financially and socially. As noted by Ramsay:

Differing patterns of credit use and access to credit may act as a potential 'multiplier' of advantage and disadvantage in society potentially heightening social divisions ... Exclusion from access to credit may therefore mean both economic exclusion from markets ... and also exclusion from a central aspect of public expression in modern society.²³

In relation to a lack of access to basic insurance, it has been noted that low income Australians are likely to be uninsured. This is due to such factors as cost, a lack of facilities

¹⁹ Elaine Kempson, *In or Out? Financial Exclusion: A Literature and Research Review* (Financial Services Authority, 2000) 55.

²⁰ See, eg, Australian Securities and Investments Commission, 'Payday Lender Nimble to Refund \$1.5 Million following ASIC Probe' (Media Release, 16-089MR, 23 March 2016) <<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-089mr-payday-lender-nimble-to-refund-15-million-following-asic-probe/>>.

²¹ Department of Trade and Industry, UK, *Fair Clear and Competitive: The Consumer Credit Market in the 21st Century* (DTI, UK, White Paper, 2003) 76-78.

²² Chant Link and Associates, *A Report on Financial Exclusion in Australia* (ANZ, 2004) 94.

²³ Iain Ramsay, 'Consumer Credit Law: Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177, 181.

that enable payment of insurance premiums in instalments, and an absence of appropriate products in the market which provide suitable levels of cover for people on low incomes.²⁴ A lack of access to appropriate, basic insurance cover tends to exacerbate the vulnerability of low income Australians in that they are not protected, in the sense of being able to replace property in the event of damage to their home or belongings.²⁵

III A CONCEPTUALISATION OF BASIC CREDIT AND INSURANCE PRODUCTS AS ESSENTIAL SERVICES

Given the impacts of financial exclusion arising from a lack of access to appropriate, basic credit and insurance products, it is argued that credit and insurance products should be regarded as essential products, the provision of which should in some way be guaranteed. One way in which such products might be guaranteed is by imposing a mechanism such as the universal service obligation upon their providers.²⁶ In the Australian context, for example, universal service obligations have been applied to telecommunication services, although limited to telephone services, on the basis that a lack of telephone access will lead to social exclusion.²⁷

Underlying the imposition of universal service obligations is recognition of the increasing tendency in neoliberal markets for essential goods and services to be provided by private providers.²⁸ While neoliberalism favours “free markets” and is therefore assumed to favour limited regulatory intervention in those markets, it has been argued that neoliberalism in fact fosters interventionist regulation to protect the interests of ‘giant firms’ such as banks and insurance companies, rather than the interests of individuals.²⁹ That is to say, rather than neoliberalism resulting in an absence of, or a limited amount of, regulation of the market, it has in fact created a regulatory structure which favours large corporations. For example, corporate pursuit of profit is encouraged under section

²⁴ Genevieve Sheehan and Gordon Renouf, *Risk and Reality: Access to General Insurance for People on Low Incomes* (Brotherhood of St Laurence, 2006) 7–16; Claire Whyley, James McCormick and Elaine Kempson, *Paying for Peace of Mind* (Policy Studies Institute, 1998) 2.

²⁵ Consumer Action Law Centre, *A Fair Go in Insurance* (1 April 2011) Consumer Action Law Centre, <<https://consumeraction.org.au/fair-go-in-insurance/>>; Sheehan and Renouf, above n 24, 1.

²⁶ Hans Micklitz, ‘Universal Services: Nucleus for a Social European Private Law’ in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press, 2011) 63–102.

²⁷ Australian Communication and Media Authority, *USO Obligations* (25 May 2016) Australian Communication and Media Authority <<http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Obligations/universal-service-obligation-obligations-i-acma>>.

²⁸ Lynne Chester, ‘The Participation of Vulnerable Australians in Markets for Essential Goods and Services’ (2011) 68 *The Journal of Australian Political Economy* 169, 169.

²⁹ Crouch, above n 6, 98.

181 of the *Corporations Act 2001* (as amended) (Cth), in requiring directors to act in the 'best interests of the company'.³⁰ Access and exclusion problems arise when deference to the "free market", itself created by a certain style of regulatory regime supportive of large corporations, leads to individuals being unable to pay the market price for these goods and services. Where a service should be construed as an essential service, it has been argued that the individuals excluded from access should be conceptualised as citizens rather than consumers, entitled to access those services regardless of their ability to pay the market price.³¹ Consistent with this suggested distinction between citizen rights and consumer rights, it has been argued that there should also be a distinction between market consumption on the one hand, whereby market-based approaches to the provision of goods and services might be adequate, and social consumption on the other hand, whereby goods or services are essential for social inclusion.³²

The question is then: what characteristics should cause a service to be categorised as an essential service which citizens are entitled to access? In Europe, essential services which should attract universal service obligations have come to be referred to as both 'universal services' and 'services of general economic interest'.³³ Under article 36 of the Charter of Fundamental Rights of the European Union, 'the Union recognises and respects access to services of general economic interest as provided for in national laws and practices'.³⁴ Wilhelmsson explains services of general economic interest as services necessary to enable a person to live a "normal" life in the context in which they live. Wilhelmsson goes on to explain that:

Many financial services and information society services are now central to the infrastructure of society, and the consumer cannot reasonably be expected to live without them. These aspects of those services can be treated as social rights in the same way that services provided by 'traditional' public utilities are.³⁵

In referring to access to financial services as necessary for a "normal" life, it is acknowledged that this approach is consistent with the 'unprecedented financialisation'

³⁰ *Corporations Act 2001* (Cth) s 181.

³¹ Ran Greenstein, 'Social Rights, Essential Services, and Political Mobilization in Post-Apartheid South Africa' (2006) 29 *Journal of Consumer Policy* 417, 418.

³² *Ibid* 423.

³³ Micklitz, above n 26, 63–102.

³⁴ *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 36.

³⁵ Wilhelmsson, above n 10, 154–155.

in recent decades, which has prioritised financial over non-financial outcomes, financial services over trade and commodity production, and which has led to a perhaps undesirable increase in the scale and profitability of the financial services market.³⁶ It is the financialisation of housing, whereby subprime mortgages were packaged for financial investors, which has been blamed for the global financial crisis.³⁷ One might ask whether there has in fact been a financialisation of welfare, whereby access to the necessities of life for vulnerable, low income consumers now requires the involvement of financial services. Paradoxically, this financialisation, because it involves a privatisation of services which are then provided by profit-seeking corporations, has at the same time led to exclusion from those services for those who are most vulnerable, and least profitable, as outlined above.

In any event, the reality is that financial services, such as the provision of basic credit and insurance products, are necessary to enable a person to lead a normal life in a modern consumerist society such as Australia. The conceptualisation of financially excluded Australians as citizens, with rights to access essential financial services notwithstanding market barriers such as lack of affordability, gives rise to practical considerations regarding which entities should bear the costs of providing potentially unprofitable services. Should private corporations, such as banks and insurance companies, bear these costs on the basis that they enjoy the privilege of being licensed to provide essential services to predominantly profitable customers? Or should the government compensate these private corporations, at least in part, for the economic loss they suffer as a result of having to provide unprofitable services? In the absence of clear regulatory requirements for banks and insurance companies to sacrifice profits to meet the needs of financially excluded citizens, is it even possible under Australian corporate law for boards of directors to agree to such profit sacrifice without breaching their directors' duties? The potential role of banking and insurance corporations in ensuring access to appropriate basic credit and insurance products will be considered in the next section.

³⁶ Susan Christopherson, Ron Martin and Jane Pollard, 'Financialisation: Roots and Repercussions' (2013) 6 *Cambridge Journal of Regions, Economy and Society* 351, 355.

³⁷ Costas Lapavitsas, 'Financialised Capitalism: Crisis and Financial Expropriation' in Costas Lapavitsas (ed), *Financialisation in Crisis* (Brill, 2012) 15.

IV THE ROLE OF THE CORPORATES

Should private entities such as banking corporations and insurance corporations be compelled to bear the costs of unprofitable service provision on the basis of their corporate social responsibilities? The concept of corporate social responsibility arises out of an understanding that corporations have responsibilities beyond those owed to shareholders: that there are responsibilities owed by corporations to serve broader stakeholder interests such as those of employees and customers, as well as concerns regarding the environment, and general public welfare. There are a number of possible bases for this assertion, two of which will be explored in this article. The first is an argument that corporate activities may give rise to externalities, whereby the costs of a corporation's activities are borne by society rather than the company, and therefore duties are owed to society by that corporation. The second is an argument which highlights the *raison d'être* of shareholder theory as being to address the separation of ownership and control problems in corporate structures (and thus requiring management to ensure the corporation maximises profit for the owner shareholders). Shareholder theory informs Australian corporate law and requires a corporation (through the mechanism of its board of directors) to focus on profit-making to benefit corporate owners or shareholders. This has been referred to as a 'shareholder primacy' approach.³⁸ The argument is that shareholder theory ignores the "other separation problem", namely separation of production and consumption which is also present in an economy dominated by large corporations as producers, and which can only be addressed by adopting a stakeholder theory model. Relevant to this second argument is the concept of a social contract to which corporations such as banks are said to be parties. The "externalities" argument is an economic argument which counters the "economic efficiency" argument that otherwise supports shareholder theory. The economic efficiency argument provides that corporate pursuit of profits for the benefit of shareholders is efficient in the sense of being financially beneficial to society. This forms part of a broader neoliberal argument supporting the "free economy" or "free market" undistorted by government interference (or at least government interference which

³⁸ See, eg, David Yosifon, 'The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture' (2015) *Brigham Young University Law Review* 1309, 1328.

interferes with profit-making), as being of optimal benefit to society.³⁹ This argument cannot always be maintained, given that the pursuit of profits by one corporate entity may in some circumstances be of little or no benefit to society at large, due to externalities whereby the costs of the corporation's activities are borne by society rather than the corporation. As discussed above, the costs to society and individuals of financial exclusion can be significant, including burdens to social welfare, health, and legal systems. One might argue that this is an externality arising as a result of the banking and insurance sectors' choices to pursue profitable customers and not provide appropriate credit and insurance products to those whom they regard as less profitable customers. Conversely, where a corporate entity acts specifically to contribute to the social good (for example by providing appropriate services to low income consumers), then financial benefits such as decreased reliance on social welfare, fewer bankruptcies, and so forth, may well follow. Indeed, one reason that has been given for allowing and encouraging the exercise of corporate social responsibility by corporations is that aggregate social welfare may be higher than where corporations adhere to a model of pure profit maximisation.⁴⁰

In relation to a failure of shareholder theory to address the 'separation of production and consumption problem', this argument acknowledges that following the industrial revolution and the increase in production of goods and services by corporations, there has arisen a separation between the production and consumption of goods and services which has led to a consumer agency problem.⁴¹ Whereas shareholder theory and Australian corporate law address the problem of separation of ownership and control within corporations, the consumer agency problem can only be addressed by taking a broader stakeholder theory approach to corporate governance and regulation. Those who must consume the goods and services provided by corporations, in circumstances where they have no control over the production and supply of those goods and services, must be afforded protections so that their interests are not exploited. This must particularly be the case where the services being provided by corporations are essential, or quasi-essential, services. Where corporations are given government support for

³⁹ John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, 1995) 305-346.

⁴⁰ Forest L Reinhardt, Robert N Stavins and Richard H K Vietor, 'Corporate Social Responsibility through an Economic Lens' (Working Paper, NoRWP08-023, Harvard Kennedy Law School, April 2008) 219, 25-26.

⁴¹ Yosifon, above n 38.

providing these services (for example in the form of a licence to operate and supportive policies to maintain a well-functioning sector), there is said to be a social contract which requires reciprocity from the corporations and which provides corporations with 'a moral framework for engaging in economic activities'.⁴² In the context of banking corporations, banks should be required to fulfil obligations to benefit society in return for government support for their commercial operations.

Under Australian corporate law,⁴³ corporate directors owe duties to act in the best interest of the corporation and that duty has been traditionally defined as one to act in the best financial interests of the 'shareholders as a whole', meaning the best financial interests of the corporation.⁴⁴ There is little obvious scope for profit sacrifice in that formula. Arguments can be made that it is in the best financial interests of a corporation to maintain a strong reputation and to be perceived as legitimate and as a good corporate citizen, but there is no doubt that activities which have the effect of sacrificing corporate profits would be open to challenge by disgruntled shareholders.⁴⁵ Further, there is a concern that arguments around the potential for voluntary corporate social responsibility ('CSR') driven purely by reputational concerns, will lead only to tokenistic corporate responses. This has been referred to as the "business case" view of CSR which is, according to Shamir, an example of the "de-radicalization" of CSR through being "hijacked" by capitalist entities.⁴⁶ Shamir notes that, as previously public roles have been taken over by private corporations, societal concerns regarding the conduct of corporations have increased, and corporations have had to respond to that.⁴⁷ Shamir refers to 'various corporate strategies designed to prevent the use of law as means for bringing about greater corporate accountability', and a process whereby 'corporations have assertively embarked on the Social Responsibility bandwagon, gradually shaping the very notion of Social Responsibility in ways amenable to corporate concerns'.⁴⁸ As a

⁴² Tara Nair, 'Commercial Microfinance and Social Responsibility: A Critique' (2010) 45(31) *Economic and Political Weekly* 32, 36.

⁴³ *Corporations Act 2001* (Cth) s 181.

⁴⁴ See, eg, *Greenhalgh v Arderne Cinemas* [1945] 2 All ER 719; See, eg, *Woolworths v Kelly* (1991) 22 NSWLR 189, 226 (Mahoney JA); See, eg, Therese Wilson, 'The Pursuit of Profit at All Costs: Corporate Law as a Barrier to Corporate Social Responsibility' (2005) 30(6) *Alternative Law Journal* 278.

⁴⁵ See discussion in Wilson, above n 44.

⁴⁶ Ronen Shamir, 'The De-Radicalization of Corporate Social Responsibility' (2004) 30(3) *Critical Sociology* 669, 670.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* 671, 676.

result, CSR has come to be regarded as a matter for voluntary initiative, concerned with furthering the strategic “business case” for corporations.

Even with the best of intentions on the part of corporate boards, there is a possible disconnect between the boardroom deliberations that occur within the legal reality of directors’ duties, and the more public rhetoric when it comes to corporate social responsibility. This tension has perhaps led to a somewhat constrained application of corporate social responsibility principles, explained in the following terms:

[C]orporate law forbids directors from giving supportive voice to policies that would aid non-shareholding stakeholders at the expense of shareholders. Square pegs of social responsibility that cannot fit the round hole of shareholder primacy are left unplaced in the corporate conscience ... The combination of forced speaking, on behalf of shareholders, and forbidden speaking, about non-shareholders, gives shape to a particular kind of knowledge and practice, and precludes others. It keeps directors thinking carefully about the shareholder interest, and thinking only casually about non-shareholder interests.⁴⁹

It would be possible to reshape Australian corporate law to give explicit permission to boards of directors to consider broader stakeholder interests, for example by following the UK model, or the “public benefit corporations” model. The UK model is contained in section 172 of the *Companies Act 2006* (UK) and requires directors to consider broader stakeholder interests when acting in a way most likely to promote the success of the company for the benefit of its members as a whole,⁵⁰ for example by considering the impact of the company’s operations on the community and the environment.

The “public benefit corporations” model has been adopted in Delaware in the US under section 365(a) of its *General Corporation Law*.⁵¹ Under that legislation, where corporations elect to become “public benefit corporations”, their boards are required to take into account non-financial, broader stakeholder interests when making decisions and are protected (from accusations of breach of duty) when doing so. The relevant provision states that:

⁴⁹ Yosifon, above n 38, 1332.

⁵⁰ *Companies Act 2006* (UK) c 2, s 172.

⁵¹ *General Corporations Law*, ch 1, § 365(a), Del Laws 1, 90.

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.⁵²

Amendments to Australian corporate law giving companies the option of becoming “public benefit corporations” where they are providers of services of general economic interest, would explicitly enable Australian corporations to construct their activities in accordance with a stakeholder theory of the corporation. This could extend to allowing profit sacrificing activities where this is in the interests of a broader stakeholder group, including individuals who require access to private corporate services. A proposal along these lines has been put forward by not-for-profit organisation, B Lab, to amend the *Corporations Act 2001* (as amended) (Cth) to provide an option for corporations to register as ‘benefit companies’,⁵³ which ‘will be required to include a binding corporate purpose in their constitution requiring the company to create a material positive impact on society and the environment’.⁵⁴

Directors of benefit companies would have positive duties to consider the interests of non-financial stakeholders. The benefit companies would also be required to report annually on their overall social and environmental performance.⁵⁵

It should be noted, however, that financial exclusion remains a problem in the UK and the US notwithstanding such regulatory measures, suggesting that more targeted measures are necessary.⁵⁶

An alternative model would be the introduction of regulation directed specifically at banks and insurance companies requiring the provision of appropriate, affordable, basic credit and insurance products to address ongoing financial exclusion in Australia, perhaps through the imposition of universal service obligations. Given that directors must ensure that corporations comply with the law, there is no risk that they would be

⁵² Ibid.

⁵³ *Corporations Act 2001* (Cth).

⁵⁴ B Lab Australia & New Zealand, *The Benefit Company* (2018) <<https://www.benefitcompany.org/>>.

⁵⁵ Ibid.

⁵⁶ Centre for Social Impact (for National Australia Bank), *A Global Snapshot of Financial Exclusion* (NAB, 2014) 48–49.

found to have breached directors' duties when acting to ensure legal compliance, even where some profit sacrifice results.

There is then a question as to whether government should play a role in subsidising the costs of potentially unprofitable corporate activities. Such subsidisation occurred in the US in the lead up to the global financial crisis, whereby government-sponsored enterprises underwrote mortgage backed securities in order to attract funds for mortgage lending.⁵⁷ Of course, this did not end well when commercial enterprises "followed suit" and were willing to invest in riskier, subprime mortgage loans with a view to receiving higher returns.⁵⁸

An example of government subsidisation which might operate in the basic credit and basic insurance markets would involve governments paying compensation to banks and insurance companies for the profits sacrificed as a result of providing those products to low income consumers. Another possibility is for the government to subsidise financially excluded citizens through an additional welfare payment to enable them to access the financial service notwithstanding that it is offered at a high cost. The difficulty with both of these suggestions is the reliance on increased social welfare. It is argued by one commentator that the welfare state in western liberal democracies is likely to have grown as far as is possible while maintaining continued public and political support.⁵⁹ Should that be the case, a response which does not involve increasing welfare in order to facilitate access to credit and insurance products is more likely to attract support. This makes the corporate profit sacrifice model on the basis of corporate social responsibility an attractive one, perhaps with some limited government subsidisation under a government program to address financial exclusion, as opposed to direct provision of increased welfare payments.

There are some current examples of the corporate sector engaging in the provision of appropriate credit and insurance products targeted at vulnerable, low income, financially excluded Australians, although these occur in partnership with community sector

⁵⁷ Peter J Wallison and Bert Ely, *Nationalizing Mortgage Risk: The Growth of Fannie Mae and Freddie Mac* (American Enterprise Institute for Public Policy Research, 2000) 5.

⁵⁸ Martha Poon, 'From New Deal Institutions to Capital Markets: Commercial Consumer Risk Scores and the Making of Subprime Mortgage Finance' (2009) 34 *Accounting, Organizations and Society* 654, 654–5.

⁵⁹ Christopher Pierson, *Beyond the Welfare State: The New Political Economy of Welfare* (Polity Press, 2006) 237.

organisations which are well placed to understand and work with the target group. It is suggested that banking and insurance corporations could be required to expand upon these models, either alone, or in expanded partnerships with the community sector, to better meet the needs of financially excluded individuals. Government could financially support an expansion of these partnership programs, with the proviso that any government investment is matched by the partnering corporate.

With respect to relevant community sector programs, the StepUP loan has been offered by Good Shepherd Microfinance (previously known simply as a part of Good Shepherd Youth and Family Service) in partnership with National Australia Bank since 2004.⁶⁰ These loans are for up to \$3000 with a current applicable interest rate of 5.99 per cent per annum, and a repayment period of between six months and three years. The loans are for cars, car repairs, household items, computers, and medical and dental services. To be eligible for a StepUP loan, a person must be a Centrelink Health Care cardholder or a Pension Concession Card Holder or a Family Tax Benefit Part A recipient.⁶¹

Good Shepherd Microfinance has now also entered into a partnership with Suncorp Insurance to offer an insurance product designed for people on low incomes, called 'Essentials by AAI'.⁶² The product is for car and home contents insurance, and Suncorp has established a dedicated call centre for the product. Policy holders can be covered for \$10 000 or \$20 000 for home contents and for up to two cars valued at \$3000 and \$5000. Policy holders can choose to pay fortnightly, monthly, or annually, and can pay out of their Centrelink payments. The cost of the home contents insurance ranges between \$4 per week and \$9 per week depending upon the level of cover, and from between \$5.50 per week and \$13 per week for car insurance.⁶³

These forms of microfinance and micro-insurance which involve corporations working with the community sector, potentially with the assistance of government grants and other subsidies, can overcome concerns that have been raised with regard to the

⁶⁰ Good Shepherd Microfinance, *Compare Loans* (2017) <<http://goodshepherdmicrofinance.org.au/compare-loans/>>.

⁶¹ Ibid.

⁶² Essentials by AAI, *Everyone Deserves Simple & Affordable Insurance* (2018) Essentials by AAI <<https://www.essentialsbyaai.com.au/>>.

⁶³ Good Shepherd Microfinance, *Insurance for People on Low Incomes Wins Product and Innovation of the Year* (21 October 2015) <<http://goodshepherdmicrofinance.org.au/media/insurance-for-people-on-low-incomes-wins-product-and-innovation-of-the-year/>>.

increasing commercialisation of microfinance products. Whereby private investors have been encouraged to invest in microfinance companies, a conflict of interest inevitably arises between the companies' duties to vulnerable, low income borrowers, and to their investors. This has resulted in high interest rates being charged on micro-loans, and a focus on profitability over improving the living conditions of the poor.⁶⁴ These are not features of the Good Shepherd Microfinance models outlined above.

V CONCLUSION

In this article, I have described the problem of financial exclusion in Australia, as it relates to access to basic credit and insurance products. Access to these products, it has been suggested, should be regarded as essential in a modern consumerist society, adopting the European definition of services of general economic interest.

The neoliberal context, which underpins corporate law in Australia, encourages corporations to pursue profit in the best interests of shareholders. It is argued that banking and insurance corporations should in fact be required to sacrifice profit in order to provide access to appropriate, affordable, basic credit and insurance products for vulnerable, low income consumers. Such profit sacrifice would be justified on the basis of those corporations' corporate social responsibilities. This will serve to both avoid externality costs to society, and to address the consumer agency problem.

This could be achieved by legislatively imposing universal service obligations on banks and insurance companies with regard to these services and might at least be enabled by amendment of section 181(1) of the *Corporations Act 2001* (Cth)⁶⁵ to explicitly permit consideration of broader stakeholder interests beyond those of shareholders in corporate decision-making. I have taken issue with the recommendations of government inquiries and research that argue against the need for any legislative reform of this type,⁶⁶ on the basis of a constrained application of corporate social responsibility principles by corporations under the current regime.

⁶⁴ Nair, above n 42, 35.

⁶⁵ *Corporations Act 2001* (Cth) s 181(1).

⁶⁶ See, eg, Corporations and Markets Advisory Committee, above n 3; See, eg, Parliamentary Joint Committee on Corporations and Financial Services, above n 3; See, eg, Marshall and Ramsay, above n 1.

There is a question as to whether government should provide some form of subsidisation to banks and insurance companies in recognition of their profit sacrifice, whether in the form of direct payments or tax incentives. Although if the corporate social responsibility argument is accepted, then government subsidy should be unnecessary. A form of subsidisation in the case of insurance would be an increase in social welfare to individuals to enable the purchase of insurance at market prices. Although, as discussed, suggestions involving an expansion of social welfare may not receive political or popular support. Government could also play a role in providing financial support to community sector organisations which undertake microfinance or micro-insurance activities, with the proviso that government investment is matched by the corporations partnering with the community sector organisations. The partnership model is an attractive one because it brings together the skill of community sector organisations of engaging effectively with the target market, with the skill of banks or insurance companies of being able to develop and provide credit or insurance products.

Under any of these models, the engagement of banking and insurance corporations in the provision of basic credit or basic insurance products is necessary and must be required of these corporations in order to properly address financial exclusion in Australia. A regulatory framework which will potentially require profit sacrificing activities by these corporations will achieve social outcomes superior to those derived from a singular pursuit of profits.

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THE INTERNATIONALISATION OF AUSTRALIA'S HIGHER EDUCATION SYSTEM: TRADING AWAY HUMAN RIGHTS

JACOB DEBETS*

The commoditisation and internationalisation of Australia's education system has been so far-reaching that Australia's economic stability, and the future of higher education institutes, are now largely dependent on the continued enrolment of overseas students into their courses. This paper critically analyses the international education industry, demonstrating that the current policy approach adopted by governments and education providers is fundamentally incompatible with Australia's human rights obligations towards international students and fundamentally unsustainable if left unaccompanied by human rights principles. It begins with a history of Australia's neoliberal approach to international education and how this approach has made international students vulnerable to significant and pervasive human rights abuses by both private and public actors. It then argues that the 2009 Indian student protests saga was at its core a revolt against this state of affairs and that responses to this crisis by government were ineffective because they fell back on market principles. It then discusses recent developments in the higher education sector and the 7-Eleven underpayments scandal, before making the case for restructuring Australia's international education sector in alignment with its human rights obligations.

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I INTRODUCTION

Since the 1990s, international education has been one of Australia's most lucrative industries, contributing \$28 billion to the domestic economy in 2016–17 alone,¹ making it Australia's third-largest export and largest service export.² On the world stage, Australia controls six per cent of the tertiary market with over 800 000 overseas students,³ studying at 169 different education institutes including 43 universities.⁴ It is ranked third in the world for attracting international students in tertiary education, and significantly outperforms its "competitors" on a per capita basis.⁵

Notwithstanding the significant economic contribution made by international students and their families, their treatment by the government and education providers, both historical and contemporary, has been callous. Many of their experiences are defined by vulnerability, uncertainty, and exploitation, a reality underscored by the 2015 7-Eleven workers scandal.

In the following paper, I analyse the international education industry with the object of demonstrating how the current policy approach adopted by governments and education providers is fundamentally incompatible with Australia's human rights obligations towards international students,⁶ and is moreover economically unsustainable if left unaccompanied by human rights principles.

¹ Department of Education and Training, Australian Government, *Export Income in to Australia from International Education Activity in 2016–17 (Research Snapshot)* (December 2017)

<<https://internationaleducation.gov.au/research/Research-Snapshots/Documents/Export%20Income%20FY2016%E2%80%9317.pdf>>.

² Department of Foreign Affairs and Trade, Australian Government, *Australia's Trade in Goods and Services 2016* <<http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2016.aspx>>.

³ Department of Education and Training, Australian Government, *International Student Data 2017* <<https://internationaleducation.gov.au/research/International-Student-Data/Pages/InternationalStudentData2017.aspx>>.

⁴ Australian Government, *National Strategy for International Education 2025* (2016) 3 <<https://nsie.education.gov.au/>>.

⁵ Ibid.

⁶ Australia is a party to the seven key international human rights treaties. Australia has signed and ratified: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 13 November 1980) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, [1976] ATS 5 (entered into force 10 March 1976) ('ICESCR'); *Convention on the Rights of the Child*, opened for signature 20 November 20 November 1989, [1991] ATS 4 (entered into force 16 January 1991) ('CRC'); *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, [1989] ATS 21 (entered into force 7 September 1989) ('CAT'); *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, [1975] ATS 40 (entered into force 30

I advance my contention in five parts. In Part II, I provide a brief historical overview of Australia's neoliberal approach to international education. My aim is to illustrate that this approach has primarily treated (and progressively relied upon) international students *only* as sources of revenue, which has in turn left them vulnerable to significant and pervasive human rights abuses by public and private actors.

In Part III, I argue that the 2009 Indian student protest saga, where thousands of international students revolted against their mistreatment and neglect by Australian governments, was at its core a reflection — and rejection — of this reality. I further contend that whilst this campaign exposed the mortality of the international education industry and raised a plethora of human rights issues, the response by State and Federal governments — which largely fell back on market principles — failed to address these issues or insulate students against new frontiers of exploitation.

In Parts IV and V, I contend that this failure, exacerbated by recent developments in the higher education sector and the labour market, represents a grave threat to the sustainability of both the higher education sector and Australia's economy more broadly. I further contend that in order to avert this disaster, Australia's international education sector should be restructured in alignment with human rights principles.

Finally, in Part VI, I conclude by proposing a series of broad, interconnected reforms that align with this objective.

In this paper, the terms “international student” and “overseas student” are used interchangeably and encompass students studying vocational education and training (“VET”) courses, higher education courses, and those studying English Language Intensive Courses for Overseas Students.

October 1975) (*CERD*); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, [1983] ATS 9 (entered into force 27 August 1983) (*CEDAW*); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entry into force 16 August 2008) (*CRPD*).

II INTERNATIONALISATION OF EDUCATION: PROFIT OVER PEOPLE

A Australia's Education Revolution: Neoliberalism and Globalism

Australia's acceptance of international students started in the late 1940s in the aftermath of World War II.⁷ By the 1960s, there were approximately 10,000 private overseas students, predominantly originating from Asia, enrolled in Australian education institutions, whose tuition fees were subsidised at the same rate as private domestic students 'as part of a wider effort to secure good diplomatic relationships with countries in the Asia-Pacific region'.⁸ In 1974, under Labor's Whitlam administration, all student fees (including those payable by international students) were abolished and placements were fully subsidised by the Commonwealth, a policy that was later revised by the Liberal Fraser government to require international students to pay a fee (called the "Overseas Student Charge") representing a quarter of the average cost of an Australian university degree.⁹

The catalyst for the transformation of international education, now one of Australia's leading exports on which Australia's future prosperity depends,¹⁰ occurred under Labor's Hawke-Keating government in the 1980s and 1990s. As part of a drastic slate of reforms to the domestic economy,¹¹ the administration spearheaded a new higher education model, which conceptualised education as a tradeable commodity rather than a public good, and depended on external revenue for future growth.¹² As Hil observes some 30 years after these reforms were implemented:

Economic rationalism, commercialisation, managerialism, corporate governance and other outgrowths of neoliberal ideology ... ushered in an entirely new way of thinking

⁷ Lyndon Megarrity, 'A Highly-Regulated "Free Market": Commonwealth Policies on Private Overseas Students from 1974 to 2005' (2007) 51(1) *Australian Journal of Education* 39, 39; Caroline M Rueckert, *Conceptions of Care in International Higher Education in Australia* (PhD Thesis, Queensland University of Technology, 2017) 15–16.

⁸ Megarrity, above n 7, 39; See also Lyndon Megarrity, 'Regional Goodwill, Sensibly Priced: Commonwealth Policies towards Colombo Plan Scholars and Private Overseas Students, 1945–1972' (2007) 38(129) *Australian Historical Studies* 88.

⁹ Megarrity, above n 7, 40.

¹⁰ Australian Government, above n 4, 6–7.

¹¹ See generally Mark Beeson and Ann Firth, 'Neoliberalism as a Political Rationality: Australian Public Policy since the 1980s' (1998) 34(3) *Journal of Sociology* 215.

¹² See generally Gwilym Croucher et al (eds), *The Dawkins Revolution: 25 Years On* (Melbourne University Press, 2013).

about what constitutes academic life, what universities are for, and what values these institutions represent.¹³

In line with these new imperatives, successive Coalition and ALP governments thereafter implemented policies that encouraged universities to attract overseas enrolments by deregulating fees for international students,¹⁴ whilst heavily reducing (public) university funding.¹⁵ The relatively easy pathway from study to permanent residency made Australia a highly appealing study destination for (predominantly young) persons thinking of studying abroad,¹⁶ and the industry flourished.

Australia's 'neoliberal approach to education export' has come to be the benchmark for university administrations across the world,¹⁷ including those in Europe.¹⁸ Today, there are upwards of five million international students worldwide (up from 1.3 million in 1990),¹⁹ these students being the subject of intense global competition amongst nation-states.²⁰ Although I revisit this point below, it is worth noting at the outset that

¹³ Richard Hil, *Whackademia: An Insider's Account of the Troubled University* (NewSouth Publishing, 2012) 10.

¹⁴ Chris Nyland, Helen Forbes-Mewett and Charmine E J Hartel, 'Governing the International Student Experience: Lessons from the Australian International Education Model' (2013) 12(4) *Academy of Management Learning & Education* 656, 659; Andrew Norton and Ittima Cherastidham, 'University Fees: What Students Pay in Deregulated Markets' (Grattan Institute, 2015) 6 <https://www.csu.edu.au/_data/assets/pdf_file/0009/1817190/2015-Grattan-Institute-University-FeesUniversity-fees-what-students-pay-in-deregulated-markets.pdf>.

¹⁵ See generally Simon Marginson, 'Nation-Building Universities in a Global Environment: The Case of Australia' (2002) 43(3) *Higher Education* 409, 416; See also Nyland, Forbes-Mewett and Hartel, above n 14, 659; Andrew Jakubowicz and Devaki Monani, 'International Student Futures in Australia: A Human Rights Perspective on Moving Forward to Real Action' (The Academy of Social Sciences in Australia, 2010) 9; Peter D Burdon and Mary Heath, 'Academic Resistance to the Neoliberal University' (2015) 23(2) *Legal Education Review* 379 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585814>; For a localised perspective, see Duncan Wallace, 'Melbourne Law School and the Politics of Education', *De Minimis* (online), 1 March 2015 <<http://www.deminimis.com.au/1/post/2015/02/melbourne-law-school-and-the-politics-of-education.html>>; Jacob Debets, 'Bursting the Law School Bubble', *De Minimis* (online), 3 April 2016 <<http://www.deminimis.com.au/1/post/2016/04/bursting-the-law-school-bubble.html>>.

¹⁶ Michiel Baas, 'Victims or Profiteers? Issues of Migration, Racism and Violence among Indian Students in Melbourne' [2014] (2) *Asia Pacific Viewpoint* 212, 212.

¹⁷ Shanthi Robertson, 'Cash Cows, Backdoor Migrants, or Activist Citizens? International Students, Citizenship, and Rights in Australia' (2011) 34(12) *Ethnic and Racial Studies* 2192, 2193.

¹⁸ See generally Blue Ribbon Panel on Global Engagement, 'Strength through Global Leadership and Engagement: US Higher Education in the 21st Century' (American Council on Education, November 2011) <<http://www.acenet.edu/news-room/documents/2011-cige-brpreport.pdf>>.

¹⁹ ICEF Monitor, *The State of International Student Mobility in 2015* (5 November 2015) <<http://monitor.icef.com/2015/11/the-state-of-international-student-mobility-in-2015/>>.

²⁰ John Douglass and Richard Edelstein, 'The Global Market for International Students: American Perspectives' [2015] (59) *International Higher Education* <<https://ejournals.bc.edu/ojs/index.php/ihe/article/view/8482>>; Vai Io Lo, 'Before Competition and beyond Complacency: The Internationalisation of Legal Education in Australia' (2012) 22 *Legal Education Review* 3; See, eg, NAFSA: Association of International Educators, 'Restoring US Competitiveness for

competition in this sector has prompted widespread concern for the integrity of academic standards, insofar as universities' reliance on full-fee paying international students has forced them to compromise on their admission and assessment standards.

B International Students' Experience in Australia

The policy adopted by Australia treats the millions of international students within its borders primarily as sources of revenue and international prestige,²¹ and to a lesser extent as potential threats to national security.²² Enthusiasm for economic growth, and progressive border anxiety,²³ has displaced considerations of the inherent vulnerabilities of many students, deriving from their youth, cultural and linguistic backgrounds, insecure residence status, and limited social and political power as non-citizens.²⁴ That Australia is under an obligation to respect, protect, and fulfil the human rights of international students under international law, including rights to:²⁵

- an adequate standard of living including access to safe, adequate, and affordable housing;²⁶

International Students and Scholars' (June 2006)

<http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdf>; Bob Alagh on 17 Oct 2013 at 01:57 said, 'New Zealand Announces New Initiatives to Attract More International Students' <<http://monitor.icef.com/2013/10/new-zealand-announces-new-initiatives-to-attract-more-international-students/>>; Citizenship and Immigration — Government of Canada, *Notice — New Regulations for International Students Finalized* (2 December 2014) <<http://www.cic.gc.ca/english/department/media/notices/2014-02-12.asp>>; Rahul Choudaha, 'How China Plans to Become a Global Force in Higher Education', *The Guardian* (online), 13 October 2015 <<https://www.theguardian.com/higher-education-network/2015/oct/12/how-china-plans-to-become-a-global-force-in-higher-education>>.

²¹ Andrew Jakubowicz and Devaki Monani, 'Mapping Progress : Human Rights and International Students in Australia' (2015) 7(3) *Cosmopolitan Civil Societies Journal* 61, 10; Australian Bureau of Statistics, 'Participation in Education: Overseas Students in Higher Education' (20 June 1995) <<http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/de4fd4d0af435ad4ca2570ec007521f0!OpenDocument>>.

²² Sydney University Postgraduate Representative Association, Submission to Michael Knight, *Strategic Review of the Student Visa Program*, 15 April 2011.

²³ Simon Marginson, 'Including the Other: Regulation of the Human Rights of Mobile Students in a Nation-Bound World' (2012) 63(4) *Higher Education* 497, 4.

²⁴ Alex Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181, 182–187; Marginson, above n 23, 497; Ana Deumert et al, 'Global Migration and Social Protection Rights: The Social and Economic Security of Cross-Border Students in Australia' (2005) 5(3) *Global Social Policy: An Interdisciplinary Journal of Public Policy and Social Development* 329, 330.

²⁵ See, eg, Economic and Social Council, *Statement on the Obligations of State Parties regarding the Corporate Sector and Economic, Social and Cultural Rights*, E/C.12/2011/1 46th sess (2–20 May 2011).

²⁶ ICESCR, above n 6, art 11.

- personal safety and security;²⁷
- access to physical and mental health services;²⁸ and
- safe and fair employment,²⁹

has, until recently, been entirely ignored. To the extent that “rights” are conferred on international students, it is through the narrow lens of consumer regulation, with the *Education Services for Overseas Students Act 2000* (Cth) (‘ESOS Act’) imposing limited obligations on service providers (but not governments) in relation to the quality of the student’s course, a process for claiming a refund, and students’ visa-compliance.³⁰ Responsibility for accommodation, employment, financial, and counselling services is delegated to the discretion of education providers which in practice has meant these needs are delegated to students or ignored.³¹

Fitting within the dominant paradigm of neoliberalism, which emphasises individual choice and autonomy,³² the (in)ability of international students to navigate Australian life outside of the university has therefore been largely ignored by the architects of policies designed to maximise overseas enrolments.³³ One limited exception to this is the ‘financial capacity’ requirements students must satisfy for the purposes of receiving a student visa, which require students to show they are able to pay their course fees and can access a prescribed annual sum to cover living expenses.³⁴ This sum however consistently falls below the Henderson Poverty line,³⁵ and as Reilly has noted, students and their families often meet these requirements by taking out loans or mortgaging their

²⁷ ICCPR, above n 6, art 9(1).

²⁸ ICESCR, above n 6, art 12(1); CRPD, above n 6, art 10(h), 12.

²⁹ ICESCR, above n 6, art 7; See also *Discrimination (Employment and Occupation) Convention*, 1958 (No 111).

³⁰ See *Education Services for Overseas Students Act 2000* (Cth) (‘ESOS Act’), Pt 3 (‘Obligations of Registered Providers’).

³¹ Marginson, above n 23, 502.

³² Rueckert, above n 7, 66.

³³ See generally Helen Forbes-Mewett et al, ‘Australian University International Student Finances’ (2009) 22(2) *Higher Education Policy* 141, 146.

³⁴ \$20,290 at the time of writing for a single student: Department of Immigration and Border Protection, Australian Government, *Student Visa (Subclass 500)* (1 February 2018) <<http://www.border.gov.au/Trav/Visa-1/500->>.

³⁵ For example, the Henderson Poverty Line in the final quarter of 2017 was \$518.16 per week (\$26,944.32 per year), more than \$6000 over the financial capacity requirement: Melbourne Institute of Applied Economics and Social Research, ‘Poverty Lines: Australia (December Quarter 2017)’ (The University of Melbourne, 18 April 2017) 3 <https://melbourneinstitute.unimelb.edu.au/_data/assets/pdf_file/0011/2750933/Poverty-Lines-Australia-December-Quarter-2017.pdf>.

homes, compounding financial and familial pressures on students.³⁶ In practice then, students are largely left to their own devices in negotiating a life while studying, which has in turn left them vulnerable to mistreatment and exploitation by both private and public actors.

C Rights Abuses by Private Actors

A large and growing body of research documents the experience of international students in Australia and the various human rights abuses perpetrated against them by private actors. These encompass abuses in specific spheres such as housing and employment, as well as more amorphous challenges associated with racism and racial discrimination.³⁷

The research paints a stark picture. A lack of affordable student accommodation exposes international students to a private rental market often characterised by discriminatory and exploitative landlords,³⁸ with overcrowding and poor sanitation.³⁹ Unscrupulous employers use stringent student-visa conditions as leverage to force international students into submitting to reduced wages, breaches of workplace safety laws, and, in some cases, sexual harassment.⁴⁰ Many students have been the subject of violence;⁴¹ some have been murdered.⁴² Despite the ESOS Act, bodies charged with ensuring

³⁶ Reilly, above n 24, 186–7.

³⁷ See, eg, Australian Human Rights Commission, *International Students' Human Rights: A Review of the Principles and the Issues* (2015) 10–11 <https://www.humanrights.gov.au/sites/default/files/document/publication/2015_IS_ReviewReport%20.pdf>.

³⁸ Adam Graycar, *Racism and the Tertiary Student Experience in Australia* (Academy of the Social Sciences in Australia, 2010) <https://www.humanrights.gov.au/sites/default/files/content/racial_discrimination/publications/tertiary_students/Graycar_racism_tertiary2010.pdf>; Emma McCarthy, "We Forgot How Vulnerable We Were": *Foreign Students Struggle to Find Homes* (14 April 2015) Crikey <<https://www.crikey.com.au/2015/04/14/we-forgot-how-vulnerable-we-were-foreign-students-struggle-to-find-homes/>>.

³⁹ Victorian Equal Opportunity & Human Rights Commission, Submission to Victorian Government, *Victorian Overseas Student Taskforce*, 24 October 2008.

⁴⁰ Michael Knight, 'Strategic Review of the Student Visa Program 2011' (Australian Government, 30 June 2011) 85 <<https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/2011-knight-review.pdf>>; See also Simon Marginson et al, *International Student Security* (Cambridge University Press, 2010) 136.

⁴¹ See, eg, *Hussein v The Queen* [2010] VSCA 257 (4 October 2010); See generally Graycar, above n 38.

⁴² See, eg, *R v Wong* [2010] NSWSC 171 (Unreported, 10 March 2010); *DPP v Caratozzolo* [2009] VSC 305 (29 July 2009); See also discussions in C Nyland, H Forbes-Mewett and S Marginson, 'The International Student Safety Debate: Moving beyond Denial' (2010) 29(1) *Higher Education Research & Development* 89, 96–7; Janelle Wells, '21 Years' Jail for "Reign of Sexual Terror"', *ABC News* (online), 16 July 2010 <<http://www.abc.net.au/news/2010-07-16/21-years-jail-for-reign-of-sexual-terror/907172>>.

compliance have historically used a “light touch”,⁴³ allowing many education providers to get away with dubious practices,⁴⁴ a reality underscored by the collapse of a significant number of private colleges in the wake of the 2009 crisis.⁴⁵ Although many educators are keenly aware of these problems, the burgeoning workloads of university academics,⁴⁶ and the ever-increasing imposition of economic and vocational imperatives at the expense of more traditional notions of pastoral care, limits their ability to meaningfully intervene.⁴⁷

D Rights Abuses by the Immigration Department

The government’s failure to *protect* and *fulfil* the economic, social, and cultural rights of international students, manifest in the devolution of responsibility to education providers and correlative abuses committed by private actors, is accompanied by an immigration regime that is actively hostile to students’ civil and political rights (failing to *respect* these rights). This is most visibly reflected in the policy of mandatory detention that underpinned the student-visa regime until the late-2000s and survives in a more limited form today.⁴⁸

This system, marginally improved after the 2009 crisis described below, fundamentally treated international students who breach their visas as criminals, with innocuous indiscretions resulting in mandatory visa cancellation and detention with limited access to appeal processes and high bond fees to be released back into the community on a bridging visa.⁴⁹ As observed by Michaela Rost, these processes cumulatively breach Article 9(1) (which prohibits arbitrary detention) and 9(2) (which prohibits the rights for

⁴³ Sushi Das, “‘Sham’ Colleges Operating with Impunity”, *The Sydney Morning Herald* (online), 25 October 2008 <<http://www.smh.com.au/national/sham-colleges-operating-with-impunity-20081024-58az.html>>.

⁴⁴ See generally Forbes-Mewett et al, above n 33.

⁴⁵ Deloitte Access Economics, ‘Broader Implications from a Downturn in International Students’ (Universities Australia, 30 June 2011) 35 <<https://www.deloitteaccessconomics.com.au/uploads/File/DAE%20International%20students%20analysis%2030%20June%202011.pdf>>.

⁴⁶ See generally Mary Sarah-Jane Gregory and Jason Michael Lodge, ‘Academic Workload: The Silent Barrier to the Implementation of Technology-Enhanced Learning Strategies in Higher Education’ (2015) 36(2) *Distance Education* 210.

⁴⁷ Hil, above n 13, 14–15, 101–130; Margaret Thornton, ‘The Law School, the Market and the New Knowledge Economy’ (2007) 17(1–2) *Legal Education Review* 1, 19.

⁴⁸ See summary in Michaela Rost, Submission to Senate Education, Employment & Workplace Relations Committee, *Inquiry into Welfare of International Students 2009*, September 2009, 7–19; *Migration Act 1958* (Cth) s 189.

⁴⁹ Rost, above n 48.

detained persons to challenge the lawfulness of their detention) of the *International Covenant on Civil and Political Rights*, and likely Article 31 of the *Refugee Convention* (which prohibits states from imposing penalties on ‘unauthoris[ed]’ residents who present themselves to authorities).⁵⁰

From 2001 to mid-2005, this regime led to the detention of 2310 international students,⁵¹ many of whom were placed alongside an ‘unholy mix’ of criminal deportees and ‘traumatised’ asylum seekers.⁵² Reasons for detention included inadequate academic results and attendance, working for more than 20 hours per week,⁵³ or overstaying their visas (often as a result of these breaches).⁵⁴

III THE 2009 CRISIS

A Synopsis of Events

The longstanding indifference shown towards the needs of international students studying in Australia by governments and education providers came to a head on 31 May 2009 when, in response to a spate of racially motivated criminal acts perpetrated against Indian students,⁵⁵ thousands of Indian students staged a “revolt” in Melbourne,⁵⁶ which was accompanied by smaller solidarity protests across Australia.⁵⁷

⁵⁰ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

⁵¹ See Nick Johns-Wickberg and Inga Ting, *Students in Detention? Life Gets Harder for International Scholars* (24 September 2010) Crikey <<https://www.crikey.com.au/2010/09/24/students-in-detention-life-gets-harder-for-international-scholars/>>.

⁵² Frederika Steen, Submission No 131 to Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 3 September 2008.

⁵³ See visa condition 8104 and 8105. This entitlement was changed from 20 hours a week to 40 hours per fortnight on 26 March 2012 in response to a recommendation of the Knight review discussed in Part IV. these conditions were introduced so as to prevent students’ employment from interfering with their studies; Reilly, above n 24, 201; See also Neville Neill et al, ‘The Influence of Part-Time Work on Student Placement’ (2004) 28(2) *Journal of Further and Higher Education* 123, 129.

⁵⁴ Senate Inquiry into Migration Act: Reply to QON from Senator Ludwig re International Students — M Rost, 28 October 2005; Rost, above n 48, 8; Steen, above n 52; See also Marginson, above n 23, 500.

⁵⁵ Gail Mason, ‘Naming the “R” Word in Racial Victimization: Violence against Indian Students in Australia’ (2012) 18(1) *International Review of Victimology* 39; Baas, above n 16; Graycar, above n 38.

⁵⁶ Jakubowicz and Monani, above n 21, 65.

⁵⁷ Mason, above n 55, 39–40; Jacqueline Joudo Larsen, Jason Payne and Adam Tomison, *Crimes Against International Students in Australia, 2005–09* (Australian Institute of Criminology, 2011) 4 <<http://www.pravasitoday.com/wp-content/uploads/2011/08/Report.pdf>>.

Whilst the ultimate catalyst for the 2009 saga was the screw-driver stabbing of 25-year-old Sravan Kumar Theerthala,⁵⁸ the protests raised a plethora of long-standing welfare and educational problems facing international students that were directly attributable to the government's treatment of these persons as commodities,⁵⁹ and the related failure to provide them with adequate rights protection.⁶⁰

That students were implicitly challenging the government's derogation of human rights obligations was reflected by the set of demands issued by the Federation of Indian Students of Australia to the Victorian State Government during the saga. These included: the establishment of a multicultural police section (reflecting inter alia a perception of racism in the response of police to attacks on international students,⁶¹ and thus the right to be free from racial discrimination),⁶² insurance for accidents and assaults (reflecting inter alia a frustration at the lack of direct government responsibility towards students' physical safety and concurrent economic burdens placed on them),⁶³ and an education campaign highlighting the positive influence that international students had on the country.⁶⁴ Students also expressed a desire for on-site accommodation for Indian students at universities and colleges,⁶⁵ implicitly invoking the right to adequate housing protected under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁶⁶

⁵⁸ Ibid, 42–8.

⁵⁹ Margaret Simons, 'Exodus: The International Student Sector', *The Monthly* (online), November 2010 <<https://www.themonthly.com.au/issue/2010/november/1288836088/margaret-simons/exodus>>.

⁶⁰ Hurriyet Babacan et al, 'The Community Safety of International Students in Melbourne: A Scoping Study' (Institute for Community, Ethnicity and Policy Alternatives, Victoria University, February 2010) 11–25 <<http://eprints.vu.edu.au/15491/>>.

⁶¹ See discussion in Baas, above n 16, 219–220; See further AAP, 'Rudd's Plea: We're Not Racists', *Sydney Morning Herald* (online), 1 June 2009 <<http://www.smh.com.au/national/rudds-plea-were-not-racists-20090601-bsnj.html>>; Matt Wade and Chris Johnston, 'Rudd Steps in as Tensions Rise over Attacks on Students', *The Age* (online), 30 May 2009 <<http://www.theage.com.au/national/rudd-steps-in-as-tensions-rise-over-attacks-on-students-20090529-bqb3.html>>; Cf ET Bureau (last), 'Australia, Land of Racism', *The Economic Times* (online), 28 May 2009 <<http://economictimes.indiatimes.com/news/politics-and-nation/australia-land-of-racism/articleshow/4587003.cms>>.

⁶² CERD, above n 6; ICCPR, above n 6, art 2(1); ICESCR, above n 6, art 2(2).

⁶³ ICCPR, above n 6, art 2(2).

⁶⁴ Ben Doherty and Paul Millar, 'Indian Anger Boils Over', *The Sydney Morning Herald* (online), 3 June 2009 <<http://www.smh.com.au/national/indian-anger-boils-over-20090531-brrm.html>>; Paul Millar, 'Indian Students March in Protest against Attacks', *The Age* (online), 31 May 2009 <<http://www.theage.com.au/national/indian-students-march-in-protest-against-attacks-20090531-brhj.html>>.

⁶⁵ Doherty and Millar, above n 64.

⁶⁶ ICESCR, above n 6, art 11.

B Reform of the Sector

The 2009 saga and its fallout spelled disaster for Australia's international education sector, with the upward trend in international enrolments coming to an abrupt halt and Indian student enrolments plummeting by 49 per cent in 12 months.⁶⁷ Economic modelling estimated this downturn would cost \$37.8 billion to Australia's GDP from 2010–2020,⁶⁸ which 'triggered widespread soul-searching and hard-head policy reviews' by governments and education providers.⁶⁹

Despite the centrality of human rights issues to the protests and numerous calls for greater human rights protections by a number of public authorities,⁷⁰ the ensuing reforms implemented by the Australian government avoided these issues. Instead, they were largely oriented around recouping Australia's market share of international students through the application of market-based principles (through changes to the student visa program)⁷¹ and a marginally improved consumer-rights framework (implemented by increased regulation of the education sector).

C Student Visa Changes

Changes to the student visa program included a requirement that students show a higher level of financial security before being granted a visa and a crackdown on migration agents engaging in fraud.⁷² A number of occupations were also removed from the Skilled

⁶⁷ Deloitte Access Economics, above n 45, 70.

⁶⁸ *Ibid* 70.

⁶⁹ Jakubowicz and Monani, above n 21, 64.

⁷⁰ Australian Human Rights Commission, 'Human Rights of International Students a Major Issue' (Media Release, 5 November 2009) ('AHRC') <<http://www.humanrights.gov.au/news/media-releases/2009-media-release-communicate-human-rights-international-students-major-issue>>; Australian Human Rights Commission, *Principles to Promote and Protect the Human Rights of International Students* (2012) <<https://www.humanrights.gov.au/publications/book-principles-promote-and-protect-human-rights-international-students>>; Babacan et al, above n 57, 6–7, 38, 44; Human Rights Law Resource Centre, *Briefing Paper on Key Human Rights Issues in Australia* (July 2009) 12 <<http://www.hrlrc.org.au/files/Briefing-Paper-Human-Rights-Issues-in-Australia-July-2009.pdf>>; Victorian Equal Opportunity & Human Rights Commission, *Annual Report (2008/09)* 6–7, 38, 44 <http://www.humanrightscommission.vic.gov.au/our-resources-and-publications/annual-reports/item/download/8595_f501ab086c63bb6a32c8cc07d232b4c0>.

⁷¹ See, eg, Deloitte Access Economics, above n 45, 39–53.

⁷² Elsa Koleth, *Overseas Students: Immigration Policy Changes 1997–May 2010* (Parliament of Australia, 18 June 2010)

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/OverseasStudents>; For a more recent exposition of this requirement see: Department of Immigration and Border Protection, *Answer to Question on Notice*, 17 July 2015 (received 11 August 2015); Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of

Occupation List, which had hitherto operated as a pathway to permanent residency for international students studying vocational courses unlikely to improve their job prospects back home.⁷³

Reforms were also introduced in accordance with recommendations made in the *Strategic Review of the Student Program 2011* ('the Knight Review'), their express object being to 'strengthen the competitiveness of [the] international education sector'.⁷⁴ This included the conferral of two years of post-study work rights on students who had completed two years of tertiary study in Australia,⁷⁵ and the replacement of automatic/mandatory visa cancellation with the conferral of discretion on Immigration officers.⁷⁶

These reforms, although welcomed insofar as they blunted some of the more draconian elements of the student visa program, were cumulatively ineffectual in many respects. In particular, whilst changes to the Skilled Occupation List were important in dissuading education providers from offering vocational courses that were proxies for permanent residency pathways, the introduction of post-work rights for tertiary students, described by Knight as a marketing tool,⁷⁷ merely transferred the possibility of 'extended years of precarious residency' to a different class of students,⁷⁸ without addressing the underlying causes for international student insecurity.

D Regulation of International Education Sector

The two primary reviews undertaken into the international education sector were the *Review of the ESOS Act* ('Baird Review') in February 2010 by Bruce Baird,⁷⁹ and the

Australia, 17 July 2015, 46 (David Wilden, Acting Deputy Secretary, Department of Immigration and Border Protection).

⁷³ See discussion in Bob Birrell and Ernest Healy, 'The February 2010 Reforms and the International Student Industry' (2010) 18(1) *People and Place* 65, 73–5.

⁷⁴ Knight, above n 40, 127; Nyland, Forbes-Mewett and Hartel, above n 14, 664.

⁷⁵ Knight, above n 40, recommendation 4.

⁷⁶ *Ibid* recommendation 25.

⁷⁷ *Ibid* xiv.

⁷⁸ Students for Migrant Workers Rights, 'Rights without Borders — Realising Human Rights for All Workers Irrespective of Citizenship' (*University of Sydney*, 2013) 20–1 <http://www.hrca.org.au/wp-content/uploads/s4mwr_report_rights_without_border1.pdf>.

⁷⁹ Bruce Baird, *Strong, Simpler, Smarter ESOS: Supporting International Students* (Department of Education, Employment and Workplace Relations, 2010) <http://www.aei.gov.au/AEI/GovernmentActivities/InternationalStudentsTaskforce/ESOS_REview_Final_Report_Feb_2010_pdf.pdf>.

Council of Australian Governments' *International Students Strategy for Australia* ('COAG Strategy').⁸⁰

Together, these reviews addressed a number of criticisms of the industry, which had long been ignored,⁸¹ through legislative change,⁸² and reformed industry practice.⁸³ This included the need for harsher penalties for non-compliant education institutes;⁸⁴ the strengthening of consumer protection rights;⁸⁵ and the provision of more robust information and support services for students.⁸⁶ Community engagement strategies were also implemented to reduce negative attitudes towards international students,⁸⁷ and provide better access to complaint and dispute resolution mechanisms for students.⁸⁸

As observed by the Australian Human Rights Commission ('AHRC') and others, these reforms were inadequate in a number of key respects, foremost because they merely facilitated international students' access to legal protections and services (addressing the 'information gap')⁸⁹ rather than addressing deficiencies with the protections themselves. Crucial discussions (such as those into affordable transport and accommodation and labour market exploitation) and strategies (such as those to combat racism) were lacking, and insofar as rights rhetoric did pervade these debates, they were overshadowed by or

⁸⁰ Council of Australian Governments, *2010–2014: International Students Strategy for Australia* (2010) <<https://www.coag.gov.au/sites/default/files/International%20Students%20Strategy%20-%20PDF.pdf>>.

⁸¹ See, eg, Sushi Das, 'College Collapses Spark Fresh Probe', *The Age* (online), 17 August 2010 <<http://www.theage.com.au/victoria/college-collapses-spark-fresh-probe-20100816-126xy.html>>; Das, above n 43.

⁸² See *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010* (Cth); *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012* (Cth); *Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Act 2012* (Cth); *Education Services for Overseas Students (TPS Levies) Act 2012* (Cth).

⁸³ See, eg, Australian Universities Quality Agency, 'Good Practice Principles for English Language Proficiency for International Students in Australian Universities' (March 2009) <http://www.deewr.gov.au/HigherEducation/Publications/Documents/Final_Report-Good_Practice_Principles.pdf>.

⁸⁴ Baird, above n 80, 22–9 (ch 4).

⁸⁵ *Ibid*, 30–6 (ch 5).

⁸⁶ *Ibid*.

⁸⁷ Council of Australian Governments, above n 80, 13.

⁸⁸ *Ibid*, 22–4.

⁸⁹ Marginson, above n 23, 506–7.

conflated with the more operative desire to 'protect Australia's lucrative market share' of the industry.⁹⁰

IV NEW FRONTIERS FOR ABUSE

A Developments in Higher Education Sector

Since 2009, the international education sector has largely recovered, with over 800 000 international enrolments in 2017.⁹¹ This is in part a product of the above reforms, however more operative have been continued cuts in public funding for the higher education sector, which have forced universities to increasingly rely on, and seek out, international enrolments to fund their operating expenses.⁹² Significantly, in April 2016, the then Minister for Tourism and International Education identified international education as one of Australia's five 'super growth' sectors, stressing the importance of pursuing a greater 'share' in students from traditional origin countries (China and India) whilst also pursuing those in emerging markets (Philippines, Thailand, Indonesia, Vietnam, South Korea, Malaysia, and Hong Kong).⁹³

The integral place of overseas students to the sustainability of higher education, combined with increased competition from other Western host countries, has means that universities are now being compelled to supply more university places than there are international students with suitable academic capabilities.⁹⁴ Consequently, the quality control measures implemented under the Baird Review have been largely undercut, with the NSW Independent Commission Against Corruption ('ICAC') recently warning:

⁹⁰ Robertson, above n 17, 2206.

⁹¹ Department of Education and Training, above n 3.

⁹² Victorian Ombudsman, Victoria Government, *Investigation into How Universities Deal with International Students* (October 2011) 12, 71 <<https://www.ombudsman.vic.gov.au/Reports-Publications/Parliamentary-Reports/Investigation-into-how-universities-deal-with-inte>>; Stephen Corones, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1, 1; New South Wales and Independent Commission Against Corruption, *Learning the Hard Way: Managing Corruption Risks Associated with International Students at Universities in NSW* (2015); See, eg, University of Melbourne, 'The University of Melbourne Strategic Plan 2015–2020: Growing Esteem' <https://about.unimelb.edu.au/_data/assets/pdf_file/0006/1462065/11364-GROWING-ESTEEM-2015-FA-WEB.pdf>; See also Rea Jeannie, 'Critiquing Neoliberalism in Australian Universities' (2016) 58(2) *Australian Universities' Review* 1, 11.

⁹³ Australian Government, above n 4, x, 4–5.

⁹⁴ New South Wales and Independent Commission Against Corruption, above n 93, 4.

[T]here is a gap — at least in some courses — between the capabilities of many students and academic demands. *Students may be struggling to pass, but universities cannot afford to fail them.*⁹⁵

This tension has had a devastating effect on the integrity of higher education, with the need to remain ‘competitive’ in many cases leading universities to compromise both their admission and marking standards,⁹⁶ a process expedited by offshore “education agents” who fall outside Australia’s regulatory regime.⁹⁷

Quite apart from the perilous consequences that may befall universities in the future as a result of these arrangements,⁹⁸ a more immediate cause for concern for our purposes is the influx of international student populations who are even more susceptible to rights abuses than their pre-2009 counterparts. High levels of financial and academic pressure and low levels of English proficiency make these students vulnerable to exploitation both in the workplace (discussed below) and by educators.⁹⁹

B The 7-Eleven Scandal & Labour Market Exploitation

The consequences of the government’s failure to adopt a more holistic, rights-oriented response to the 2009 saga, and its continued recklessness in pursuing profit in the international education sector as a means of sustaining Australia’s economic growth, are perhaps most visible in the labour market exploitation of student visa holders — a reality laid bare in the 2015 7-Eleven wage scandal.¹⁰⁰

⁹⁵ Ibid (emphasis added).

⁹⁶ Corones, above n 93, 1.

⁹⁷ Knight, above n 37, xiv; Jerry Gomez, ‘Student Visa Fraud Out of Control But DIBP Still Refuses to Act against Unregistered Education Brokers’ on *Migration Alliance* (21 January 2015) <<https://migrationalliance.com.au/immigration-daily-news/entry/2015-01-student-visa-fraud-out-of-control-but-dibp-still-refuses-to-act-against-unregistered-education-brokers.html>>.

⁹⁸ Corone for example has argued these practices may constitute breaches of the Australian Consumer Law guarantees of due care and skill and fitness for purpose: See generally Corones, above n 93; There has also been a steady increase in international student complaints to industry regulators: Overseas Student Ombudsman, *Annual Report* (2014–15) 2–6 <http://www.ombudsman.gov.au/_data/assets/pdf_file/0016/37330/Overseas-Students-Ombudsman-Annual-Report-2014-15.pdf>.

⁹⁹ For educators asking for bribes or sexual favours: see, eg, Four Corners, *Degrees of Deception* (20 April 2015) ABC News <<http://www.abc.net.au/4corners/stories/2015/04/20/4217741.htm>>.

¹⁰⁰ See generally Four Corners, *7-Eleven: The Price of Convenience* (30 August 2015) ABC News <<http://www.abc.net.au/4corners/7-eleven-promo/6729716>>.

The scandal involved the widespread and systemic exploitation of international students working at 7-Eleven stores, who made up a majority of the 7-Eleven workforce.¹⁰¹ Exploitation manifested itself, inter alia, in the underpayment of wages;¹⁰² the coercion of workers to stand for long periods without sitting down, eating, or going to the toilet;¹⁰³ denial of sick pay and compensation for workplace injuries (which were commonplace);¹⁰⁴ and extortion.¹⁰⁵ In some of the most egregious cases, employees compared their conditions to slavery,¹⁰⁶ and many victims remain uncompensated.¹⁰⁷

These practices are clearly irreconcilable with the rights of international students under the ICESCR to 'just and favourable' employment, including to equal remuneration, and safe and healthy working conditions.¹⁰⁸ Moreover, and despite media commentary focusing mainly on the moral bankruptcy of the 7-Eleven corporation, they are largely the product of a confluence of variables directly attributable to the government's international education policy, being:

- The high number of international students seeking part-time or casual employment,¹⁰⁹ who lack knowledge regarding their legal entitlements (see

¹⁰¹ Education and Employment References Committee, Parliament of Australia (Senate), *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (March 2016) 227; Fair Work Ombudsman, Commonwealth of Australia, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (2016) 11, 46; *Fair Work Ombudsman v Bosen Pty Ltd and Others (Industrial)* Magistrates Court of Victoria Y03727156 [49].

¹⁰² Klaus Toft, Adele Ferguson and Sarah Danckert, '7-Eleven: A Sweatshop on Every Corner', *The Sydney Morning Herald* (online), 29 August 2015 <<http://www.smh.com.au/business/workplace-relations/7eleven-a-sweatshop-on-every-corner-20150827-gj8vzn.html>>.

¹⁰³ Education and Employment References Committee, above n 102, 227.

¹⁰⁴ *Ibid* 229–30.

¹⁰⁵ Stewart Levitt, Submission No 61 to the Senate Standing Committee on Education and Employment, *The Impact of Australian Temporary Working Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders*, 18 September 2015, 2.

¹⁰⁶ See, eg, AAP, 'I Was Paid 47c an Hour: 7-Eleven Worker', *News.com.au* (online), 15 February 2016 <<https://www.news.com.au/national/breaking-news/i-was-paid-47c-an-hour-7-eleven-worker/news-story/054d5a1b461afef0a86e5ff9e7e15c07>>; Leigh Sales, "'I Would Call Myself a Modern Century Slave,' Says Former 7-11 Worker", *ABC News* (online), 3 September 2015 <<http://www.abc.net.au/7.30/content/2015/s4305800.htm>>.

¹⁰⁷ Adele Ferguson and Sarah Dunckert, '7-Eleven's Wage Fraud Sparks \$170 Billion Blow Back', *The Sydney Morning Herald* (online), 27 August 2016 <<http://www.smh.com.au/business/retail/7eleven-wage-fraud-sparks-170-billion-blow-back-20160826-gr264h.html>>.

¹⁰⁸ ICESCR, above n 6, art 7.

¹⁰⁹ Joo-Cheong Tham, Submission No 3 (Supplementary Submission) to the Senate Standing Committee on Education and Employment, *The Impact of Australian Temporary Working Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders*, 16 September 2015, 2.

above) and experience difficulty securing employment in less ‘precarious’ industries;¹¹⁰

- The ease with which employers are able to force international students into breaching their visas, putting them at risk of visa cancellation and placing them outside the purview of the *Fair Work Act 2009* (Cth);¹¹¹
- A ‘profound’ lack of empirical knowledge regarding international students’ experience in the labour market which is critical to developing policies that protect their interests,¹¹² which Forbes-Mewett et al note is consistent with ‘the highly commercial manner in which Australia’s governments and universities approach the supply of international students’;¹¹³ and
- The limited presence of third parties otherwise responsible for securing compliance with workplace law (eg the Fair Work Ombudsman which is chronically under-funded,¹¹⁴ or trade unions which international students and convenience store workers rarely join).¹¹⁵

The highly visible plight of international students working in the convenience store industry is accompanied by less conspicuous (but equally pervasive) forms of labour exploitation in other areas, such as in the food services, cleaning, and taxi industries,¹¹⁶ and more worryingly, the budding internship industry. A report to the Fair Work Ombudsman in 2013, for example, reported the existence of for-profit agencies brokering unpaid internships and job placements, a business that is ‘largely ... confined to’ current or recently graduated international students.¹¹⁷ This additional tier of exploitation

¹¹⁰ See generally Iain Campbell, Martina Boese and Joo-Cheong Tham, ‘Inhospitable Workplaces? International Students and Paid Work in Food Services’ (2016) 51(3) *Australian Journal of Social Issues* 279 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849687>; See also Australian Education International, Commonwealth of Australia, *International Graduate Outcomes and Employer Perceptions* (2010) 13–8.

¹¹¹ *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964 [59]–[80].

¹¹² Tham, above n 110, 5.

¹¹³ Forbes-Mewett et al, above n 33, 146.

¹¹⁴ Joo-Cheong Tham, ‘7-Eleven Is the Tip of the Iceberg in Worker Exploitation. So Who’s Turning a Blind Eye?’, *The Guardian* (online), 12 May 2016 <<https://www.theguardian.com/commentisfree/2016/may/12/7-eleven-is-the-tip-of-the-iceberg-in-worker-exploitation-so-whos-turning-a-blind-eye>>.

¹¹⁵ Tham, above n 110, 4.

¹¹⁶ Campbell, Boese and Tham, above n 111; United Voice, ‘International Students Cop Melbourne’s Worst Paid Jobs’ (Media Release, 17 October 2013) <www.unitedvoice.org.au/press-releases/international-students-cop-melbourne-s-worst-paid-jobs>; *Fair Work Ombudsman v Primeage Pty Ltd & Ors* [2015] FCCA 139, [32].

¹¹⁷ Andrew Stewart and Rosemary Owens, Fair Work Ombudsman, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*

(*paying* agencies to work for free) is attributable to the over-supply of under-equipped international graduates and the conferral of post-graduation work rights (recommended by the Knight Review), the latter reform being explicitly introduced to make Australia's international education sector more competitive.¹¹⁸

Together, these forms of exploitation risk permanently relegating international students and graduates to subordinate economic and social status even as they transition into the next phase of life in Australia and distort the labour market by driving down wage growth and diluting workplace protections.¹¹⁹ Their prevalence is hostile to Australia's commitment to securing universal human rights, which are premised on the 'principle of fair treatment for all'.¹²⁰

V ADOPTING A HUMAN RIGHTS RESPONSE

A Limitations of the Consumer-Approach

As reflected in the Baird Review and COAG strategy, to the extent that governments have recognised a need to "protect" international students, it has been manifested in the conferral of rights on them as consumers, which are founded on the financial transaction entered into between the student and their education provider.¹²¹ As I have argued above, this approach is fundamentally incapable of protecting international students from rights abuses in Australia, posing a correlative risk to the stability of the international education sector and the economy more broadly.

Foremost of these limitations is the problem of scope. As I have prefaced above, international students' legal position as "non-citizens" limits their access to public services and,¹²² more damningly, to legal protections (such as in the labour market). Strengthening consumer protections does nothing to fill these gaps and moreover places

(2013) xii, 62 (emphasis added)

<<http://cdn.workplaceexpress.com.au/files/2013/unpaidworkreport.pdf>>; See, eg, *Host an Intern* <<http://www.studyandwork.com.au/pages/host-an-intern>>.

¹¹⁸ Knight, above n 40, xiv.

¹¹⁹ Commonwealth, *Parliamentary Debates*, Senate, 15 March 2016, 1937-8 (Doug Cameron, Shadow Minister for Social Services).

¹²⁰ Australian Government, *Australia's National Framework for Human Rights: National Action Plan* (2004) <<http://wwda.org.au/wp-content/uploads/2013/12/austnaphr1.pdf>>; see also *Al Ferdous v Minister for Immigration & Citizenship* [2010] FMCA 824 [59].

¹²¹ ESOS Act, s 4A.

¹²² Marginson et al, above n 40, 17-20.

responsibility on private actors, rather than public bodies, who are ill-equipped to and structurally discouraged from protecting students from exploitation and mistreatment.¹²³

The second limitation is one of *responsibility*. As the AHRC has noted, a system that relies on international students making complaints (eg to a host institution, industry regulator, or other body) is inherently inappropriate and unappealing to students with a limited understanding of the law and fear of jeopardising their future employment, housing opportunities, and permanent resident status.¹²⁴

Finally, there is the question of *accountability*. Even insofar as international students are willing to seek out the help of government regulators, the international education regime is nevertheless 'characterised by a lack of clear standards that leave considerable discretion to universities',¹²⁵ and there is moreover no direct recourse *against* the government — whose policies directly cause students' acute vulnerability.¹²⁶ Combined with the general inability of international students to negotiate better conditions for themselves at a structural level (they have no voting rights in Australia and are underrepresented in student unions and other representative bodies),¹²⁷ they are left with limited recourse when they are mistreated. Resultantly, they are more likely to resort to extreme (and disruptive) measures to secure better conditions, such as protests or appeals to their home government. As the 2009 saga showed, these actions are capable

¹²³ Silvia Sovic and Margo Blythman, *International Students Negotiating Higher Education: Critical Perspectives* (Routledge, 2012) 10.

¹²⁴ Victorian Equal Opportunity & Human Rights Commission, *Submission to Victorian Overseas Students Taskforce* (24 October 2008) 5 <<http://pandora.nla.gov.au/pan/99466/20090514-1405/www.humanrightscommission.vic.gov.au/pdf/SubmissionInternationalStudentsTaskforce.pdf>>; A similar point was made by the AHRC, Helen Szoke, in 2012: AHRC, above n 70, 3; See also Marginson, above n 23, 505; For a recent illustration of this, see Fair Work Ombudsman (FWO), above n 102, 48, which asserts that out of all complaints to the FWO by visa holders in 2014–15, only 8% were by student visa holders.

¹²⁵ Corones, above n 93, 11; Victorian Ombudsman, above n 93, 40–1 [187]–[195], 62–8 [314]–[351].

¹²⁶ Marginson, above n 23, 502.

¹²⁷ Benjamin Johnson, Patrick Kavanagh and Kevin Mattson, *Steal This University: The Rise of the Corporate University and the Academic Labor Movement* (Psychology Press, 2003) 178; Cf Reilly, above n 24.

of causing great detriment to the stability of the international education sector,¹²⁸ the broader economy, and Australia's international standing.¹²⁹

B A Human Rights Response

The need to develop a human rights-based response to the above problems is underscored by three claims at the centre of the preceding analysis: (a) that Australia has consistently failed to protect the human rights of international students, who are inherently vulnerable to mistreatment by private and public actors; (b) that this failure is rooted in the 'marketisation' of student populations;¹³⁰ and (c) that so long as this continues, the viability of the international education sector and the integrity of the national labour market are at risk. More broadly, without human rights-based reform, the example Australia sets as a market leader in the education export trade threatens to induce its competitors to adopt similar policies that undermine the state's obligations towards international student populations and exacerbates the relative dearth of initiatives by international bodies to protect these persons from rights abuses.¹³¹

As expounded by the AHRC in its 2012 *Principles to Promote and Protect the Human Rights of International Students*,¹³² a human rights-based approach, at its most elementary, recognises that Australia has a responsibility to protect overseas students under international law as persons within its jurisdiction and that this responsibility implicates the broad range of public, private, and international stakeholders with whom they interact and rely upon.¹³³

¹²⁸ See generally Australian Education Union, *International Education Crisis and the Failure of Private Providers* (February 2010) <<http://www.aeusa.asn.au/03ie.pdf>>.

¹²⁹ Mason, above n 55, 50; Deloitte Access Economics, above n 45, 35–6; Babacan et al, above n 60, 11–25; Gail Mason, 'Violence against Indian Students in Australia: A Question of Dignity' (2010) 21(3) *Current Issues in Criminal Justice* 461, 461–5.

¹³⁰ Shanthi Robertson, 'The Production of the Indian Student: Regimes and Imaginaries of Migration, Education, Labour, Citizenship and Class' (2015) 7(3) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 1, 3.

¹³¹ See generally Nyland, Forbes-Mewett and Hartel, above n 14.

¹³² AHRC, above n 70.

¹³³ See also Danwood Mzikenge Chirwa, 'Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1; United Nations: Office of the High Commissioner, *Implementing the United Nations 'Protect, Respect and Remedy' Framework* (United Nations, 2011) <http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nethqur44§ion=14>; But see discussions in Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16 *Australian International Law Journal* 219; Dianne Otto, 'From Reluctance to Exceptionalism' (2001) 26(5) *Alternative Law Journal* 219.

It is obviously beyond the scope of this paper to set out in detail how this recognition translates into effective and comprehensive reform. However, central to this approach is (a) the conferral of legal equality on international students; (b) the imposition of human rights standards on education providers in relation to how they promote and provide their services; and (c) the facilitation of greater accountability of governments and education providers, for international students, through both domestic and bilateral processes. These structural pillars are reflected in the proposed reforms below.

VI PROPOSED REFORMS

Recommendation 1: Addressing Gaps in Conventional Rights

Protection for International Students

At the heart of Australia's human rights obligations is the obligation to ensure that all persons are entitled to equal protection before the law.¹³⁴ As Marginson argues, this 'norm of equivalence' informs broader cultural, social, and economic inclusivity and is moreover pivotal to international students' assertion of stable human agency.¹³⁵

Exclusionary public laws should thus be amended to bring international students into parity with Australian citizens (with limited exceptions for example with respect to voting for national government or tuition costs),¹³⁶ which then provide a foundation for longer-term efforts to ensure that formal equality is accompanied by fairness, certainty, and transparency in the law's application.¹³⁷

The central example I have relied upon in the above discussion is the intersection of Australia's student visa and labour market regimes, which operates to exclude international students (and other migrant workers)¹³⁸ from workplace protections where they breach visa-imposed work restrictions.¹³⁹ Compounded with poor regulation, this state of affairs permits unscrupulous employers to profit from the direct

¹³⁴ ICCPR, above n 6, art 16, 26; ICESCR, above n 6, art 2(2); CERD, above n 6, art 5.

¹³⁵ Marginson, above n 23, 499.

¹³⁶ Ibid 508.

¹³⁷ United Nations: Office of the High Commissioner, above n 134, 4; See CERD, above n 6, art 1(4).

¹³⁸ See generally Employment and Workplace Relations References Committee, Commonwealth of Australia (Senate), *Welfare of International Students* (2009).

¹³⁹ *Australian Meat Holdings v Kazi* [2004] QCA 147; *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964.

breach of students' rights under domestic and international law,¹⁴⁰ with dire implications for the cumulative social and financial wellbeing of international students and broader industry standards.

As Tham has argued (though not exclusively through a human rights lens), a number of legislative reforms should be implemented to address this injustice and in turn prevent these practices from becoming further entrenched.¹⁴¹ These include amending the *Migration Act 1958* (Cth) and *Fair Work Act 2009* (Cth) to provide:

- that visa breaches do not necessarily void contracts of employment; and
- that standards under the *Fair Work Act* apply even when there are visa breaches,

as well as amending Australia's anti-discrimination laws,¹⁴² to specifically prohibit discrimination against international students (and other temporary migrant workers) on the basis of their migrant status.¹⁴³

*Recommendation 2: Impose Human Rights Due Diligence
Requirements on Education Providers*

The actions of education providers, both in promoting their 'product' to international audiences and by engaging "education agents" to secure more overseas enrolments,¹⁴⁴ directly mediate the journey of international students into Australia. It follows that a rights-oriented reform should encompass these stakeholders. This notion aligns with the increasing recognition in international law that the State's human rights obligations towards persons within its jurisdiction extend to imposing requirements on private

¹⁴⁰ See, eg, *ICESCR*, above n 6, art 7; *International Convention on the Protection of All Migrant Workers and Members of Their Families*, opened for signature on 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 25 (though note Australia has not ratified this instrument and that international students are not covered in this definition).

¹⁴¹ Joo-Cheong Tham, Submission No 3 to the Senate Standing Committee on Education and Employment, *The Impact of Australian Temporary Working Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders*, 29 April 2015, 21.

¹⁴² *Racial Discrimination Act 1975* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 2010* (WA).

¹⁴³ Tham, above n 107, 7–10.

¹⁴⁴ Luke Slattery, 'Too Many University Students Spoil the Product', *The Australian* (online), 23 April 2016 <<http://at.theaustralian.com.au/link/3b1651e97a65f00c79f1b9696057d8ae?domain=theaustralian.com.au>>; Productivity Commission, 'International Education Services: Research Paper' (Australian Government, April 2015).

enterprises to respect human rights in their operations,¹⁴⁵ particularly for enterprises controlled or substantially supported by the state (such as universities).¹⁴⁶

A relatively simple means of achieving this would be imposing due diligence reporting obligations on universities in relation to how their activities promote respect for the human rights of international students, and providing greater public funding for compliant universities. University undertakings meeting this description might include:

- Greater investment in learning and language services to support international students at all levels of study;¹⁴⁷
- Implementing more comprehensive screening mechanisms for internship, employment, and housing opportunities marketed through universities to exclude illegal or predatory operators;¹⁴⁸
- Allocating additional time and funding towards programs that identify and reach out to international students believed to be at risk of mistreatment in the employment and housing markets;
- Facilitating student access to appropriate legal services where issues do arise and providing support and assistance throughout;¹⁴⁹
- Facilitating student access to physical and mental health services, including information and health services.¹⁵⁰

Recommendation 3: Initiate Bilateral Treaties with Origin Countries

Above, I have argued that Australia's rights crisis has largely been caused by the government's distinctly inward-looking economic conception of international students as sources of external revenue that is only marginally tempered by the conferral of consumer rights protections. This conception of international student welfare, as limited

¹⁴⁵ United Nations: Office of the High Commissioner, above n 134, 13–26.

¹⁴⁶ *Ibid* 6–7.

¹⁴⁷ See, eg, Craig Baird, 'Targeted, Timely, Learning Support for International Students: One Australian University's Approach' (2012) 5(1) *Journal of Learning Design* 52.

¹⁴⁸ Amy McNeilage, "'You Just Take It': The Students at the Sharp End of Sydney's Housing Nightmare', *The Guardian* (online), 19 March 2018 <<http://www.theguardian.com/australia-news/2018/mar/19/you-just-take-it-the-students-at-the-sharp-end-of-sydneys-housing-nightmare>>.

¹⁴⁹ See, eg, Study Melbourne, *International Students Work Rights Legal Service* (24 February 2017) Study Melbourne <<https://www.studymelbourne.vic.gov.au/event/international-students-work-rights-legal-service-wednesday>>.

¹⁵⁰ See generally AHRC, above n 70, 9.

to a matter of 'national private good',¹⁵¹ is inherently flawed however, in that it ignores the interests that origin countries have in securing better conditions for students and — more significantly — the respective abilities of both governments and student communities to pursue those interests through formal and informal processes.¹⁵² Indeed, both of these stakeholders undertook highly consequential actions during the 2009 protests: the students by protesting and lobbying and the Chinese and Indian governments by discouraging tens of thousands of potential international students from enrolling in Australian educational programs.¹⁵³

In recognition of the interests that home countries have in securing conditions for international students, and in free and secure cross-border movement more broadly, a reform worth exploring is the creation and entry of bilateral treaties (or alternatively, more informal 'protocols') between Australia and these countries. These instruments should explicitly recognise the rights and entitlements of students (for example by reference to the *Universal Declaration of Human Rights*),¹⁵⁴ clearly identify the shared responsibility that individuals, governments, and private bodies (like educational institutes) bear in asserting and protecting those rights, and impose greater accountability on the Australian government for the protection of non-citizen students within its borders. This last-mentioned limb might best be achieved by the conferral of 'coercive' rights on home countries to enforce human rights standards; where there are clear derogations however, this would more likely be pursued through persuasion and 'acculturation'.¹⁵⁵ At the very least, there should be recognised processes and forums whereby origin countries can express concerns to government officials by reference to the standards set out in the treaty or protocol. This should also be accompanied by a streamlined complaints procedure, whereby students who have been victims of significant human rights abuses can seek redress from or through the Australian

¹⁵¹ Marginson, above n 23, 507.

¹⁵² See generally 'Australia in Damage Control over Indian Attacks', *ABC News* (online), 1 June 2009 <<http://www.abc.net.au/news/2009-06-01/australia-in-damage-control-over-indian-attacks/1699936>>.

¹⁵³ See, eg, Sharon Verghis, 'Australia: Attacks on Indian Students Raise Racism Cries', *Time* (online), 10 September 2009 <<http://content.time.com/time/world/article/0,8599,1921482,00.html>>.

¹⁵⁴ Marginson, above n 23, 508–9; Frank J Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 25 *Brooklyn Journal of International Law* 51, 64–9.

¹⁵⁵ Ryan Goodman, 'Sociological Theory Insights into International Human Rights Law' (Unpublished presentation, Institute for International Law and Justice, Legal Theory Colloquium: Interpretation and Judgment in International Law, NYU Law School, 3 April 2008) 5–7.

government (in the form of declarations, injunctions, or compensation) after exhausting other legal processes.

An additional benefit of the treaty option, even if implemented in a limited form, would be the potential to safeguard Australian nationals studying abroad as this practice becomes more popular,¹⁵⁶ and in turn begin to address the current lacuna of international human rights standards that apply specifically to overseas students.¹⁵⁷ As Marginson has noted, the best means of addressing these 'gaps' is through an 'incremental process of voluntary agreement': starting with bilateral protocols with the aim of stimulating the development of *global* standards to be monitored by both governments and international NGOs (non-governmental organisations).¹⁵⁸ Importantly, a multilateral and democratic effort to reform the global international education space to align with human rights principles would stand to mitigate the extent to which any single state would suffer competitively by initiating such reforms in isolation — an approach that has significant precedent in international trade law.¹⁵⁹

VII CONCLUSION

Australia's international education industry, on which the future of tertiary education and the nation's economic prosperity increasingly depends, is fundamentally unsustainable. By conceiving of international students as transient populations with limited consumer rights, rather than humans with universal rights, governments and education providers have left them vulnerable to mistreatment and abuse on a wide scale. This is not only detrimental to Australia's human rights commitments and the integrity of its education sector and labour market, but also threatens to undermine the international human rights framework at a time when global mobility is significantly increasing. Human rights oriented reforms, which increase the accountability of

¹⁵⁶ Julie Hare, 'Number of Australians Studying Abroad Doubles', *The Australian* (online), 8 June 2016 <<http://at.theaustralian.com.au/link/597b3f9dca710d12e4f3f9ab2104a1a4?domain=theaustralian.com.au>>; Universities Australia, *More Australian Students See the Value of Study Abroad* <<https://www.universitiesaustralia.edu.au/Media-and-Events/media-releases/More-Australian-students-see-the-value-of-study-abroad#.WAozJtxA8dU>>.

¹⁵⁷ See generally Deumert et al, above n 24.

¹⁵⁸ Marginson, above n 23, 509; Sovic and Blythman, above n 124, 24.

¹⁵⁹ Garcia, above n 156, 64–9.

education providers and governments and engage with origin countries, are necessary to address this crisis and have significant flow-on benefits.

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AFFIRMATIVE ACTION IN PIERCING THE BAMBOO CEILING WITHIN THE AUSTRALIAN LEGAL PROFESSION — UTOPIAN IDEAL OR DYSTOPIAN NIGHTMARE?*

K ABRAHAM THOMAS**

In memory of my paternal Grandparents

31 March 1930 – 18 October 2017

3 October 1927 – 10 December 2017

This paper considers the phenomenon of the bamboo ceiling and whether affirmative action presents an adequate means of alleviating such deeply entrenched inequalities within the Australian legal profession. It is suggested that “The Medici Effect” presents an adequate means of overcoming the problem of the bamboo ceiling. It is concluded that “The Medici Effect”, bringing together different disciplines and finding their intersections, is a means of generating collaboration and invoking innovation through an influx of ideas bringing about the core notable benefit of “diversity of thought”.

* This paper was selected as the winning paper of the inaugural William Ah Ket Scholarship, designed to highlight issues related to equality, diversity, and the law, while fostering the development and promotion of cultural diversity in the Australian legal profession. The scholarship is named after William Ah Ket, the son of Chinese migrants who was admitted to practice in Victoria in 1903. William completed his articulated clerkship at Maddock Jamieson (now Maddocks) before signing the Victorian Bar roll in 1904. He practised as a barrister until his death in 1936. William is believed to be the first person of Chinese background to practise as a barrister in Australia. This Scholarship is initiated by the Asian Australian Lawyers Association and proudly sponsored by Maddocks.

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I INTRODUCTION

It is time for parents to teach young people early on that in diversity there is beauty and there is strength. We all should know that diversity makes for a rich tapestry, and we must understand that all the threads of that tapestry are equal in value no matter their colour — Maya Angelou

This paper engages in a systemic analysis of the phenomenon termed the “bamboo ceiling”, and in doing so, examines the strategy of affirmative action in piercing the bamboo ceiling within the Australian legal profession. Affirmative action is scrutinised based on its effectiveness and shortfalls in various facets of Australian society, and as evinced in other jurisdictions the world over.

On the outset, this paper recognises that any discussion of affirmative action in a vacuum that disregards broader considerations of racial, ethnic, or other minority and marginalised groups is necessarily incomplete. However, this paper selectively focuses on affirmative action specifically in relation to the “bamboo ceiling” within the Australia legal profession in the context of equality and diversity.

This paper ultimately acknowledges the benefits that affirmative action may bring in terms of equality and diversity and the potential for improved standards of both equality and diversity. However, it is postulated that although quantitative measures of diversity and equality are instructive, true diversity and true equality can only be achieved through

the harnessing of “The Medici Effect”.¹

It is suggested that harnessing “The Medici Effect” is necessary to attain the core benefit of “diversity of thought” which is necessary to break the bamboo ceiling as well as simultaneously tackle the ‘traffic jam of diversity’ within the Australian legal profession.²

II THE BAMBOO CEILING

A An Overview

The term “bamboo ceiling” was originally coined in 2005 by Jane Hyun.³ The term is a derivative of the more commonly recognised metaphor known as the “glass ceiling”, used to describe the intangible barriers that impede minority groups in the workforce.

The conception of the term bamboo ceiling originated in reference to the barriers Asian Americans faced in the American workforce. Today, the term itself is used in common parlance when referencing the obstacles faced by individuals of Asian descent in workforces generally, as well as the particular difficulties encountered by these individuals in attaining positions of seniority.

Australia, like most of its western contemporaries, is not immune from this pervasive and undesirable phenomenon. As stated by the Australian Human Rights Commission (‘AHRC’), despite Australia’s multicultural and heterogeneous composition of various nationalities and ethnicities, the under-representation of non-Anglo-Celtic backgrounds in positions of seniority is glaringly evident as represented below:⁴

¹ Frans Johansson, *The Medici Effect* (Harvard Business School Press, 2006).

² Tuah Nguyen and Reynah Tang, ‘Gender, Culture and the Legal Profession: A Traffic Jam at the Intersection’ (2017) Special Issue 2017 *Griffith Journal of Law & Human Dignity* 93.

³ Jane Hyun, *Breaking the Bamboo Ceiling: Career Strategies for Asians* (HarperCollins, 2005).

⁴ Australian Human Rights Commission, ‘Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership’ (Working Group on Cultural Diversity and Inclusive Leadership, Australian Human Rights Commission, 2016) 2.

Table: Cultural backgrounds of Australia's senior leaders (in percentage terms)

	Indigenous	Anglo-Celtic	European	Non-European
ASX 200 (CEOs)	0	76.62	18.41	4.98
Federal parliament (MPs and Senators)	1.77	78.76	15.93	3.54
Federal ministry (Ministers and Assistant Ministers)	2.38	85.71	11.90	0
Federal and state public service (Secretaries and heads of departments)	0.81	82.26	15.32	1.61
Universities (Vice-chancellors)	0	85.00	15.00	0

This under-representation of non-Anglo-Celtic backgrounds in positions of seniority is closely mirrored when regard is had to senior positions within the Australian legal workforce. A survey undertaken by the Asian Australian Lawyers Association ('AALA') highlights that although Asian Australians account for 9.6 per cent of the total Australian population,⁵ Asians only comprise 3.1 per cent of partners in law firms, 1.6 per cent of barristers, and a mere 0.8 per cent of judges.⁶

Statistics such as these are instructive in pointing out the lack of diversity from a quantitative standpoint. More importantly, these statistics serve a function of the phenomenon itself 'gaining currency' and in so doing, bring to light possible measures that should be implemented as well as strategies and targets that could be embarked upon to address and prevent the lacuna of diversity from exacerbating.⁷ As a corollary, the publicity of such statistics has increased awareness, in turn resulting in organisations, corporations, and senior individuals taking concerted efforts to mitigate the entrenchment of the bamboo ceiling, be it real or perceived, pervasive or localised.⁸

This paper does not suggest that these statistics point to the unequivocal existence of the bamboo ceiling in the Australian legal workforce, nor does it attempt to enter into a

⁵ Diversity Council Australia, 'Cracking the Cultural Ceiling: Future Proofing Your Business in the Asian Century' (Research Report, Diversity Council Australia, 2014).

⁶ Asian Australian Lawyers Association, 'The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015' (Infographic, Asian Australian Lawyers Association, 2015).

⁷ Tim Soutphommasane, 'Culture, Talent and Leadership' (Speech delivered at the launch of Diversity Council Australia's Cracking the Cultural Ceiling Report, Sydney, 11 August 2014) <<https://www.humanrights.gov.au/news/speeches/culture-talent-and-leadership>>.

⁸ Kaori Takahashi, *Australia's 'Bamboo Ceiling' in the Spotlight* (29 August 2016) *Nikkei Asian Review* <<https://asia.nikkei.com/Business/Trends/Australia-s-bamboo-ceiling-in-the-spotlight>>.

dialectic of its existence or level of pervasiveness within the Australian legal sphere. Instead, the recognition of the phenomenon by renowned Australian corporations (Westpac Bank and PwC), institutions (Australian Institute of Company Directors) and individuals (Lieutenant-General (ret) David Morrison) in other sectors of the Australian workforce provides sufficient basis for similar assumptions to be made within the specific context of the Australian legal profession.⁹

B The Australian Legal Profession “Unwigged”

The Australian legal profession is heralded because it continues to be steeped in culture and tradition. This is perfectly evidenced by how, until most recently, the Victorian jurisdiction continued to embrace horse-hair wigs, a standard feature of court dress since the 1860s for both barristers and judges in Victorian courts. The doing away of horse-hair wigs alike in the Victorian Supreme Court arose as a result of an edict issued by the Honourable Marilyn Warren, former Chief Justice of the Supreme Court of Victoria, describing wigs as a symbol of the past with no place in the modern courtroom and of no assistance to the administration of justice.¹⁰

The eschewal of such long-standing tradition should not be considered a simple task or an uncomplicated exercise, particularly when considered in light of the historical and traditional underpinnings dating back to practices connected with the English aristocracy. Wigs aside, the Australian legal profession has much more deeply entrenched, intangible norms with greater implications that are less readily removed, be it through edict or otherwise.

1 “Male, Pale, and Stale” — An Anachronistic Triple Whammy

The Australian legal profession is beset with a triple whammy of entrenched norms. Most

⁹ See Michael Smith, ‘Australian Boards Need to Break Bamboo Ceiling’, *Australian Financial Review* (online), 4 October 2017 <<http://www.afr.com/brand/chanticleer/australian-boards-need-to-break-bamboo-ceiling-20171004-gytwf2>>; Takahashi, above n 8; Liz Burke, *Australia’s Shameful Bamboo Ceiling: Australian of the Year David Morrison Pushing for More Asian People in Top Jobs* (29 January 2016) News.com.au <<http://www.news.com.au/finance/work/careers/australias-shameful-bamboo-ceiling-australian-of-the-year-david-morrison-pushing-for-more-asian-people-in-top-jobs/news-story/f94f5c949111bca2679e40355cd0a976>>.

¹⁰ Melissa Coade, *Vic Court Refuses to Hear Wigged Barristers* (30 May 2016) Lawyers Weekly <<https://www.lawyersweekly.com.au/wig-chamber/18666-vic-court-refuses-to-hear-wigged-barristers>>.

particularly, its higher echelons are anachronistically “male, pale, and stale”, although currently more diverse than ever before.¹¹ This is in stark contradistinction to Australia’s ‘hugely diverse’ demographic,¹² which in 2016 comprised of 49 per cent of persons being born overseas or having at least one parent born overseas.¹³

It should be appreciated that although Australia’s demographic is currently very diverse, the Australian legal fraternity is plagued with anachronistic norms which have resulted in it continuing to be predominantly “male, pale, and stale”:

Any professional group which, for 700 years, has comprised solely of men is bound to have inherited attitudes which may seem unwelcoming to some new entrants ... Women. Aboriginal lawyers. Lawyers from non-Anglo Celtic backgrounds. Gay and lesbian lawyers.¹⁴

The bamboo ceiling is a result of these aforementioned, deeply entrenched norms permeating the Australian legal profession. Although the bamboo ceiling constitutes only one of these anachronistic norms, a linear solution alone should not be adopted in an attempt to address the “paleness”, with no regard made to the “maleness” or “staleness” of the profession. This triple whammy of norms is not disparate, but a collective whole that has continuously been entrenched for all these years, and will continue to get staler, “male-er”, and paler *unless* measures are taken to address century-long entrenchment within the legal profession.

2 A Traffic Jam of Diversity

In theory, it is acknowledged that in addressing the bamboo ceiling, a linear approach should not be adopted, and instead, regard must be had to the other aspects of diversity also plaguing the system.

In practice, however, there is a “traffic jam” for diversity in the law, due to other aspects

¹¹ Wayne Martin, ‘Cultural Diversity and the Law Conference — Access to Justice in Multicultural Australia’ (Paper presented at Cultural Diversity and the Law Conference, Sydney, 13–14 March 2015) 3.

¹² Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016* (27 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>>.

¹³ *Ibid*; But see Martin, above n 11, 7.

¹⁴ Michael Kirby, ‘Women Lawyers Making a Difference’ (Speech delivered at the Women Lawyer’s Association of New South Wales, Sydney, 18 June 1997) <<http://www.hcourt.gov.au/speeches/kirbyj/womenlaw.htm>>.

of diversity being kept in abeyance until gender equality is resolved.¹⁵ As pointed out by Nguyen and Tang, this “traffic jam” is exemplified by the Law Council of Australia’s statement in 2016 that targets relating to the equitable briefing of female barristers will be reviewed in July 2018 as to whether the broader application of such targets beyond gender is necessary.¹⁶

Addressing other aspects of diversity only after the profession’s “maleness” has been addressed is promising. However, without a definitive time frame, it would mean that other aspects of diversity such as that relating to the bamboo ceiling are kept in limbo pending the resolution of gender equitability in the profession:

To wait until gender equality is achieved within the workplace would place the issue of cultural diversity on indefinite hold. In any case, the different dimensions of diversity frequently intersect. Efforts to improve the advancement of culturally diverse talent may also contribute to improve gender representation in leadership ...¹⁷

A prolonged or indefinite stalling or abeyance not only creates a “traffic jam” for diversity but also simultaneously impedes cultural diversity and equality, made particularly worrying when considering the role and function of the legal profession in Australian society.

3 Ivory Towers and the Control of Power

The entrenchment of anachronistic norms such as the bamboo ceiling lead to a lack of diversity and equality and is cause for concern in any given industry or profession. However, this is amplified multi-fold in the context of the legal profession as the resulting pernicious effects are not localised merely within the peripheries of the legal fraternity. Instead, these pernicious effects extend to affect the broader community and society at large, owing to the power the profession wields in the administration (and interpretation) of justice:

Law is not an ordinary profession ... Law is about the values that inform what we do, how we do it and outcomes ... therefore it’s more important in law to reflect the

¹⁵ Nguyen and Tang, above n 2.

¹⁶ Law Council of Australia, ‘National Model Gender Equitable Briefing Policy’ (Policy Paper, June 2016) 7.

¹⁷ Above n 4, 12.

diversity of values than it is in just about anywhere else because law is about power ... And if values affect the exercise of power, it is very, very important that the diversity of values and the experience of backgrounds should be reflected.¹⁸

Values informing a select, homogeneous group of individuals that hold the balance of power in an increasingly heterogeneous society may be perceived as a disenfranchisement to the very diversity held sacrosanct by the demographic. This, in turn, could strain the (delicate) social fabric of such a diverse society and have unintended consequences.

Moreover, it may lead to the exercise of such power to be deemed draconian and oppressive due to a detachment from the norms and ideals of general society. Instead, the exercise of power would benefit most and work best when it is able to draw from a myriad of diverse talent and perspectives. A truly egalitarian society not only endeavours in principle to achieve diversity, but also utilises such a diverse talent pool in actuality and in the present. The question must be asked — can the legal profession uphold the rule of law and legal values in circumstances where it is not truly reflective of the society in which it operates?

III AFFIRMATIVE ACTION

*A Executive Order 10925 — The Seedbed of Affirmative Action*¹⁹

The policy of affirmative action was formally conceived and unveiled in the United States of America on 6 March 1961 by President John F Kennedy. President Kennedy issued Executive Order 10925 requiring all federally funded employers to:

take affirmative action to ensure that applications are employed ... without regard to their race, creed, color [sic], or national origin.²⁰

Executive Order 10925 institutionalised affirmative action as an official policy of the United States government and is often cited as the birth of the policy of affirmative action.

¹⁸ Michael Kirby (Speech delivered at the Asian Australian Lawyers Association launch in New South Wales, Sydney, 10 November 2015).

¹⁹ Judson MacLaury, 'President Kennedy's E O 10925: Seedbed of Affirmative Action' (2010) *Federal History Online* 42.

²⁰ John F Kennedy, 'Statement by the President upon Signing Order Establishing the President's Committee on Equal Opportunity Employment' (Presidential Statement, 7 March 1961) <<http://www.presidency.ucsb.edu/ws/?pid=8520>>.

Affirmative action is not without its criticism and in some jurisdictions has even been the subject of legal action questioning its very legal or constitutional validity.²¹ However, affirmative action itself has come a long way in terms of its applicability and scope in the context of various jurisdictions around the world. Though limited in application, it has also been applied in Australia in the context of the education industry, police recruitment, and gender briefing of barristers, among others.

B Affirmative Action in Australia

1 Police Recruitment

In Australia, discriminatory practices have been rife in police forces around the country, largely attributable to the gender imbalance and male-dominated culture within the forces. The Victorian police force is such an example, starkly evidenced by the 1998 case of *McKenna v State of Victoria*,²² which found that senior Victorian police officers had engaged in discrimination and victimisation of a female officer due to her gender and marital status.

Such discrimination is not an isolated example, instead sexual harassment and predatory behaviour have been found to be systemic and endemic within the Victorian police force.²³

Former Chief Commissioner of Victoria Police, Christine Nixon, attempted to employ affirmative action in police recruitment in order to address such discriminatory practices and harassment. Although women were the primary targets of the Victoria Police proposal, there was also a focus made to recruit new police officers from Asian and Islamic groups.²⁴ Affirmative action was attempted through “weak forms” (such as gender-inclusive language, circulation of images of female police officers, and the encouragement of women to apply) and “strong forms” (eg quotas).²⁵

²¹ See *Fisher v University of Texas* 579 US ___ (2016); See *Grutter v Bollinger* 539 US 306 (2003); See *Regents of the University of California v Bakke* 438 US 265 (1978).

²² [1998] VADT 83.

²³ See S Walpole, ‘Trends in Sexual Harassment Case Law’ in R Naughton (ed), *Workplace Discrimination and the Law* (1995).

²⁴ Margaret Thornton, ‘Affirmative Action, Merit and Police Recruitment’ (2003) *Alternative Law Journal* 235.

²⁵ *Ibid.*

As with other Anglo-Saxon, male-centric professions, minority groups do not merely face linear forms of discrimination in terms of their overall under-representation, but also a perverse disparity in certain areas of a profession, namely at the senior and executive level.

In the context of Victoria Police, it has been found that the representation of women within the Community Policing Squad, Mounted Branch, and Rape Squad is significantly higher than in other divisions.²⁶ It is apparent that the proportion of women is higher in areas of policing deemed traditionally feminine, such as those involving juveniles, family violence, and administration.²⁷ However, as Burton suggests, the central question is whether women are in these particular positions as a result of personal choice or due to procedures or entrenched norms that have resulted in them being placed there.²⁸ It is acknowledged that this indeed is a difficult question to fully conceptualise or answer because the prevalence of minority groups in particular roles or areas within a profession may be a result of the implementation of measures, but also a consequence of intangible bias and culture that have long been entrenched.

2 Gender Briefing

Male-dominated professions are characterised by a lack of females entering the particular profession and evidenced by a great disparity in gender ratios from entry-level through to senior roles.

The Australian legal profession is commonly categorised as being one of these male-dominated and male-centric professions. Despite this, the Australian legal profession has improved significantly, in terms of the number of females entering the profession. Although not representative of the entire Australian legal profession, as at October 2016, the legal profession in New South Wales was described as having, for the first time ever, equal numbers of men and women in the profession.²⁹

²⁶ Walpole, above n 23, 19.

²⁷ K Buckley and L Schetzer, 'The Ongoing Need for Affirmative Action in the Victoria Police Force, Brute Force II' (1999) *Police Issues Group, Federation of Community Legal Centres*, 21.

²⁸ Clare Burton, 'Merit and Gender: Organisations and the Mobilisation of Masculine Bias' (1987) 22 *Australian Journal of Social Issues* 425.

²⁹ Urbis Pty Ltd, 'NSW Profile of Solicitors 2016' (Final Report, Law Society of New South Wales, 19 July 2017).

Even more encouragingly, the Victorian legal profession has witnessed a greater number of females being admitted to the profession than males this year, with ‘well over 65 per cent of the new lawyers’ admitted being women.³⁰ This was similarly the case in New South Wales between 2015 and 2016, where the legal profession also saw a greater increase of female solicitors (5.9 per cent) as opposed to men (2.6 per cent).³¹ Although relatively new, the higher number of females entering the legal profession in various jurisdictions in Australia is itself not unprecedented:

[A]s in previous years, a higher proportion of solicitors entering the profession for the first time are females. In 2014, 58.9 per cent of solicitors entering the profession for the first time were women — a similar figure to that of 58.1 per cent in 2013.³²

However, the number of female barristers (28.98 per cent) remains significantly lower than males (71.02 per cent), despite an almost equal overall proportion of male and female solicitors and barristers in the profession, exemplified by the various proportions in Victoria as at 31 May 2017:

Type			
	Solicitors	Barristers	Total
Male	9,113	1,448	10,561
Female	9,781	591	10,372
Total	18,894	2,039	20,933

Solicitors and barristers by gender³³

This disparity between male and female barristers has currently widened to the point that there is a clear bifurcation of a mere handful of female silks, standing at 12.3 per cent

³⁰ Marilyn Warren, ‘Barristers, Solicitors, Law Officials and Others: On the Admission of Lawyers’ (Speech delivered at the Admission of Lawyers in the Supreme Court of Victoria, Melbourne, 19 September 2017) <<http://scvwebcast.com/admissions/>>.

³¹ Urbis Pty Ltd, above n 29, 3.

³² Urbis Pty Ltd, ‘2014 Report of the Solicitors of NSW’ (Final Report, Law Society of New South Wales, March 2015) 16.

³³ Victorian Legal Services Board + Commissioner, *Lawyer Statistics* (1 June 2018) <http://lsbc.vic.gov.au/?page_id=287>.

in Victoria,³⁴ and 10.0 per cent in Sydney.³⁵

It comes as no surprise that bodies such as the Law Council of Australia and the Victorian Equal Opportunity & Human Rights Commission ('VEOHRC') have adopted briefing policies to improve the overall representation of female barristers as well as their representation as senior counsel in Australia and Victoria respectively.³⁶ For instance, the Law Council of Australia adopted the National Model Gender Equitable Briefing Policy on 18 June 2016, with the intention of briefing senior female barristers in at least 20 per cent of all briefs and/or 20 per cent of the value of all briefs paid to senior barristers, and similarly at least 30 per cent of all briefs and/or 30 per cent of the value of all briefs paid to junior barristers by 1 July 2018.³⁷

It is apparent that the Law Council of Australia and the VEOHRC specifically steer clear from the use of the term "affirmative action", choosing instead to couch the respective policies as "equitable briefing". These policies are premised on targets as opposed to quotas and do not have mandatory requirements; in essence, however, they are affirmative action in gender briefing, be it that emphasis is placed on soft measures within an overall scheme of measures to 'accommodate both "soft" and "hard" forms of affirmative action'.³⁸

C Evaluation

1 Positives

Affirmative action is not the panacea to breaking the bamboo ceiling within the Australian legal profession; however, it has positive ramifications in its application (if applied) to the bamboo ceiling within the Australian legal profession.

³⁴ Note: No of female silks: 36, No of male silks: 256, Total No of silks: 292, Percentage: $36/292 = 12.3$ per cent: Victorian Bar, *Find a Barrister* <<https://www.vicbar.com.au/find-barrister>>.

³⁵ Note: No of female silks: 48, No of male silks: 392, Total No of silks: 440. Percentage: $48/440 = 10.9$ per cent: New South Wales Bar, *Find a Barrister* <<http://find-a-barrister.nswbar.asn.au/>>.

³⁶ See, eg, Law Council of Australia, above n 16; Victorian Equal Opportunity and Human Rights Commission, 'Equitable Briefing Initiative' (Aggregate Data Report — Period One (January – June 2016), July 2017).

³⁷ Nguyen and Tang, above n 2.

³⁸ Julie O'Brien, 'Affirmative Action, Special Measures and the *Sex Discrimination Act*' (2004) 27(3) *University of New South Wales Law Journal* 848.

(a) A Step in the Right Direction

Any step(s) embarked upon to address issues of diversity within the Australian legal profession, be it through affirmative action or otherwise, is necessarily commendable. Whether it is *the* step that should be embarked upon to achieve equality and diversity, in this instance, the abolishment of the bamboo ceiling is a separate consideration in itself.

The implementation of affirmative action to alleviate the entrenchment of the bamboo ceiling within the legal profession, particularly in its higher echelons, is a step in the right direction of heightened cultural diversity. It is a step in the right direction not merely because of the satisfaction that can be derived (deservingly so) in acknowledging and proclaiming such tangible improvements within the Australian legal profession, but also because more laudable, heightened cultural diversity or diversity generally provides the Australian legal system and its constituent institutions and organisations a springboard to achieve improved performance in a highly globalised legal market which thrives on inclusivity, not insularity:

diversity matters because we increasingly live in a global world that has become deeply interconnected. It should come as no surprise that more diverse companies and institutions are achieving better performance.³⁹

The imperatives of breaking the bamboo ceiling through the implementation of policies such as affirmative action is all the more increased when it is recognised that the Australian legal profession, through its strategic placement in the Asia-Pacific region, is not only highly sought after by Asian markets for its well-regarded legal expertise, but also heavily relies upon these very same Asian markets for its own business growth. The implementation of affirmative action in breaking the bamboo ceiling will be mutually beneficial as it has the potential to further foster and strengthen this symbiotic relationship between the Australian legal profession and the respective Asian markets.

(b) Quick Fix Remedial Strategy

The implementation of affirmative action, particularly through “hard” measures,⁴⁰ would,

³⁹ Vivian Hunt, Dennis Layton and Sara Prince, *Why Diversity Matters* (2 February 2015) McKinsey & Company <<http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>>.

⁴⁰ O'Brien, above n 38, 848.

without a doubt, be controversial and most certainly draw its fair share of diatribe from various quarters both within and outside the Australian legal profession.

Affirmative action may also be unpopular due to its apparent “artificiality” in endeavouring to bring heightened standards of diversity and equality. Nevertheless, despite its aura of artificiality, it is one of the few available ‘remedial strategies’ that can be implemented to address structural discrimination,⁴¹ which has resulted in legal professionals of Asian descent being under-represented or in certain instances, unrepresented at all, in senior positions within the Australian legal profession.

In the context of norms that have been deeply-entrenched for decades or even centuries, affirmative action being a remedial strategy is a positive effect in itself solely due to the shorter period of time it will take to implement such policies to break the bamboo ceiling. The very nature of affirmative action being a ‘proactive’ and deliberate strategy,⁴² undertaken to artificially effect improved levels of equality and diversity also has the result of providing rectification more expeditiously than what would ordinarily be expected from organisational change-type initiatives.⁴³ Temporally, although ‘change will not happen overnight’,⁴⁴ affirmative action is a relatively quick fix as tangible results will ensue in a shorter period of time. This is particularly so when regard is made to the length of time, deep entrenchment, and the level of pervasiveness of the bamboo ceiling within the Australian legal profession.

(c) Substance over Form

The *raison d’etre* of affirmative action is the appreciation that society is non-homogeneous owing to the unequal and imperfect allocation of resources between the various facets of society. It does not have any particular definition as to what it must constitute, instead it is loosely defined as:

any policy that recognises and addresses past or present disadvantage of an identified group (based on a range of rationales from retributive justice to

⁴¹ Phillip Tahmindjis, ‘Affirmative Action in a Democratic Society’ (1997) 13 *Queensland University of Technology Law Journal* 204.

⁴² *Ibid.*

⁴³ Victorian Equal Opportunity & Human Rights Commission, ‘Equitable Briefing Initiative’ (Public Statement, July 2017) 5.

⁴⁴ *Ibid.*

distributive justice and arguments favouring diversity or social utility).⁴⁵

Owing to its loose definition, affirmative action is not rigidly confined to a particular manner or mode of implementation. The loose definition of the term coupled with the lack of rigidity on the type or mode of implementation does mean that different forms of affirmative action (eg “soft” and “hard” measures) can be employed in tandem to achieve the same end-result.

This is critical because the successful implementation of affirmative action to break the bamboo ceiling will be no mean feat and would require a variety of means to achieve success, specifically tailored to address the level of hierarchy or specific sector within the Australian legal profession, which to an extent is pluralistic and made up of various facets.

Affirmative action emphasises substance over form and differs from other mechanisms employed to achieve equality and diversity due to its focus on results rather than the process. Affirmative action is less focused on the means to an end, but rather is a result-driven mechanism. This directly translates to a preponderance on equality of results rather than equality of procedure.⁴⁶ The emphasis on substance over form is imperative because it does mean there is a high likelihood of success in attaining results evincing greater equality and diversity within the Australian legal profession, when compared to a mechanism that places emphasis on the process rather than actual results.

(d) Distributive Justice

And the life of man, solitary, poore, nasty, brutish and short.⁴⁷

Thomas Hobbes described the “state of nature” as solitary, poor, nasty, brutish, and short, owing to the variability of human desires and the scarcity of resources to fulfil those desires. Hobbes believed that all humans are equal in faculties of body and mind in the state of nature. However, owing to the scarcity of resources, everyone is willing to fight against each other to obtain a greater benefit or right. Hence, Hobbes advanced the need for a “social contract” where individuals relinquish their personal liberties to the State

⁴⁵ Francesca Bartlett, ‘Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action’ (2008) 32 *Melbourne University Law Review* 373.

⁴⁶ *Ibid* 374.

⁴⁷ Thomas Hobbes, *Leviathan, or The Matter, Forme & Power of a Common-wealth Ecclesiastical and Civill* (Andrew Crooke, 1651) 62.

(eg the government and judiciary) to alleviate this hypothetical “state of nature” which is characteristically anarchic.

John Rawls recognised the value of the “social contract” but in so doing also came to appreciate the limits of the State, instead opting to focus on the “social contract” in terms of distributive justice between individuals in a society where individuals “under a veil of ignorance” consent to certain principles of justice by agreeing to set aside their individual proclivities.

Affirmative action is a ‘combination of justice with utility’.⁴⁸ It is a mechanism that predominantly focuses on utility by preventing future injustice, although to a much smaller extent, it serves as a form of retributive justice capable of addressing and correcting past inequality and the lack of diversity.

There has long been an argument favouring the implementation of affirmative action based on distributive justice.⁴⁹ Distributive justice places a strong emphasis on the egalitarian distribution of scarce resources, particularly in circumstances where such distribution would be most beneficial and desperately needed. Affirmative action has a great untapped potential to effectuate distributive justice by improving the egalitarian representation of Asian legal professionals across the various sectors and hierarchies within the Australian legal workforce. Affirmative action is a proactive measure that not only has the capacity to break the bamboo ceiling to bring current distributive justice through present implementation but is also ‘more than the simple termination of discriminatory practices’,⁵⁰ as it has the positive effect of reducing the future entrenchment of the bamboo ceiling by addressing and correcting the present.

A corollary of being proactive, affirmative action also has the potential to positively ‘change a culture, both in the macro and micro sense’.⁵¹ This ability to change a culture is paramount, as it will ensure that the positive ramifications of affirmative action, such as distributive justice are not ephemeral but will continue for as long as the particular

⁴⁸ Tahmindjis, above n 41, 203.

⁴⁹ Bartlett, above n 45; See also Ronald F Fiscus, ‘The Constitutional Logic of Affirmative Action’ (1992); Gwyneth Pitt, ‘Can Reverse Discrimination Be Justified?’ in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of the Law* (1992) 281; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985); Alan Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979).

⁵⁰ O’Brien, above n 38, 840.

⁵¹ Tahmindjis, above n 41, 204.

culture prevails. In the present context, the importance of a change in culture is all the more pertinent considering the aforementioned entrenchment of culture and tradition in the Australian legal profession.

2 *Negatives*

This paper acknowledges that affirmative action has potentially innumerable positive ramifications, but to focus solely on these would be myopic and one-dimensional. To obtain a holistic perspective, it is apposite also to consider the negative effects of affirmative action.

(a) Innocuous Term for Positive/Reverse Discrimination?

Affirmative action is founded on virtuous principles; it is proactive rather than reactive, and it focuses on substance over form, among others. It is a mechanism that can be suitably employed to deal with the structural discrimination of legal professionals of Asian descent, evinced by their under-representation in positions of seniority within the various facets of the Australian legal profession. However, this suitability is tainted when delving deeper into its means of implementation. Although not axiomatic, affirmative action involves ‘making distinctions between people on the basis of their difference’.⁵² On a superficial level, this conscious decision to make such distinctions between people based on their difference is tantamount to discrimination, not merely ideologically, but is also ‘legally understood as a form of discrimination’.⁵³

In Australia, various legislation dealing with discrimination have provided that “special measures” undertaken to prevent discrimination against particular groups of disadvantaged persons are exceptions to the general prohibition on discrimination.⁵⁴ In the same vein, the exemption accorded to such measures is embodied in section 8(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which states as follows:

⁵² Bartlett, above n 45, 374.

⁵³ *Ibid* 375.

⁵⁴ See, eg, *Equal Opportunity Act 2010* (Vic) s 12; *Equal Opportunity Act 1984* (WA) s 51; *Discrimination Act 1991* (ACT) s 27; *Anti-Discrimination Act 1996* (NT) s 57; *Anti-Discrimination Act 1991* (Qld) s 105; *Equal Opportunity Act 1984* (SA) s 65; *Anti-Discrimination Act 1998* (Tas) ss 25, 26.

Recognition and equality before the law

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.⁵⁵

Proponents of affirmative action will eschew the label of “reverse discrimination” accorded to affirmative action and are likely to highlight instead the positive effects that could potentially manifest from its implementation. However, the downside of implementing such a mechanism to deal with discrimination is not limited to the negative connotations associated with the discriminatory character of affirmative action itself.

More troublingly, the negative connotations associated with the intrinsically discriminatory character of affirmative action could potentially lead to greater detriment than good and may further ‘exacerbate discrimination against a group (being provided with assistance)’.⁵⁶ This, in turn, could be counter-productive to the fundamental precepts meant to be achieved through the implementation of affirmative action.

Affirmative action may potentially further entrench the already deeply-entrenched norms and ‘unconscious bias’ prevalent within the profession. The criticism levelled at the initiatives undertaken for the equitable briefing of female barristers, deemed by its opponents to be a form of ‘tokenism’,⁵⁷ brought about by ‘a touch of social engineering’,⁵⁸ are recent cases in point highlighting the increased opposition and discrimination that could inadvertently arise from affirmative action.

(b) Dichotomous Relationship with Merit

Affirmative action has received its fair share of backlash due to its intrinsically discriminatory character, albeit its purpose being to combat various forms of discrimination itself. Adding to this list is affirmative action’s dichotomous relationship with merit. The implementation of affirmative action to improve the representation of

⁵⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).

⁵⁶ Bartlett, above n 45, 381.

⁵⁷ Janet Fife-Yeomans, ‘Gender War in Sydney Legal Ranks over New Female Quota System’, *The Daily Telegraph* (online), 27 January 2017 <<http://www.dailytelegraph.com.au/news/nsw/gender-war-in-sydney-legal-ranks-over-new-female-quota-system/news-story/5a721353ffe67d9d8c88f4b79f9c0721>>.

⁵⁸ Jeffrey Phillips, ‘Affirmative Action Creates Obstructions on the Level Playing Field’, *The Australian* (online), 24 March 2017 <<http://www.theaustralian.com.au/business/legal-affairs/affirmative-action-creates-obstructions-on-the-level-playing-field/news-story/62262dece0d14ecc4a01ab5cef06998>>.

Asians, particularly in senior positions within the Australian legal profession will be controversial at the very least.

The pertinence of merit will also be reduced significantly by implementing affirmative action to break the bamboo ceiling. It is acknowledged that this argument is countered by proposing that “soft” measures such as targets rather than “hard” measures such as quotas are implemented instead. However, any weight placed other than on the principle of merit, be it through racial preference being “a” factor rather than “the” factor, or through “soft” rather than “hard” measures, will still result in other minority groups being jeopardised in terms of their opportunities and dreams. Despite the pervasive and systemic under-representation of Asians in the higher echelons of the Australian legal profession, it is less than ideal if such minority groups are jeopardised even if only to a limited extent.

Moreover, to undertake affirmative action to attain equality of representation of Asians in the upper echelons or positions of seniority in the profession is erroneous. Not only will it result in an oppositional relationship to merit, but it will also impede the attainment of ‘true equality’ within the profession and between different minority groups.⁵⁹

(c) Where to Draw the Lines?

An additional setback likely to be faced during the implementation of affirmative action to break the bamboo ceiling is quantifying the standard that should be set. In the context of gender, the target or goal is much simpler, with most policies implementing a target of 50 per cent or close to 50 per cent female representation.

However, with race preferences, more particularly Asian legal professionals, it is uncertain how and where the lines are to be drawn with any affirmative action policies and what percentage should be attributed to a target, quota, or other guiding attribute.⁶⁰

⁵⁹ *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236, [32].

⁶⁰ See generally Edmund Tadros, ‘PwC Splits with Deloitte, EY and KPMG on Diversity Targets’, *Australian Financial Review* (online), 1 August 2017 <<http://www.afr.com/business/accounting/deloitte-ey-kpmg-and-pwc-split-on-diversity-targets-20170724-gxhyju>>.

The uncertainty in defining the quantum of a guiding attribute such as targets is further hampered by the lack of understanding both in quantitative and qualitative terms on the present levels of cultural diversity or lack thereof. The lack of information evidencing the actual scale and magnitude of the under-representation of Asians, or even more generally non-Anglo Celtic professionals in particular facets of the Australian legal profession, is an underlying reason for the uncertainty on where the starting point is for affirmative action. This uncertainty is not limited to where the starting line should be drawn, but also where the line should end. In the United States of America, this very issue was judicially considered by O'Connor J in the seminal affirmative action case of *Grutter v Bollinger*:

[W]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [eg diversity] approved today.⁶¹

As highlighted by O'Connor J, affirmative action policies require a well-defined timeframe. Absent a "sunset clause" to limit the length of time affirmative action should be in place for, there will be no strict parameters to define how long such policies should be implemented for before it becomes ineffective or even counter-productive.⁶² Not only will it be onerous to pre-empt how long affirmative action should be implemented for, but it is highly speculative to pre-empt the appropriate duration based on no past data or comparable examples.

The term "Asian" does not generally come across as being equivocal. Drawing the lines to establish the parameters of what constitutes "Asian" for the purposes of the bamboo ceiling is not a simple exercise when it is appreciated that the term is more commonly used in Australia to refer to an individual who is of Southeast Asian and East Asian origin rather than an individual who originates from Asia as it is geographically understood. For example, individuals from South Central Asia such as India, Pakistan, Sri Lanka, Bangladesh, Kazakhstan, and Kyrgyzstan to name a few, are not commonly referred to in anecdotal terms as "Asians" in Australia. Although nuanced, further compounding the problem is whether "Asian" with regard to the bamboo ceiling should relate to an

⁶¹ *Grutter v Bollinger* 539 US 306, 343 (O'Connor J) (2003); See also Joel Goldstein, 'Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in *Grutter*' (2006) 67 *Ohio State Law Journal* 83.

⁶² See especially Adrian Liu, 'Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans' (2008) 13(2) *Michigan Journal of Race & Law* 407.

individual who identifies as Asian in terms of cultural and ethnic background or Asian due to nationality and country of origin.

(d) Merely Changes the Shares of the Cake

Affirmative action is touted as a form of distributive justice through its combination of justice and utility. Conversely, it can also be said that affirmative action is only the means to a particular end. Affirmative action in itself is not looked at as a measure of success despite its ability to affect distributive justice.

The redistribution of human capital through affirmative action is merely the process undertaken to bring about beneficial change. Any action taken to break the bamboo ceiling, affirmative action included, increases the likelihood of such beneficial change occurring, but it does not guarantee that positive effects are definite. Such a redistribution may potentially evince better levels of equality and diversity, but to equate such a redistribution to equality will be myopic, especially because true equality is a concept that is brought about by a confluence of not only measurable statistics, but it is also made up of intangible factors such as the eradication of unconscious bias.

In the context of the systemic entrenchment of the bamboo ceiling in the Australian legal profession, affirmative action can be implemented to collectively improve the representation of Asian legal professionals as a group. Owing to its collective manner of implementation relating to a particular group as a whole, affirmative action is unable to distinguish on a case-by-case basis between a member of such a group who has been discriminated against from a member who has not experienced any discrimination.⁶³ Consequently, in changing the shares to only collectively favour a group, affirmative action is not suited to assist members within a discriminated group who are in greatest need of such a redistribution. Instead, the benefits may only be experienced by the well-connected and most successful members of that discriminated group.⁶⁴

The mere hiring of Asian legal professionals or the placing of Asian legal professionals in positions of seniority in the profession would not break the intangible, deeply entrenched

⁶³ Tahmindjis, above n 41, 205.

⁶⁴ See Alan Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979); Phillips, above n 58.

norms such as the bamboo ceiling and unconscious bias that have perpetuated for well over a century in the Australian legal profession.

Affirmative action can facilitate redistribution by assisting with 'changing the shares of the cake but leaving the unsatisfactory nature of the cake untouched'.⁶⁵ In doing so, it is able to circumvent, but not necessarily break, the bamboo ceiling itself.

3 Conclusion

There is no denying the fact that affirmative action is founded on intrinsically virtuous principles and can bring a number of various positive ramifications in the context of attempting to break the bamboo ceiling and being able to contribute to overall improved levels of equality and diversity in the Australian legal profession.

However, the bamboo ceiling exists not solely due to the entrenchment of anachronistic norms such as unconscious bias. In conceiving the term "bamboo ceiling", Jane Hyun also highlights that this ceiling is not always imposed by others and is partly due to Asian professionals' self-limiting cultural influences on their behaviour, attitude, and performance in various social and professional settings.⁶⁶

Affirmative action is useful to a limited extent to address the external systemic entrenchment of anachronistic norms as imposed by other individuals or the profession itself; however, it is ultimately unable to completely break the bamboo ceiling until Asian legal professionals are able to internally address their self-limiting influences.

Moreover, owing to its localised manner of implementation targeting specific groups, affirmative action is unable to simultaneously address other diversity issues also plaguing the Australian legal profession. Although not particularly dystopian, in addition to its negative effects, the inability to simultaneously address other aspects of diversity is a serious shortfall considering that 'different dimensions of diversity frequently

⁶⁵ Margaret Malloch, 'One Step Forward: Two Steps Back? Women and Affirmative Action: A Case Study of the Victorian Teaching Service' (Research Paper 33 1995–1996, Department of the Parliamentary Library)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp33>.

⁶⁶ Hyun, above n 3.

intersect'.⁶⁷

IV HARNESSING "THE MEDICI EFFECT"

The Medicis were a banking family in Florence who funded creators from a wide range of disciplines. Thanks to this family and a few others like it, sculptors, scientists, poets, philosophers, financiers, painters, and architects converged upon the city of Florence. There they found each other, learned from one another, and broke down barriers between disciplines and cultures. Together they forged a new world based on new ideas — what became known as the Renaissance. As a result, the city became the epicenter of a creative explosion, one of the most innovative eras in history. The effects of the Medici family can be felt even to this day.⁶⁸

Though not quite as epochal as the Italian Renaissance centred in the city of Florence, the attempt to break the bamboo ceiling in the Australian legal profession will be a momentous and revolutionary task in itself.

Affirmative action may be one of the several mechanisms employed to break the bamboo ceiling. However, owing to its shortfalls previously discussed, a broad-based approach is needed. This broad-based approach that should be adopted is "The Medici Effect", which can be incorporated under the overarching broader framework to break the bamboo ceiling while also tackling the "traffic jam of diversity" in the Australian legal profession.

Johansson conceived the concept of the Medici Effect, which can be created to bring together different disciplines by searching for where they connect.⁶⁹ The Medici Effect is highly instructive in amalgamating intersections between the various aspects of diversity within the Australian legal profession to create an 'explosion of extraordinary ideas and take advantage of it as individuals, as teams, and as organisations'.⁷⁰ It is based on creating intersections between different disciplines and cultures. The Medici Effect is not a quantitative mechanism based on restrictive quotas or other statistical measures of success; instead, it is based on qualitative precepts that address underlying problems

⁶⁷ Australian Human Rights Commission, above n 4, 12.

⁶⁸ Johansson, above n 1, 2.

⁶⁹ Johansson, above n 1, 3.

⁷⁰ *Ibid.*

through an appreciation of the value of diversity, thereby facilitating the intersection of disparate cultures and disciplines.

Harnessing the Medici Effect would serve as a prime catalyst to generate groundbreaking and novel ideas to embark on the exercise of not only breaking the bamboo ceiling, but also addressing other aspects of diversity that collectively plague the Australian legal profession. The catalytic nature of the Medici Effect has resulted in its ability to bring a wholesome range of limitless benefits to any particular aspect of society requiring intervention and innovation, as the need should arise. It would do a great disservice to the very essence of the concept to prescriptively list the ways that it should be implemented, due to its intrinsic fluidity and flexibility to any aspect of society requiring intervention and innovation.

Harnessing the Medici Effect has the potential to bring varied benefits for heightened standards of equality and diversity in respect of various facets of the Australian legal profession. In the context of the bamboo ceiling, the Medici Effect has the potential to break the bamboo ceiling by imbibing diversity of thought within the profession. This paper posits that diversity of thought will best be achieved by a two-pronged approach encompassing engagement and the implementation of an institutional framework.

A Engaging "Diversity of Thought"

Assimilating the Medici Effect to bring about benefits in diversity within the Australian legal profession is promising due to its broad-based ability to enable diversity of thought to flourish within the profession.

Diversity of thought will be a fundamental cornerstone to eradicate the bamboo ceiling due to its flexibility derived from the idea of 'more-than-one-way'.⁷¹ As an organisational resource, this enables diversity of thought not to just be a race-centric solution to break the bamboo ceiling and other aspects of diversity similarly affecting minority cultural or ethnic groups (eg Aboriginal legal professionals). It is also placed in a prime position to intervene and address aspects of diversity currently plaguing the Australian legal profession, such as that relating to gender, sexual orientation, socio-economic status, age,

⁷¹ Susan Woods, 'Thinking About Diversity of Thought' (Working Paper, Workforce Diversity Network, 2008) <<http://digitalcommons.ilr.cornell.edu/workingpapers/108/>>.

and health to name a few. To ensure that such engagement succeeds in its ability to bring its “more-than-one-way” ability of creating all-encompassing diversity, rather than mere localised benefits specific only to a particular group, three factors need to be in place to utilise this powerful resource—1) *willingness*, 2) *readiness* and 3) *opportunity*.⁷²

1 *Willingness*

Firstly, an individual who has diverse identity and experiences needs to possess the *willingness* to share these differences with the broader community. Individuals, who due to their difference think differently, control the ability to inform others of their thinking by either revealing that thinking or staying silent.⁷³

Informal sharing utilising the power of social media (eg Facebook, Instagram, Twitter) or even a casual coffee catch-up to share these differences is sufficient. However, more formal platforms such as conferences and symposiums will better facilitate the broader reach of such differences in thinking being shared.

2 *Readiness*

Secondly, *readiness* to listen to and learn from such diversity of thought is similarly as essential.⁷⁴ Both interpersonal skills (eg communication, dialogue, conflict resolution) and diversity skills (eg self-awareness, awareness of others, flexibility) that facilitate such learning need to be developed.⁷⁵

Although it is possible for anyone to self-learn such general skills, it would be best for such skills to be inculcated through a variety of means. In the context of the bamboo ceiling and other aspects of diversity within the Australian legal profession, this could possibly be formally implemented through the premise of Continuing Professional Development (‘CPD’) sessions.

This paper also suggests that a new group termed “diversity” could be added to the already existing groups comprising of substantive law, professional skills, practice management, and ethics. However, whether this new group is enacted in legislation as

⁷² Ibid 2.

⁷³ Ibid 3.

⁷⁴ Ibid.

⁷⁵ Ibid.

one of the requisite mandatory groups in the respective CPD rules is beside the point of imbuing true diversity of thought within the Australian legal profession.

3 Opportunity

Thirdly, avenues that open *opportunity* for learning from diversity of thought are just as needed.⁷⁶ Such opportunities should be implemented at the micro level (eg individual companies, organisations, educational institutions) and also at the macro level (country-wide, state-wide, profession-wide).

At the micro level, these opportunities may be implemented through a variety of means, for example, reduced hierarchy, group process, focus groups, cross-functional teaming, and idea generation.⁷⁷ From a profession-wide, macro perspective, such avenues that open opportunities may be tangentially implemented through broadly-addressed schemes. In the context of the Australian legal profession, a rating system which measures diversity best-practices closely echoing other legal rating guides, such as 'Doyles Guide' and 'Chambers and Partners',⁷⁸ should be considered as a potential means to facilitate such opportunity for learning from diversity of thought.

A diversity best-practice guide as such will definitely be a refreshing change to current legal rating guides whose sole emphasis is on reputation associated with legal prowess and experience. More importantly, it will serve as a salient message to the fiercely competitive legal profession that success in the profession should begin to be measured by yardsticks other than legal prowess and will include a legal professional's ability to emulate diversity of thought, among other praiseworthy yardsticks.

B Implementing Diversity of Thought

Engagement is a rudimentary step in creating a diversity of thought within the Australian legal profession. However, to ensure that such engagement continues to flourish on a broad scale throughout the profession, it is imperative that diversity of thought is implemented through structural frameworks.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ See generally Doyles (2018) <<http://doylesguide.com/>>; See generally Chambers and Partners <<https://www.chambersandpartners.com/>>.

This paper suggests that an institution or regulatory authority should be established to deal primarily with diversity and equality (or the lack thereof) within the Australian legal profession. It is acknowledged that this can be put in place through a variety of different forms, be it through an independent Australia-wide regulatory authority or a state-specific organisation within the respective frameworks of each of the various state and territory law societies.

More critically, the implementation of such a framework should predominantly focus on the cardinal benefits such an organisation or regulatory authority will bring, including improving understanding as well as the facilitation of “directional” and “intersectional” ideas, both of which will assist with attaining desired levels of diversity and equality within the Australian legal profession.

1 Understanding

There is a general lack of understanding of the less than favourable standards of diversity and equality in the Australian legal profession. This transcends to a lack of understanding afforded to specific constituent groups within the profession. The ‘gap[s]’ in data on diversity and the almost palpable inexistence of empirical data on legal support staff are indicative of this lack of understanding in respect of the different facets of diversity and equality within the overall fabric of the Australian legal profession.⁷⁹

The establishment of an institution or regulatory authority would provide much-needed structure for the implementation of diversity of thought.⁸⁰ It is recognised however that the implementation of such understanding within a profession categorically classified as “male, pale, and stale” will be no mean feat. In fact, it would entail breaking deeply entrenched, anachronistic barriers that take pride of place almost as much as the esteemed culture and status of the profession itself. Consequently, the utilisation of traditional forms of pedagogy to imbibe understanding on issues pertaining to equality and diversity will be futile.

This paper suggests that the Medici Effect is well-suited for implementing diversity of

⁷⁹ Nguyen and Tang, above n 2, 101; Cf Sundeep Aulakh et al, ‘Mapping Advantages and Disadvantages: Diversity in the Legal Profession in England and Wales’ (Final Report for the Solicitors Regulation Authority, October 2017).

⁸⁰ See generally Solicitors Regulation Authority <<https://www.sra.org.uk/home/home.page>>.

thought, being primed for breaking down ‘associative barriers’,⁸¹ while simultaneously harnessing understanding by adopting the following ground-breaking and novel principles built into its ethos:

- Being exposed to a range of cultures;⁸²
- Learning differently;⁸³
- Reversal of assumptions;⁸⁴ and
- Trying on different perspectives.⁸⁵

The above four principles, premised on the broad-based and dynamic framework of the Medici Effect, is apt for implementing diversity of thought due to its ability to deal with complex and non-linear barriers that remain and frequently intersect within the Australian legal profession, including the bamboo ceiling.

2 Directional and Intersectional Ideas

The terms “structure” and “framework” or “organisation” and “authority” commonly carry connotations associated with prescriptiveness and archaism. The implementation of an institutional framework premised on the Medici Effect should be distanced from any such associations to do with notions of conformity or prescriptiveness. Instead, the implementation of a framework should endeavour to attain true diversity of thought through the establishment of both “directional” and “intersectional” ideas.

Directional ideas are necessary for realising and putting into place short-term goals in a ‘particular direction’,⁸⁶ such as obtaining particular statistics of a particular minority group in the profession or the specific attempt to incrementally fill gaps in data on diversity within the profession. On the other hand, intersectional ideas do not possess a pre-determined direction or trajectory; they are sporadic and widespread, aligned towards the creation of intersections through the creation of a viral-like cultural phenomenon and, as Johansson puts it, ‘an epidemic of an idea virus’.⁸⁷

⁸¹ Johansson, above n 1, 48.

⁸² *Ibid* 46.

⁸³ *Ibid* 49.

⁸⁴ *Ibid* 53.

⁸⁵ *Ibid* 57.

⁸⁶ *Ibid* 16.

⁸⁷ *Ibid* 18.

The very foundation of an intersectional idea is its capability to spread ideas in an epidemic fashion without a pre-determined boundary or direction. Hence, to prescribe what it could or should entail artificially circumscribes its very essence. However, on the basis of attempting to proffer examples of intersectional ideas, it could be that new law award categories such as “Diversity Lawyer of the Year” or “Diversity Legal Practice of the Year” are created.⁸⁸ Similarly, an area of specialisation in “Diversity and Equality” could be newly established under the Accredited Specialists program.⁸⁹

It should be appreciated that intersectional ideas are not confined to the boundaries of a particular profession or industry. The malleability of intersectional ideas has the potential to provide opportunities for the legal profession to adopt and collaborate with other industries that have in place well-known diversity and equality schemes within their respective industries. For example, the respective law societies could adopt the structure of the Australian Football League’s established ‘AFL Community Ambassador Program’ or collaborate to come up with a “Legal Diversity Week”,⁹⁰ held in conjunction with the ‘AFL Multicultural Round’,⁹¹ to promote diversity of thought through the pervasive influence of sport.

Intersectional ideas are full of novel conceptions when compared to directional ideas that may come across as being predictable and even potentially rigid. However, both forms share a symbiotic relationship with each other and are both needed for long-term success to eventuate.⁹² A framework based solely on intersectional ideas may seem novel and fanciful but is likely to end up being a far-fetched and lofty ideal at best. Similarly, a framework based solely on directional ideas may be viewed as dire and ubiquitous, which may result in the lack of participation by legal professionals.

Necessarily, an institutional framework will provide the right impetus for the facilitation of both directional and intersectional ideas for the implementation of diversity of thought through vibrant and novel methods that continue to improve and evolve in a particular

⁸⁸ Note: This will enable the award to be open to both government organisations and private practice firms that engage in legal practice.

⁸⁹ See generally Law Institute of Victoria, *Accredited Specialists* <<https://www.liv.asn.au/Specialists>>.

⁹⁰ See generally AFL Community, *AFL Community Ambassadors* (2017) <<http://community.afl/programs/community-ambassador-program>>.

⁹¹ See generally ALF, *AFL Multicultural Round* (25 July 2015) <<http://www.afl.com.au/news/event-news/multiculturalround>>.

⁹² Johansson, above n 1, 18.

direction.⁹³

V CONCLUSION

The Australian legal profession of today is situated in a globalised world characterised by unrelenting upheaval and change. It is not isolated or immune from similar upheaval occurring in other jurisdictions the world over. As mentioned in this paper, the Australian legal profession has a symbiotic relationship with the various Asian markets. This is perfectly elucidated by Chief Justice Martin who noted that Perth is closer to Singapore than it is to Sydney and shares the same time zone as many Asian commercial centres.⁹⁴

As a key player in the global and respective regional markets, the Australian legal profession needs to strategically engage rather than insulate or disengage itself from other countries to ensure that the rule of law in Australia and the Asia-Pacific region is upheld.⁹⁵ This will require Australia to emulate diversity of thought, which can only be achieved in turn once such tenets of diversity and equality are first holistically embraced and imbibed as part of the intrinsic fabric of the Australian legal profession as a whole.

⁹³ Johansson, above n 1, 18–9.

⁹⁴ Wayne Martin, 'After Dinner Address' (Speech delivered at the 10th Anniversary Conference of the Asia-Pacific Regional Arbitration Group, Melbourne, 27 March 2014).

⁹⁵ Marilyn Warren, 'Australia's Place in the World' (Speech delivered at the Law Society of Western Australia Summer School, Perth, 17 February 2017).

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ECONOMIC RIGHTS AND A BASIC INCOME

ELISE KLEIN*

This paper examines the case of a basic income as a way to secure and resecure rights in Australia. The paper argues that the negligence of economic rights has resulted in an increased threat to civil and political rights and highlights a need to secure economic security for all. The article first explores current trends in growing inequality and the persistence of poverty in Australia. Following this, the paper analyses structures within the economic and political systems that are contributing to these trends. The paper then proposes a basic income as part of a way to address structural injustice through presenting basic income as a 'rightful share'.

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I INTRODUCTION

It is frequently claimed that Australians live in one of the world's best democracies. Yet in the last 30 years, we have seen a demise of power held by the people of Australia. The post-war era in the West has focused on preserving and advocating for civil and political rights such as voting rights, freedom of assembly, and expression. Yet, economic rights — such as those relating to full and meaningful work, economic security, and distribution — have been eroded at best, and purposefully neglected at worst.¹ Economic rights are a base or a floor that provides security and dignity. They are not to be confused with private property rights. The negligence of economic rights in the post-war era has meant that the freedom of all Australians has been radically undermined. The rise of neoliberalism has seen the pact between the state and its citizens demise at an unprecedented rate.² We have seen the State acting not in the interests of its people, but instead, the interests of capital. This not only degrades economic rights, but also civil liberties which were fought hard for earlier this century and well before.³ I will argue in this paper that we now need to focus on economic rights as a means not just to restore democracy, but also as a way to fight poverty, inequality, the uncertain future of work, and climate change. I suggest a universal basic income as an important way to achieve this.

To take a quick tour of the “state of affairs” in today's Australia, the 2014 Senate Report on inequality titled, ‘Bridging Our Growing Divide: Inequality in Australia, The Extent of Income Inequality in Australia’, is a good place to begin. This inquiry, representing members from diverse political persuasions, concluded that, ‘even in a country that has experienced 15 years of uninterrupted economic growth and one of the highest living standards in the world, there is severe hardship’.⁴ The report found that the richest 20 per cent of households in Australia now account for 61 per cent of total household net worth, whereas the poorest 20 per cent of households account for just 1 per cent of the total.⁵ Moreover, despite the best efforts to make us think otherwise, social mobility and the reality for people to be able to change their circumstances is limited.⁶ The sobering

¹ Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press, 2015) 17–45.

² *Ibid.*

³ *Ibid.*

⁴ Community Affairs References Committee, Australian Senate, *Bridging Our Growing Divide: Inequality in Australia, the Extent of Income Inequality in Australia* (2014) 55.

⁵ Bob Douglas, ‘Advance Australia Fair? What to Do About Growing Inequality in Australia’ (Research Report, Australia21 and The Australian Institute, May 2014) 8.

⁶ *Ibid.* 8–9.

reality is that there are over two million people in Australia that at some stage worry about where their next meal is coming from.⁷ One in eight Australian's live below the poverty line.⁸

Specific groups of Australians suffer disproportionately. Inequality for women continues to increase with women on average earning 15.3 per cent less than men.⁹ This shows that gender equality has a political economy inherently connected to capitalist relations of paid and non-paid productive labour,¹⁰ as well as restrictive norms regulating perceptions of women's workplace abilities.¹¹ Continued attempts at assimilation, denial of sovereignty, punitive policies, and incarceration have continued to ensure systemic inequality between first nation's peoples and settlers.¹²

Neoliberal capitalism has been the major ideology governing contemporary capitalism globally. Neoliberalism emphasises the complete reconfiguration of the exercise of political power to resemble that of the logic of markets.¹³ For example, the state champions progress through market competition where there is a focus on individuals determining their own economic outcomes (the transformation of people into *homo economicus*).¹⁴ In order to feed economic growth, states governing in the neoliberal era can jeopardise their citizen's democratic freedoms through a process that Tim Jackson refers to as the 'conflicted state':¹⁵

On the one hand government is bound to the pursuit of economic growth. On the other, it finds itself having to intervene to protect the common good from the

⁷ Foodbank Australia, 'The Facts, Hunger in Australia' (2015) Foodbank Australia <<https://www.foodbank.org.au/hunger-in-australia/the-facts/>>.

⁸ Australian Council of Social Service, 'Poverty in Australia' (Research Report No 194, Australian Council of Social Service, 2012) 6.

⁹ Workplace Gender Equality Agency, *What Is the Gender Pay Gap?* (2017) Workplace Gender Equality Agency <<https://www.wgea.gov.au/addressing-pay-equity/what-gender-pay-gap>>.

¹⁰ Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Post Work Imaginaries* (Durham and London: Duke University Press, 2011) 1–38; Jonathan Woetzel et al, 'How Advancing Women's Equality Can Add \$12 Trillion to Global Growth' (Research Report, McKinsey Global Institute, September 2015) 2.

¹¹ Elise Klein, 'Norms and Women's Economic Empowerment' (Background paper to the UN High Level Panel on Women's Economic Empowerment, 2016) 1–36.

¹² Kirrily Jordan and Jon Altman, *Better than Welfare? Work and Livelihood for Indigenous Australians after CDEP* (ANU Press, 2016) ch 1; Aileen Moreton-Robinson, *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007); Jon Altman, *Public Policy: Progressive Ideas in the Neo-Liberal Ascendancy* (Policy Press, 2014) 117–134.

¹³ Thomas Palley, *Neoliberalism: A Critical Reader* (Pluto Press, 2005) ch 2.

¹⁴ Michel Foucault, *Ethics: Subjectivity and Truth* (Penguin Books, 1994) ch 10.

¹⁵ Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (Earthscan, 2009) 167.

incursions of the market. The state itself is deeply conflicted, striving on the one hand to encourage consumer freedoms that lead to growth and on the other to protect social goods and defend ecological limits.¹⁶

We see this with the rhetoric of making Australia more “business friendly” which translates to exploitable labour (hidden behind the term “flexibility”). We also see this through low company tax rates (or paying no tax), and a whole host of other benefits to capital. These include limiting protections on Australian institutions, such as the justice system who interfere with these relations — seen best through the Trade Pacific Partnerships (TPPs).¹⁷ The removal of labour protections has also increased the precariousness of paid work, including the casualisation of the workforce and underemployment.¹⁸ The future of full and dignified employment is further threatened by automation.¹⁹ As a result of Australia’s efforts to be competitive in global markets, we see the erosion of citizen rights and the transfer of class power from the lower and middle class to the elite.²⁰

Contrary to claims that neoliberalism is *laissez faire* or free market without state intervention regulating it, actual practiced neoliberalism has mass regulation by the state.²¹ The key distinction to make is that the state, instead of regulating for the wellbeing of the people, now regulates in the interests of the market and capital.²² State regulation in the neoliberal era is extremely paternalistic and punitive to citizens, with the vulnerable of society being dealt the harshest blows. For example, Indigenous Australians are constantly scrutinised by the Australian state and constantly accused of welfare dependency and refusing to participate in the neo-liberal economy. Since the early 2000s, the Australian state (including both Labour and Liberal governments) have dismantled any remnants of national policy supporting Indigenous self-determination, instead using punitive techniques on Indigenous populations seen through the Northern

¹⁶ Ibid.

¹⁷ Natasha Lennard, ‘Noam Chomsky: Trans-Pacific Partnership Is a “Neoliberal Assault”’, *Salon* (online), 13 January 2014 <https://www.salon.com/2014/01/13/chomsky_tpp_is_a_neoliberal_assault/>.

¹⁸ Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury, 2011) 1–32.

¹⁹ See, eg, Tim Dunlop, *Why the Future Is Workless* (New South, 2016).

²⁰ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 1–4.

²¹ Damien Cahill, *The End of Laissez-Faire?: On the Durability of Embedded Neoliberalism* (Edward Elgar Publishing, 2014) 14–30.

²² Standing, above n 18, 1–32; Harvey, above n 20, 1–4.

Territory intervention, compulsory income management, and compulsory work for the dole.²³

Most notable is how neoliberal and libertarian thinking attribute poverty and the need for support to the fault of the individual. Such sentiment purports that welfare creates dependency, and so policy should target vulnerable groups with conditions and sanctions ‘for failing to act in an autonomous, responsible manner’.²⁴ By creating categories of the deserving and undeserving poor, this approach sets up a mechanism whereby citizens “self-police”: ‘citizen internalises and acts upon the norms structuring and embodied in the state, which, under capitalism, means (re)configuring oneself as a rational actor capable of responding to the market’.²⁵ The individual taking responsibility is essential, as well as the desired subjectivity, in a neoliberal society.

It is also worth noting that this dramatic shift has not been entirely under the provenance of the far-right economic rationalists and neoliberals. It has also occurred on the watch of the social democrats who have been neutral at best and complementary at worst of neoliberal ideology. In an essay in the *Monthly*, Kevin Rudd laid out his vision for social democracy to save Australia’s politics, stating that ‘[it is] the battle between free-market fundamentalism and the social democratic belief that individual reward can be balanced with social responsibility’.²⁶ Yet the social democratic belief in restoring a balance within capitalism was an illusion and neglected the unequal social and ecological relations under capitalism. While the Rudd government managed to weaken the brunt of the global financial crisis in Australia, it only preserved “business as usual” — in other words, rising inequality and ecological destruction in the name of economic “growth”. The unprecedented surge in inequality and the changing ecological climate is not just evidence of the failure of neoliberalism and economic rationality but also the failure of

²³ Lisa Fowkes, ‘Impact on Social Security Penalties of Increased Remote Work for the Dole Requirements’ (Working Paper No 112/2016, Australian National University, 2016) 1–7; Jon Altman, *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010) ch 14; Chris Miller and Lionel Orchard, *Australian Public Policy: Progressive Ideas in the Neoliberal Ascendancy* (Policy Press, 2014) ch 7; Elise Klein, *Developing Minds: Psychology, Neoliberalism and Power* (Routledge, 2016) 55–75.

²⁴ Rebecca Lawrence, ‘Governing Warlpiri Subjects: Indigenous Employment and Training Programs in the Central Australian Mining Industry’ (2005) 43(1) *Geographical Research* 40, 41.

²⁵ Graham Burchell, Colin Gordon and Peter Miller, *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) 10.

²⁶ Kevin Rudd, ‘Howard’s Brutopia’, *The Monthly* (online), November 2006 <<https://www.themonthly.com.au/issue/2006/november/1238384967/kevin-rudd/howard-s-brutopia>>.

social democracy. By taking the neutral stance on capitalism, social democrats have been swept along with the current shift to the right.

It should not come as much of a surprise that trends appearing in Australia are also echoed in other parts of the “developed” world, where inequality in the West has substantially increased.²⁷ As Thomas Piketty points out:

For millions of people, “wealth” amounts to little more than a few weeks’ wages in a checking account or low-interest savings account, a car, and a few pieces of furniture. The inescapable reality is this: wealth is so concentrated that a large segment of society is virtually unaware of its existence, so that some people imagine that it belongs to surreal or mysterious entities.²⁸

The Organisation for Economic Co-operation and Development (‘OECD’) reports that income inequality in OECD countries is at its highest level for the past half-century where ‘[t]he average income of the richest 10 [per cent] of the population is about nine times that of the poorest 10 [per cent] across the OECD, up from seven times 25 years ago’.²⁹ This has been the case even when economies have continued to grow.

II SECURING ECONOMIC RIGHTS

Citizenship has historically involved the promotion of civil and political rights with less focus on economic rights.³⁰ The tragedy being that the negligence of economic rights has meant the downfall of civil and political rights. We must now work towards securing economic rights through radical distribution, providing avenues for meaningful work, and ensuring real economic security for all. In an increasingly insecure world, economic security would mean that people are not worried about keeping food on the table and a roof over their heads. It would mean that all people have access to good health care, reclaim time, and have the education to engage in political struggles that affect their lives. Economic rights are essential in the restoration of democracy.

²⁷ See, eg, Thomas Piketty, *Capital in the Twenty-First Century* (Belknap Press, 2014).

²⁸ *Ibid*, 259.

²⁹ Organisation for Economic Co-operation and Development, *Divided We Stand: Why Inequality Keeps Rising* (OECD Publishing, 2011) 17.

³⁰ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of Century* (Hart Publishing, 2000); Alex Kirkup and Tony Evans, ‘The Myth of Western Opposition to Economic, Social and Cultural Rights? A Reply to Whelan and Donnelly’ (2009) 31(1) *Human Rights Quarterly* 221.

One model that could lead towards providing economic rights is universal basic income ('BI'). A BI is a simple idea which has garnered support over the centuries by scholars and intellectuals from Thomas More in his 1516 *Utopia*,³¹ to Thomas Paine,³² Henry George,³³ Bertrand Russell,³⁴ and Tony Atkinson.³⁵ BI unconditionally provides every resident (children and adults) of Australia with a regular subsistence wage. It is about providing a regular, universal, unconditional payment to every individual of a society.³⁶ It is not enough to make you rich, but enough to cover the costs of living at a modest level. It is not meant to stop you from working either — in that there are no disincentives if you choose to work alongside the payment. But it also gives you the freedom not to work if you choose, or if the options for labour are underpaid, undignified, and/or exploitative.³⁷

BI schemes have been garnering support globally.³⁸ Internationally, Basic Income programs have largely been a successful form of economic safety net for extremely marginalised populations, such as found in the Basic Income Trial in India and Namibia,³⁹ and in unconditional cash transfers in other parts of Southern Africa.⁴⁰ Basic Income in the global north has included the agreement of a trial in Utrecht, Netherlands, and the Finnish Parliament, which are supporting a targeted trial for unemployed people in the trial site.⁴¹ The Canadian Province of Ontario has also recently committed to conduct a trial of BI in three communities.⁴² Moreover, the Alaskan Permanent Fund Dividend, started in 1982, acts similarly to a Basic Income, paying unconditional annual dividends to all residents of Alaska, generated from oil wealth.⁴³ However, the dividend paid out is

³¹ See, eg, Thomas More and Dominic Baker-Smith, *Utopia* (Penguin Books London, 2012).

³² See, eg, Thomas Paine, *Agrarian Justice* (Wideside Press, 2010) 612–613.

³³ See, eg, Henry George, *Progress and Poverty* (Doubleday, Page & Co, 1920).

³⁴ See, eg, Bertrand Russell, *Roads to Freedom. Socialism, Anarchism and Syndicalism* (Unwin Books, 1918) 80–81.

³⁵ See, eg, Anthony B Atkinson, *Inequality: What Can Be Done?* (Harvard University Press, 2015).

³⁶ Guy Standing, *Basic Income: And How We Can Make It Happen* (Pelican Books, 2017).

³⁷ Karl Widerquist and Grant McCall, *Prehistoric Myths in Modern Political Philosophy* (Edinburgh University Press, 2017) 244.

³⁸ Bruce Ackermann, Anne Alstott and Phillippe Van Parijs, *Redesigning Distribution: Basic Income and Stakeholder Grants as Cornerstones for an Egalitarian Capitalism* (Verso, 2006) ch 1.

³⁹ SEWA Bharat, 'A Little More, How Much It Is ... Piloting Basic Income Transfers in Madhya Pradesh, India' (Research Report, SEWA Bharat (supported by UNICEF), 2014).

⁴⁰ James Ferguson, *Give a Man a Fish: Reflections on the New Politics of Distribution* (Duke University Press, 2015) 1–34.

⁴¹ Kate Farland, 'Current Basic Income Experiments (and Those So Called): An Overview', *Basic Income Earth Network* (online), 23 May 2017 <<http://basicincome.org/news/2017/05/basic-income-experiments-and-those-so-called-early-2017-updates/>>.

⁴² *Ibid.*

⁴³ *Ibid.*

only a proportion of the total cost of living.⁴⁴ Debates around economic security and Basic Income continue to gain more traction in growing global economic precariousness and the increase of automation amidst the labour market.⁴⁵

BI has resonance across the political spectrum. Milton Friedman saw BI as a way to cash out of social services such as healthcare and education.⁴⁶ Instead of providing these, Friedman favoured giving people cash so people could pay for what they needed, whilst at the same time, reducing bureaucracy, improving incentives, and even saving tax revenue to stimulate economic growth.⁴⁷ This view of BI is dangerous as it is deeply commodifying, and there is no guarantee that a basic income will cover items like medical treatment and education. It also fails to engage with structural inequalities through accumulation by dispossession inherent in capitalism.⁴⁸

So from the outset, it is useful to say that BI is not a panacea or a complete replacement for social security. Rather, BI is a crucial measure accompanying many other important areas of the social security system. In this spirit, BI can be a way of thinking about the kind of society and economy we want and the freedom needed for that. For example, Basic Income is not a grant but a rightful share, as argued by James Ferguson.⁴⁹ Grants infer some form of hierarchical relationship, incapacity, or charity to which the recipient is bestowed. In this sense, the framing of a grant may obscure the structural inequality within generating sums of capital to be “granted”.

Moreover, in the anthropological literature, value within capitalism is socially constructed.⁵⁰ Similar to Marx’s “social value”, commodities are valued through social relations whereby particular assemblages are deemed economically relevant for accumulation. There is social labour that goes into reproducing this value. For example,

⁴⁴Karl Widerquist, *History of Basic Income* (2014) Basic Income Earth Network <<http://basicincome.org/basic-income/history/>>.

⁴⁵ See, eg, Guy Standing, *A Precariat Charter: From Denizens to Citizens* (Bloomsbury Academic, 2014).

⁴⁶ See, eg, Randy Simmons, ‘If You Really Want to Help the Poor, Remember Milton Friedman’, (2008) 26(3) *PERC* <<https://www.perc.org/2008/09/16/if-you-really-want-to-help-the-poor-remember-milton-friedman/>>.

⁴⁷ Karl Widerquist, *History of Basic Income* (2014) Basic Income Earth Network <<http://basicincome.org/basic-income/history/>>.

⁴⁸ David Harvey, *The New Imperialism* (Oxford University Press, 2003) 137–182; Kalyan Sanyal, *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism* (Routledge, 2007) 1–43, 105–165.

⁴⁹ Ferguson, above n 40, 165–190.

⁵⁰ See, eg, Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000) 260–279; Michael Hardt and Antonio Negri, *Multitude* (Penguin Books, 2004) 350.

football is profitable because of all the millions that adore and value the game. In order to reflect the right to inherit a share of wealth, Ferguson suggests a 'rightful share' as appropriate for framing basic income. Ferguson sees a rightful share as a way to radically redistribute wealth where 'the entire production apparatus must be treated as a single, common inheritance',⁵¹ rather than a grant, benefit, or charity.

A rightful share BI is a mechanism to promote social justice. A BI could secure economic citizenship and, in doing so, would create real freedom for all peoples within a society — freedom from exploitation and rising economic insecurity and freedom to live a life people value. A BI could support an individual through a period of trying a new idea and being innovative, such as starting an enterprise, or undertaking work not valued within capitalism (for example forms of ecological, community, or domestic care work). It could also keep people from having to go down exploitative avenues that keep vulnerable people in insecure situations, such as avoiding dangerous or unequal labour conditions.

A BI has the potential to de-commodify work as it can support those who are interested in engaging in activities not rewarded or valued by capitalist labour markets.⁵² Such non-paid productive labour includes care-work, which disproportionately falls to women, creative endeavours, and working on country (particularly for Indigenous people living on country).⁵³ Interestingly, an iteration of a BI proved successful for Indigenous peoples under the recently axed Community Development Employment Program (CDEP). A 2016 article by Jon Altman documented how CDEP as a basic income supported productive labour in country and remote Australia, whilst providing economic security for populations without a formal labour market.⁵⁴ Since the axing of CDEP, these populations have fallen further into poverty.⁵⁵

A BI could also be a mechanism to promote ecological and intergenerational justice. The ecological argument is an important one as, on a broader scale, transitioning to a low-carbon, slow-growth economy is not a small matter of a technical fix and a policy prescription to get economic incentives right within a capitalist structure. Instead, it is a

⁵¹ Ferguson, above n 40, 186.

⁵² See, eg. Weeks, above n 10.

⁵³ See, eg. Ailsa McKay, 'Why a Citizens' Basic Income? A Question of Gender Equality or Gender Bias' (2007) 21(2) *Sage Journals, Work, Employment and Society* 337; Jon Altman, *Basic Income in Australia and New Zealand: Perspectives from Neoliberal Frontiers* (Palgrave Macmillan, 2016) ch 8.

⁵⁴ Altman, above n 53, 179–205.

⁵⁵ Jon Altman, 'Modern Slavery in Remote Australia?' (2017) 150 *Arena Magazine* 12, 12–15.

transformation of whole patterns of social life in terms of work, family, transport, community, food, housing, and leisure. The economic rights gained through a universal basic income are precisely what would give people the freedom to innovate towards this paradigmatic shift. Economic rights are not just about the distribution of wealth, but also about the distribution of time and opportunities. A BI could allow for human freedom in its fullest sense — to explore, create, and connect with each other and our ecological surroundings, while not being tied to an endless drive for profit and economic growth.

Still, a BI must be implemented as part of a broader suite of social and economic policies. A BI, whilst necessary, is not sufficient alone to aid Australia moving towards a socially just economy that is also ecologically sustainable. A BI could be funded through the abolishment of things such as: expensive welfare surveillance and governance systems, general revenues, and tax reform (including maximum income tax on the wealthy, higher taxes on capital — instead of labour — and eco-taxes, and/or revenue from depletion and emissions-certificate auctions).⁵⁶ To manage changes to the tax and labour markets, the implementation of a BI could be eased in slowly, where the amount paid to each individual could be gradually increased over time.

III CONCLUSION

Whilst avenues for implementation of a BI need to be debated and detailed, it is an important proposition that cannot be overlooked. BI is an idea poised to address issues ranging from economic security, wealth distribution, justice, poverty through to ecological justice and gender equality. At its heart, a BI is about instilling inalienable economic rights to all. A BI is not charity but a social dividend distributing to all their rightful share. The insurmountable and perpetual challenges to the global economy continue to be revealed, from growing inequality and dispossession, to the failure of 'employment' as the institution to provide economic security in the Global South as well as increasingly in the Global North. There is a real need to refocus policy and support on people and the environment instead of on market logic and growth securing economic rights, starting with a BI. Basic Income is an idea whose time has come.

⁵⁶ Guy Standing, *Basic Income: And How We Can Make It Happen* (Penguin Books, 2017) ch 12.

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PRE-PLANNED STARVATION AND ADVANCED DEMENTIA — IS THERE A CHOICE?

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Canadian Margot Bentley's thoughts on Alzheimer's disease were quite clear. In a written statement of her wishes, she said, 'I want it to be known that I fear degradation and indignity far more than death.' She repeatedly made her wishes known to her family, verbally and in two written documents. However, judges refused to enforce Mrs Bentley's directive that food and drink be withheld when the disease progressed to the point that she no longer recognised her family. The reasons for the court's decision are relevant to Australians who want to pre-plan a death from starvation, in the event that they develop Alzheimer's and the disease progresses to a pre-determined stage. This paper considers the legislative scheme in Queensland for health care decision-making for a person without capacity and concludes that the outcome in a case with facts similar to Mrs Bentley's would probably be the same.

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I INTRODUCTION

As a nurse in her younger years, Margot Bentley saw firsthand how dementia progressively robbed patients of their cognitive and physical abilities, along with their independence and dignity. She was adamant that she did not want to suffer a similar fate. When Mrs Bentley was diagnosed with Alzheimer’s some years later, her family did everything they could to give effect to her written and verbal instructions that food and water be withheld when the disease reached an advanced stage. They even sought a court order to force care facility staff to comply. Despite the family’s efforts, the end of Mrs Bentley’s life was exactly what she had feared. She spent her final years in an emaciated, vegetative state, unable to speak or move, and incontinent — a far cry from the dignified death she had planned.

Although the tragedy of Margot Bentley’s final years played out in Canada, the case is a caution for Australians who want to plan their deaths if they develop Alzheimer’s. Although courts in both countries have recognised the right of people with full capacity to refuse sustenance,¹ and to be kept comfortable and sedated until they die,² the position

¹ This paper will use the term ‘sustenance’ to refer to nutrition and hydration.

² See, eg, *Manoir de la Pointe Bleue (1978) Inc c Corbeil*, 1992 CarswellQue 1623 (CS) (Quebec Supreme Court); *Brightwater Care Group Inc v Rossiter* [2009] WASC 229.

is not so clear when a person with capacity leaves instructions that sustenance be withheld in the event of later progressive cognitive decline. This paper will explore this issue, using the legislative scheme in Queensland as an example.³ It begins by providing a brief outline of Margot Bentley's case and the progression of Alzheimer's before considering whether the problems highlighted by Greycliff J in the Supreme Court of British Columbia in *Bentley v Maplewood Seniors Care Society*,⁴ and then affirmed by the Court of Appeal for British Columbia,⁵ would be relevant to a Queenslanders in a position similar to that of Mrs Bentley. It argues that the outcome would be the same in Queensland. The paper concludes that it may not be possible for people to plan to starve to death if they develop Alzheimer's disease at a later date and are no longer able to care for themselves or to recognise family members. However, if the disease progresses to the point where the person is in a vegetative state or is kept alive by tube-feeding, the position may be different.

II THE BENTLEY CASE

In 1991, Margot Bentley signed a document, witnessed by two people, requesting that if the time came when there was 'no reasonable expectation of my recovery from extreme physical or mental disability', she be 'allowed to die and not be kept alive by artificial means or heroic measures'. She also requested 'no electrical or mechanical resuscitation of my heart when it has stopped beating', 'no nourishment or liquids', and euthanasia in the event she was unable to recognise members of her family due to mental deterioration.⁶

Mrs Bentley was diagnosed with Alzheimer's in 1999, and she made her family promise that her wishes would be honoured.⁷ They cared for her at home for five years and then moved her to a care facility. Within two years, Mrs Bentley was no longer able to recognise her family. Twelve years after diagnosis, Mrs Bentley spent her days lying

³ Each Australian jurisdiction has different provisions for health decision making when an adult does not have capacity. It is beyond the scope of this paper to compare how the decision in the *Bentley case* might affect a case with similar facts in the various Australian jurisdictions.

⁴ *Bentley v Maplewood Seniors Care Society* (2014) BCSC 165 (British Columbia Supreme Court).

⁵ *Bentley v Maplewood Seniors Care Society* (2015) BCCA 91 (British Columbia Court of Appeal).

⁶ *Bentley v Maplewood Seniors Care Society* (2015) BCCA 91, [2] (British Columbia Court of Appeal).

⁷ Katherine Hammond, 'Kept Alive — The Enduring Tragedy of Margot Bentley' (2016) 6(2) *Narrative Inquiry in Bioethics* 80.

‘motionless in bed, contracted and spastic, unable to speak or to move, eyes closed most of the time, essentially unresponsive and diapered’.⁸

Mrs Bentley’s husband found a second document in 2011, in which Mrs Bentley stated that if she was in a state of severe physical illness with no reasonable prospect of recovery, she did not wish to be kept alive ‘by artificial means such as life-support systems, tube feeding, antibiotics, resuscitation or blood transfusions’ and that ‘any treatment which has no benefit other than a mere prolongation of my existence’ should be withheld or withdrawn.⁹

At this point, Mrs Bentley’s family asked that the care facility honour the ‘Living Will’—that staff stop force feeding Mrs Bentley but keep her comfortable with medication and sedation and allow her to die.¹⁰ However, the care facility, supported by the local Health Authority, refused saying it had a legal duty to provide care to Mrs Bentley, and this included feeding her.¹¹ The care facility also refused to release Mrs Bentley into the care of her family so they could take her home or move her to another care facility. The family then sought a court declaration that Mrs Bentley not be given nourishment or liquids, in accordance with her wishes.¹²

Justice Greycell, in the Supreme Court of British Columbia, refused to grant the declaration sought. His Honour found that Mrs Bentley’s acceptance of sustenance offered by spoon touched to her mouth indicated consent and that she had the capacity to consent to assisted feeding. Further, such consent would override any earlier instructions that sustenance be withheld. His Honour indicated that the outcome would be the same if it was found that Mrs Bentley did not have capacity. First, the legislative regime covering health directives would not apply because spoon-feeding is personal care and not health care.¹³ If this was not correct, the inconsistencies between the two written documents signed by Mrs Bentley meant that there was no valid advance directive that could be followed.¹⁴ Justice Greycell then considered whether Mrs Bentley’s husband could make

⁸ Ibid [81].

⁹ *Bentley v Maplewood Seniors Care Society* 2015 BCCA 91, [7] (British Columbia Court of Appeal).

¹⁰ Hammond, above n 7, 81.

¹¹ *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165, [148] (British Columbia Supreme Court).

¹² Ibid [1].

¹³ Ibid [77].

¹⁴ Ibid [111].

this decision on her behalf. He said that Mr Bentley would not have the legal authority to 'make a binding decision [to withdraw assisted feeding] when her health care providers believe it is medically inappropriate'.¹⁵

The Court of Appeal upheld Greyell J's decision.¹⁶ The reasons given by Greyell J for refusing the declaration sought suggest that it may not be possible for a person to direct that sustenance be withheld at a nominated point before Alzheimer's disease progresses to its final stages.

Margot Bentley's case is not an isolated one. In Oregon, Nora Harris was diagnosed with Alzheimer's in 2009 and signed an Advance Health Directive stipulating that she was not to be provided with care to prolong her life. When the disease progressed to the point where Nora could no longer communicate, recognise family members, or feed herself, her husband sought a court order preventing nursing home staff from spoon-feeding her, in accordance with Nora's wishes.¹⁷ The court refused, for essentially the same reasons as in the *Bentley case*.¹⁸ The next part of the paper considers whether the impediments raised by Greyell J would apply to the legislative scheme in Queensland.

III ALZHEIMER'S DISEASE AND DEMENTIA

Dementia refers to a collection of symptoms rather than one specific disease. These symptoms include changes in thinking, behaviour, and the ability to perform everyday tasks. Dementia has many causes; Alzheimer's disease is the most common form of dementia and accounts for 60 to 80 per cent of dementia cases in Australia. More than 50 per cent of people in residential aged care facilities have dementia. The cost of dementia to the community in 2018 will be more than \$15 billion.¹⁹

¹⁵ Ibid [120].

¹⁶ *Bentley v Maplewood Seniors Care Society* 2015 BCCA 91, [7] (British Columbia Court of Appeal).

¹⁷ JoNel Aleccia, 'Despite Advance Directive, Dementia Patient Denied Her Last Wish, Says Spouse', *USA Today* (online), 21 August 2017 <<https://www.usatoday.com/story/news/health/2017/08/20/despite-advance-directive-dementia-patient-denied-her-last-wish-says-spouse/570585001/>>.

¹⁸ See *Re Nora Harris* (Oregon, Jackson City Circuit Court No 13-107-G6, 13 July 2016).

¹⁹ See generally Dementia Australia, *What is Dementia?*

<<https://www.dementia.org.au/information/about-dementia/what-is-dementia/>>; Alzheimer's Association, 'Alzheimer's and Dementia in Australia' (2017) <<https://www.alz.org/au/dementia-alzheimers-australia.asp#about>>; 'Dementia' on *Mayo Clinic* (2 August 2017) <<https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/symptoms-causes/syc-20350447>>.

According to Dementia Australia, there are three phases of dementia: early, moderate, and advanced.²⁰ The early phase is usually very gradual, and signs include losing interest in activities, inability to adapt to change, poor judgment and decision-making, losing things, and forgetfulness. The signs are more apparent during the second phase and include confusion, forgetting the names of or confusing family members, leaving pots on the stove, wandering, and inappropriate behaviour. When the disease reaches its final stage, the person requires total care. The person often cannot remember things for even a few minutes, does not recognise friends or family, is completely dependent on others for daily activities, and becomes incontinent, disoriented, and confused. The person may become immobile and bedridden and struggle to communicate.²¹

In the final stages of the disease, people have little interest in food and have difficulty swallowing. Nutrition can be administered via a percutaneous endoscopic gastrostomy (PEG), a tube that is inserted directly into the stomach through an incision in the abdomen. However, the focus of this paper is on people whose wish is to die when they become unable to care for themselves and not on palliative care in the final few weeks of the disease. As in Margot Bentley's case, a high-care patient with dementia can remain alive for several years.

IV WITHHOLDING SUSTENANCE FROM A PATIENT

A person who has full capacity can refuse sustenance, and this decision must be respected by healthcare givers and others.²² Capacity for this purpose in Queensland means that the person is capable of understanding the nature and effect of decisions about treatment or choosing a person to make decisions on his or her behalf, freely and voluntarily makes such decisions, and communicates the decisions in some way.²³

Clearly, a person in an advanced stage of Alzheimer's would not have the requisite capacity to understand the serious implications of a request that food and water be withheld. However, it is unclear whether a court can uphold such a directive where it was

²⁰ Dementia Australia, *Progression of Dementia* <<https://www.dementia.org.au/about-dementia/what-is-dementia/progression-of-dementia>>.

²¹ *Ibid.*

²² See *Brightwater Care Group Inc v Rossiter* [2009] WASC 229.

²³ *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity'); *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'capacity').

made while the person had capacity, with the intention that the directive should operate at a later date if the person becomes incapacitated.

*A When a Patient with Capacity has Left Clear Advance Health
Directive Instructions and Later Becomes Incapacitated*

The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) set out a comprehensive legislative scheme for Queensland healthcare decision-making for a person without capacity. The scheme allows a person with capacity to set out his or her wishes in advance, in the form of an Advance Health Directive ('AHD') with the intention that the directive is to come into operation should the person lose capacity at some time in the future. The legislation also sets out a hierarchy of people who can make healthcare decisions for a person without capacity, in the event that the person did not leave valid instructions.

1 Advance Health Directive

One way for people to direct that sustenance be withheld should they develop a particular condition that involves a loss of capacity is to complete an AHD. In the directive, they can specify what medical treatments should be carried out and also which treatments should be withheld. Provided the requirements and formalities set out in the legislation are met, professionals generally must comply with the directive when a patient loses capacity.²⁴

However, it is important that a person's instructions are set out clearly. If the instructions are uncertain or unclear, health care professionals do not have to fully comply.²⁵ In the *Bentley case*, the 1991 statement included a direction that she did not wish to be kept alive by 'artificial means or heroic measures' if she developed an extreme mental or physical disability from which there was no reasonable expectation of recovery. However, a little later on in the same document, Mrs Bentley directed that she not be given 'nourishment or liquids'. In the second document, found in 2011, she again asked that she be allowed to die and not be kept alive by artificial means such as tube feeding. She indicated that she would, however, accept basic care. Justice Greyell interpreted these

²⁴ *Guardianship and Administration Act 2000* (Qld) s 66(2) makes it clear that if an adult has made an AHD giving a direction about a health matter, the matter may only be dealt with under the direction.

²⁵ *Powers of Attorney Act 1998* (Qld) s 103(1).

documents to mean that Mrs Bentley did not want artificial delivery of nourishment or liquids through measures like a feeding tube. Eating from a spoon or drinking from a glass, even with assistance, was not, in His Honour's opinion, artificial.²⁶ Therefore, His Honour's interpretation of Mrs Bentley's instructions was that they did not cover spoon-feeding.

Clearly, problems of interpretation like this can be cured by careful drafting of an AHD. Nonetheless, there are three reasons why even a well-drafted document might not operate where a person develops Alzheimer's disease.

The first reason is that a directive refusing life-sustaining treatment can only operate in Queensland where the person has a terminal illness and death is expected within a year, is in a persistent vegetative state, is permanently unconscious, or has a severe condition and there is no reasonable prospect of recovery to the point where life-sustaining measures would no longer be required.²⁷ A person with advanced dementia can live for many years. The position might be different when the disease reaches its final stages and the person is in a vegetative state.²⁸ However, people might want nutrition and hydration withheld at an earlier stage in the disease process in a deliberate effort to hasten death.²⁹ Margot Bentley, for example, nominated failure to recognise family members, and not progression to a vegetative state, as the point where she wanted her life to end.

The second reason is that an AHD covers only health matters.³⁰ In *Bentley v Maplewood Seniors Care Society*,³¹ Greyell J found that 'providing oral nutrition and hydration by prompting with a spoon or glass is not health care' within the meaning of the relevant legislation.³² Therefore, it was instead a form of personal care or basic care.³³ It is possible that a Queensland court may come to a similar conclusion. However, the

²⁶ *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165, [111] (British Columbia Supreme Court).

²⁷ *Powers of Attorney Act 1998* (Qld) s 36.

²⁸ *Ibid* s 36(2).

²⁹ JoNel Aleccia, 'Should Patients with Dementia Be Able to Decline Spoon-Feeding?', *National Public Radio* (online), 3 November 2017 <<https://www.npr.org/sections/health-shots/2017/11/03/561393940/should-dementia-patients-be-able-to-decline-spoon-feeding>>.

³⁰ *Powers of Attorney Act 1998* (Qld) s 35.

³¹ *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165 (British Columbia Supreme Court).

³² *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, ch 181 s 1 (definition of 'health care'): Means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic, or other purpose related to health and includes a series or sequence of similar treatments or care administered to an adult over a period of time for a particular health problem or deals with one or more of the health problems that an adult has.

³³ *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165, [77] (British Columbia Supreme Court).

definition of health care in Queensland legislation is not identical to that in British Columbia. Health care in Queensland includes 'care or treatment of, or a service or a procedure for, the adult (a) to diagnose, maintain, or treat the adult's physical or mental condition; and (b) carried out by, or under the direction or supervision of, a health provider'.³⁴

It could be argued that this definition could extend to cover spoon-feeding, which would be a 'service' necessary to 'maintain ... physical condition', and if the patient was in a nursing home, this would be done by a 'health provider'.³⁵ However, in the *Bentley case*, a definition of healthcare that included anything for a therapeutic, preventive, or other purpose related to health and both 'treatments or *care* administered to an adult over a period of time for a particular health problem',³⁶ was held not to encompass spoon-feeding. Both Canadian and Queensland legislation define personal care to include matters respecting diet and dress.³⁷ While this could be interpreted to refer to the choice of what will be in a person's diet, rather than the manner of ingestion, it could also cover spoon-feeding of someone unable to feed themselves. In the *Bentley case*, Greyll J adopted the latter interpretation, and it is likely that Queensland courts would do the same.

Queensland legislation goes on to specifically indicate that health care includes withholding or withdrawal of life-sustaining measures.³⁸ However, such measures are intended to sustain life and to take the place of vital bodily functions that are not working.³⁹ One of the examples given is *artificial* nutrition and hydration. A patient such as Mrs Bentley is able to take food orally, and therefore it is arguable that spoon-feeding would not be regarded as a life-sustaining measure. If, however, the patient's condition was to deteriorate to the point where sustenance has to be provided through artificial

³⁴ *Powers of Attorney Act 1998* (Qld) s 5 (definition of a 'health provider'); *Guardianship and Administration Act 2000* (Qld) sch 2 (definition of a 'health provider').

³⁵ *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of a 'health provider'): A person who provides health care, or special health care, in the practice of a profession or the ordinary course of business.

³⁶ *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, ch 181 s 1 (definition of 'health care').

³⁷ *Powers of Attorney Act 1998* (Qld) s 2 (definition of 'personal matter'); *Guardianship and Administration Act 2000* (Qld) sch 2 (definition of 'personal matter'); *Representation Agreement Act*, RSBC 1996, ch 405 s 1 (definition of 'personal care'); All definitions include diet of an adult.

³⁸ *Guardianship and Administration Act 2000* (Qld) sch 2 s 5A; *Powers of Attorney Act 1998* (Qld).

³⁹ *Ibid.*

means, such as tube-feeding, this would fall within the definition of healthcare, and a patient's directions about withholding or withdrawing sustenance would fall within the ambit of an AHD.

It is unclear, therefore, whether spoon-feeding would be regarded as health care or personal care in Queensland. If a Queensland court were to take the same approach as Greyell J in the *Bentley case*, an AHD could not be used to give directions about withholding of sustenance at a pre-determined point in the progression of Alzheimer's disease. Provision of sustenance by artificial means, on the other hand, would be covered. Nonetheless, a directive that such sustenance be withheld could only be followed when the disease progresses to its final stages, such that one of the conditions set out in s 36(2) of the *Powers of Attorney Act 1998* (Qld) for directions to withhold a life-sustaining measure would be met.

2 Substitute Decision Maker

If there is no valid AHD, a substitute decision maker can make healthcare decisions for a person who lacks capacity.⁴⁰ However, any substitute decision maker would face legislative constraints similar to those imposed on personal directives in an AHD, discussed above: the method of providing sustenance must fall within the definition of health care and the patient must have less than a year to live or be in a vegetative state. Furthermore, the decision must be consistent with good medical practice.⁴¹ In the *Bentley case*, most of the health care providers looking after Mrs Bentley did not think it was medically appropriate to discontinue spoon-feeding.⁴² In the absence of 'substantial agreement' among health care providers, Mrs Bentley's husband, her substitute decision maker, did not have the legal authority to direct that spoon-feeding be ceased.⁴³

⁴⁰ *Guardianship and Administration Act 2000* (Qld) s 66: Under the legislation, a person can appoint an attorney to make health decisions for him or her if the person later becomes incapacitated. If the person has not appointed someone to do this, the legislation provides for a statutory health attorney to do this; *Powers of Attorney Act 1998* (Qld) s 63 provides that a statutory health attorney is the first person on the list provided who is readily available and culturally appropriate to act. The list includes a spouse or de facto, a primary carer (unpaid and over 18), and a close friend or relative (but not a paid carer and over 18). If there is no one on the list who meets the criteria, the Public Guardian will fulfil the role.

⁴¹ *Powers of Attorney Act 1998* (Qld) s 36(2)(b).

⁴² *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165, [119] (British Columbia Supreme Court).

⁴³ *Ibid* [120].

Indeed, a substitute decision maker or medical professional who withdraws spoon-feeding could be found to be in breach of their legal duty to care for the patient and could face possible civil proceedings or manslaughter charges. This was the concern raised by the care facility in *H Ltd v J*.⁴⁴ It was held that there is no positive duty on care providers to forcibly hydrate or feed patients against their wishes.⁴⁵ However, the key difference between the facts in this case and one like Margot Bentley's is that the patient in *H Ltd v J* had capacity.

It would appear then that the current legislative regime in Queensland covering a person's direction for future health care and substitute decision making in the event of Alzheimer's-related incapacity would mean that the outcome in a case like *Bentley* would be the same in Queensland. However, even if a court were to determine that assisted feeding is healthcare and that a directive, from either the patient in an AHD or from a substitute decision maker, that sustenance be withheld from an Alzheimer's patient was valid, the *Bentley case* raises yet another hurdle that may be insurmountable: that a patient in an advanced stage of the disease can nonetheless still consent to being fed and has the capacity to do this.

B Dementia and Capacity to Consent to Sustenance

Capacity is not an 'all or nothing' concept in law, and a person can have capacity to make one type of decision but not another. Clearly a higher level of capacity would be required where the decision is one with serious consequences, such as a directive that sustenance be withheld so that the person can die. On the other hand, a lesser level of understanding is required for minor decisions. The Queensland legislative scheme expressly recognises that the capacity of an adult with impaired capacity to make decisions may differ according to the type of decision to be made, including, for example, the complexity of the decision to be made.⁴⁶ Similarly, in the *Bentley case*, the local health authority (which opposed the declaration sought by the family) pointed out that Mrs Bentley 'could very well be incapable of making a complex decision, such as whether to undergo a risky

⁴⁴ *H Ltd v J* [2010] SASC 176.

⁴⁵ *Ibid* [76] (Kourakis J).

⁴⁶ *Guardianship and Administration Act 2000* (Qld) s 5.

surgery, but capable of making a basic decision, such as whether she wants to eat or not'.⁴⁷

In *Bentley*, the pivotal fact that led the judge at first instance, and then the Court of Appeal, to refuse the declaration sought by the family was the acceptance of medical evidence that Mrs Bentley was capable of deciding whether to accept food and drink offered to her and communicated her consent through behaviour.⁴⁸ Mrs Bentley's family, supported by some doctors, argued that acceptance of food, when a spoon was touched to her mouth, was a reflexive action. Her daughter, a nurse, said her mother would reflexively open her mouth if prodded with a spoon, and she believed this was akin to the basic rooting reflex of a newborn infant or a severely brain damaged infant. Further, the family had several legal opinions supporting their view that force-feeding of her mother was battery because she was being touched with a spoon without her consent and against her wishes, expressed previously.⁴⁹

However, Greyell J also heard evidence that Mrs Bentley accepted more food or liquid on some occasions than others, with a spoon or glass touched to her lips. She sometimes refused by not opening her mouth and was more likely to accept sweet foods than other foods.⁵⁰ His Honour preferred this view and found that Mrs Bentley was 'communicating her consent' by accepting food and water. Therefore, care facility staff were under a legal duty to continue to 'offer' her assistance with feeding, in the form of prompting her with a spoon or glass,⁵¹ and failure to do this would amount to neglect.⁵² Likewise, in *Nora Harris'* case, it was found that the nursing home would be in violation of state law if it stopped spoon-feeding.⁵³

The position is different during the terminal stages of Alzheimer's, when a person can have little interest in food and can have difficulty swallowing. Nutrition can be administered via a percutaneous endoscopic gastrostomy (PEG), a tube that is inserted directly into the stomach through an incision in the abdomen. Unlike spoon-feeding,

⁴⁷ *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165, [43] (British Columbia Supreme Court).

⁴⁸ *Ibid* [12].

⁴⁹ Hammond, above n 7.

⁵⁰ *Bentley v Maplewood Seniors Care Society* 2014 BCSC 165, [49] (British Columbia Supreme Court).

⁵¹ *Ibid* [60].

⁵² *Ibid* [145].

⁵³ Alan Meisel and Kathy Cerminara, *The Right to Die, The Law of End-of-Life Decisionmaking*, Supplement 1A-191 (Aspen Publishers, 2017).

insertion of a PEG is a medical procedure and therefore falls within the ambit of an AHD. A person with capacity can stipulate in an AHD that such a procedure not be carried out. Likewise, a person with capacity can make it clear that no medical treatment, other than drugs to alleviate pain and discomfort, be provided in the event that the person loses capacity and develops an infection or illness which, if left untreated, would result in death. However, a wish that normal feeding be withdrawn at a nominated earlier stage in the progression of Alzheimer's is not medical treatment and therefore not covered by an AHD.

V CONCLUSION

If Greyell J's interpretation is correct, it would be very difficult for caregivers to give effect to the wishes of an Alzheimer's patient, expressed clearly, forcefully, and repetitively, in a written AHD and verbally to family members, that sustenance be withheld when the disease progresses to a particular point, such as failure to recognise family members. If a person has capacity to make a decision about a particular matter, such as whether or not to eat food offered on a spoon, substitute decision making is irrelevant. Furthermore, a care facility that fails to offer nutrition in this way will breach a duty of care to the patient. If, on the other hand, the patient refuses to accept sustenance offered by spoon and the patient is determined to have capacity to do this, the patient's decision must be respected, and force-feeding would amount to an assault.

Meisel suggests that a statement such as the following might provide clear guidance to caregivers:

When the time comes to implement my wishes, if my decision-making capacity is questionable and I appear to be resisting the implementation of my plan to end my life by voluntarily stopping eating and drinking, I nonetheless want my contemporaneous wishes to be ignored and my plan to end my life implemented.⁵⁴

However, such a statement is likely to have little effect. If the patient has capacity to consent to food intake, regardless of his or her state of cognitive decline, that action will override any earlier written statement of wishes.

⁵⁴ Ross Fewing, Timothy W Kirk and Alan Meisel, 'A Fading Decision' (2014) 44(3) *Hastings Centre Report* 16.

However, if the patient can no longer swallow safely, as sometimes happens in the weeks before death in Alzheimer's patients,⁵⁵ and nutrition and hydration are instead being provided by means of a tube, the position is different. The difficult question whether a person in an advanced state of cognitive decline can consent to receiving sustenance orally no longer arises. Further, as artificial feeding is often only needed in the final stages of the disease, the requirements regarding timing of withdrawal of life-sustaining measures, set out in s 36(2) of the *Powers of Attorney Act 1998 (Qld)*, would be met. However, what people like Margot Bentley want to avoid is allowing the disease to progress to this point.

It would seem then that, if a case with facts similar to those in the *Bentley case* were to arise in Queensland, the outcome would be no different. The impediments to a person setting out, in an AHD, a valid directive for withdrawal of sustenance leading to a dignified death at a pre-determined point in the progression of Alzheimer's disease appear to be insurmountable. There appears to be no way to 'provide a humane exit for people who, years later, no longer remember or understand why they wanted to use it' until the disease has reached its final stages.⁵⁶

The only way people diagnosed with Alzheimer's disease can make sure they die before they reach the point where they no longer recognise their family or lose the ability to communicate is to take their own lives while they still have capacity. In so doing, they might deny themselves many years of fulfilling and worthwhile living, but this appears to be the only way to avoid the indignity and degradation of advanced Alzheimer's. It is somewhat ironic that decisions by persons to commit suicide before they are ready to die because they know it would be unlawful for someone to help them to die at a later point has been used to justify euthanasia in Canada under limited circumstances. The right to life was been interpreted as a right not to have to commit suicide prematurely in cases where progressive physical conditions would make it impossible for the person to commit suicide unaided at a later time.⁵⁷ However, it is unlikely that this reasoning would be

⁵⁵ Alzheimer's Association, *Assisted Oral Feeding and Tube Feeding* (2015) <http://mythoughtsondementia.com/Pamphlets/Assisted_Oral_Tube_Feeding.pdf>.

⁵⁶ John Schappi, *Advance Directives to Hasten Death in the Event of Dementia* Aging, AgeingCare.com <<https://www.agingcare.com/articles/advance-directives-to-hasten-death-in-the-event-of-dementia-179475.htm>>.

⁵⁷ *Carter v Canada (Attorney General)* [2015] 1 SCR 331, [58] (McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ).

extended to cover Alzheimer's patients such as Margot Bentley, in light of Greyell J's finding that such patients have the capacity to consent to assisted feeding. Even if the problems with creating a valid AHD could be overcome, such consent effectively revokes any earlier direction that sustenance be withheld at a nominated point in the progression of Alzheimer's disease.

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A CRITICAL ANALYSIS OF LEGAL REPRESENTATION IN QUEENSLAND'S MENTAL HEALTH REVIEW TRIBUNAL*

JAKE BUCKINGHAM**

Mental health review tribunals make and review a variety of decisions regarding the care and treatment of individuals who have mental conditions. Each Australian State and Territory has established its own mental health review tribunal as the “gatekeeper” of civil commitment. Queensland is the only Australian jurisdiction to establish both a Mental Health Court and a Mental Health Review Tribunal to decide mental health matters. Queensland recently implemented the Mental Health Act 2016 which mandates that individuals are to be legally represented in certain tribunal proceedings. This paper concludes that the mandatory appointment of legal representatives is an indispensable measure to ensure tribunal proceedings are fair, transparent, and therapeutically beneficial.

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I INTRODUCTION

Regulation of involuntary psychiatric treatment is an important and evolving area of the law. Historically people with 'mental conditions' faced discrimination and stigmatisation and were denied their legal rights.¹ However, society's attitude has shifted from perceiving mental conditions as a "personal weakness" to a treatable and manageable human experience. Both domestic and international frameworks governing 'involuntary commitment' now recognise and protect the rights of persons with mental conditions from arbitrary detention and unwarranted treatment.²

Legal compliance with the rights of persons who have mental conditions is important when considering that almost half of all Australians will experience degrees of mental conditions at some stage in their life.³ In the 2014/15 financial year, 48 857 people were involuntarily admitted into specialised medical institutions nationwide.⁴ Despite the large number of involuntary admissions, there has been minimal academic analysis on Australia's committal procedure. Each state and territory has established its own mental health legislative regime,⁵ which through their similar provenance share many features.⁶

In Australia, multidisciplinary tribunals are the "gatekeepers" of involuntary commitment.⁷ Queensland is the only jurisdiction to establish a dual committal system comprising of a Mental Health Review Tribunal ('MHRT') and a Mental Health Court

¹ Throughout this paper, no reference will be made to the term 'mental illness'. Rather 'mental condition' is the expression used to describe various mental experiences — or more broadly termed 'human experiences'. Persons who are subject to either a hearing in the Mental Health Review Tribunal or Mental Health Court will be described as 'patients' throughout this paper. The author considers the word 'patient' to be the most neutral and clinically correct term.

² By way of background, 'involuntary commitment', also known as 'civil commitment', is defined as the admission of an individual against their will into a mental healthcare facility to treat a diagnosed mental condition; See generally Terry Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?* (Themis Press, 2011) 4–8.

³ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (23 October 2008)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4326.0Main%20Features32007>>.

⁴ Australian Institute of Health and Welfare, *Specialised Admitted Mental Health Care Patient Characteristics* (December 2015) Mental Health Services in Australia

<<http://mhsa.aihw.gov.au/services/admitted-patient/specialised-patient-characteristics/>>.

⁵ *Mental Health Act 2016* (Qld); *Mental Health Act 2007* (NSW); *Mental Health Act 2014* (Vic); *Mental Health Act 2009* (SA); *Mental Health Act 2013* (Tas); *Mental Health Act 2014* (WA); *Mental Health Act 2015* (ACT); *Mental Health Act 2016* (NT).

⁶ Danuta Mendelson, 'Mental Health Legislation (Civil) in Australia and China: A Comparative Perspective' (2016) 23 *Journal of Law and Medicine* 762, 767.

⁷ Terry Carney et al, 'Mental Health Tribunals: "TJ" Implications of Weighing Fairness, Freedom, Protection and Treatment' (2007) 17 *Journal of Judicial Administration* 46, 46–7.

(‘MHC’).⁸ These two bodies have slightly different responsibilities. The MHC may, in its original jurisdiction, order involuntary treatment for individuals charged with a criminal offence. The MHC also hears appeals from the MHRT.⁹ The MHRT has a number of functions and must balance several competing rights and interests when making decisions regarding the treatment of patients. On the one hand, there is a need to uphold a person’s right to autonomy and freedom from undue detention and coercive treatment, while on the other hand, it is necessary to ensure both the community and the individual is protected from harm. Queensland recently overhauled its mental health laws in order to strike a more effective balance between these competing rights, as well as to ensure compliance with international best practice. One significant reform is the mandatory appointment of lawyers to represent patients appearing before the MHRT in prescribed circumstances.¹⁰ The legislative reforms also provide that in any type of hearing a person may choose to be represented by a nominated support person.¹¹ This paper aims to examine the effectiveness and desirability of legal representation in MHRT hearings. In doing so, it will be established as to whether legal representation protects individual rights and ensures that the best interests of patients and the community are upheld.

II LEGAL BACKGROUND

A Domestic Human Rights Frameworks

Mental health tribunals are bodies that aim to promote the welfare and the legal rights of persons who are unable, without assistance, to make decisions regarding the treatment of their mental condition. Despite their critical role within the broader mental health regime, mental health tribunals, and their processes, have not been thoroughly examined.¹² The scarcity of research is a consequence of a number of factors. Carney, Tait, and Beaupert assert that, unlike other nations, Australia has minimal jurisprudence in the mental health field because no Bill of Rights has been adopted in national law, and only Victoria and the Australian Capital Territory have recently adopted charters of rights and

⁸ Bernadette McSherry, ‘Hospital Orders for Offenders with Mental Illnesses: An Appropriate Diversionary Option?’ (2009) 16 *Journal of Law and Medicine* 568, 568.

⁹ Queensland Court of Appeal hears appeals from the MHC: See *Mental Health Act 2016* (Qld) ss 21, 29(a), 29(c).

¹⁰ *Mental Health Act 2016* (Qld) s 740.

¹¹ *Ibid* s 739.

¹² Carney et al, ‘Mental Health Tribunals: “TJ” Implications of Weighing Fairness, Freedom, Protection and Treatment’, above n 7, 47.

responsibilities.¹³ However, United States academic Michael Perlin writes, 'civil commitment goes almost unmentioned in legal literature'.¹⁴ Therefore, the scarcity of research in this area also extends to international jurisdictions, such as the United States, which have a constitutionally enshrined Bill of Rights.

B International Human Rights Frameworks

During the 20th century, nations such as Australia have become increasingly cognisant of the need to respect universal human rights. Specifically, Australia's adoption of the *International Covenant on Civil and Political Rights* ('ICCPR')¹⁵ and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')¹⁶ compelled legislators and administrators to implement and uphold various universal human rights. Relevant to this paper are the rights to: the highest attainable standard of physical and mental health,¹⁷ due process,¹⁸ a fair trial,¹⁹ and protection against torture and cruel, inhuman, or degrading treatment.²⁰

In 1991, the United Nations developed the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* ('United Nations Mental Health Principles').²¹ The principles were established as a model of best practice for countries to voluntarily adopt. Pertinent principles, for the purposes of this paper, include: principle 9(1) 'treatment administered in the least restrictive environment', principle 15(1) 'every effort must be made to avoid such involuntary admission',

¹³ Terry Carney, David Tait and Fleur Beaupert, 'Pushing the Boundaries: Realising Rights through Mental Health Tribunal Processes?' (2008) 30 *Sydney Law Review* 329, 336.

¹⁴ Michael Perlin, 'I Might Need a Good Lawyer, Could Be Your Funeral, My Trial: Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases' (2008) 28(1) *Washington University Journal of Law and Policy* 1, 3.

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); See also *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991) ('ICESCR').

¹⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁷ ICCPR art 12.

¹⁸ *Ibid* art 9.

¹⁹ *Ibid* art 14.

²⁰ *Ibid* art 7.

²¹ *The Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 75th plen mtg (17 December 1991).

principle 11(1) 'no treatment shall be given to a patient without his or her informed consent', and principle 11(16) 'right to appeal to judicial body'.

The latter half of the 20th century saw several Australian jurisdictions reform their mental health laws. One crucial reform needed to uphold individual rights and narrow the broad discretion of medical practitioners was the establishment of a framework for the independent review of mental health decision-making. Different jurisdictions have chosen different legal models for reviewing decisions regarding the treatment of individuals' mental conditions. Queensland opted to create a specialised Mental Health Tribunal. The MHRT was originally designed to provide criminal offenders experiencing a mental condition with early access to appropriate treatment and to assess any psychiatric criminal defences, such as unsoundness of the mind.²²

The turn of the last century saw a paradigm shift away from the traditional substituted decision-making model toward a supported decision-making approach.²³ Supported decision-making requires that treatment decisions be made by the persons themselves as often as possible.²⁴ At the same time as this paradigm changes, the academic field of therapeutic jurisprudence began to emerge. Both the supported decision-making approach and therapeutic jurisprudence emphasise the importance of empowering legally incapacitated persons to make decisions regarding their own medical treatment. Reflecting this change, Queensland continued on its path of reform by establishing the MHC in 2002.²⁵ Queensland remains the only Australian jurisdiction to establish a specialised court to hear mental health matters. Queensland's unique and innovative reform to establish the MHC best achieves principle 11(16) of the *United Nations Mental Health Principles* — being the 'right to appeal to a judicial ... authority'. In other Australian jurisdictions, tribunal decisions are appealable to a judicial body, most commonly to the State or Territory Supreme Court.²⁶ This process does accord with principle 11(16);

²² Steve Brown, 'The Mental Health Tribunal of Queensland: A Useful Model for UK Forensic Psychiatry?' (1999) 10(2) *The Journal of Forensic Psychiatry* 325, 328.

²³ Sascha Callaghan and Christopher James Ryan, 'An Evolving Revolution: Evaluating Australia's Compliance with the Convention on the Rights of Persons with Disabilities in Mental Health Law' (2016) 38(2) *UNSW Law Journal* 596, 602.

²⁴ *Mental Health Act 2016* (Qld) s 596.

²⁵ Catherine Holmes, 'Queensland's Mental Health Court' (Speech delivered at the Judicial Conference of Australia, Noosa, 11 October 2014) <<http://www.jca.asn.au/wp-content/uploads/2013/11/Mental-Health-Court-of-Qld-for-JCA-Colloquium-10-14.pdf>>.

²⁶ See, eg, *Mental Health Act 2007* (NSW) s 163; *Mental Health Act 2015* (ACT) s 267.

however, these State and Territory Supreme Courts lack the institutional specialisation that allows the Queensland MHC to rigorously test medical evidence and develop therapeutically beneficial processes that accommodate for the distinct needs of patients.

In 2008, Australia affirmed its commitment to mental health reform by becoming a signatory to the United Nations *Convention of the Rights of Persons with Disabilities* ('CRPD').²⁷ The CRPD's purpose is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.²⁸ Relevantly, the CRPD expressly provides for supported decision-making, rather than substituted decision-making,²⁹ and outlines various rights, such as access to justice,³⁰ liberty and security,³¹ and the protection of the integrity of the person.³² The predominate reading of the CRPD is that it advances a highly reformist approach which aims to remove any scope for the 'forced' treatment of individuals, and as such acts as a guide of practice.³³

C Recent Legislative Reforms in Queensland

In 2016, the Queensland Parliament overhauled the State's mental health laws by passing the *Mental Health Act 2016* (Qld) ('the Act'). The new Act replaces the *Mental Health Act 2000* (Qld) and commenced on 5 March 2017.³⁴ The Act aims to strengthen patients' rights and support recovery through a number of substantial reforms. Among the changes are: destigmatising the legislative language,³⁵ providing for better patient rights in terms of informed consent,³⁶ developing treatment criteria that is 'less restrictive',³⁷ inserting

²⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('CRPD'); See also *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, Agenda Item 67(b), Supp No 49, UN Doc A/RES/61/106 (24 January 2007, adopted 13 December 2006) annex II; Australia ratified the CRPD in July 2008 and the Optional Protocol in August 2009.

²⁸ CRPD art 1.

²⁹ Ibid art 12.

³⁰ Ibid art 13.

³¹ Ibid art 14.

³² Ibid art 17.

³³ See Callaghan and Ryan, above n 23, 604.

³⁴ See *Mental Health Act 2016* (Qld) s 2; Queensland Department of Health, *About the Mental Health Act 2016* (23 March 2017) Queensland Government <<https://www.health.qld.gov.au/clinical-practice/guidelines-procedures/clinical-staff/mental-health/act/about>>.

³⁵ For instance, pursuant to s 815 of the Act, 'Involuntary Treatment Orders' are now named 'Treatment Authorities'.

³⁶ A comprehensive definition of 'capacity to consent to be treated' is included in s 14 of the Act.

³⁷ See eg *Mental Health Act 2016* (Qld) s 305.

a stand-alone chapter dealing with the rights of patients,³⁸ and establishing consistent criteria for decisions made by the MHRT.

A detailed analysis of every reform is beyond the scope of this paper. Accordingly, this paper will analyse two specific reforms concerning representation during MHRT hearings. First, the Act requires the MHRT to provide free legal representation for patients in certain prescribed hearings.³⁹ Second, the Act expressly provides that persons subject to any type of hearing may be represented by a nominated support person, a lawyer, or another person.⁴⁰

III GENERAL FUNCTIONS AND PROCEDURES OF THE MERIT

A Overview

The MHRT is an independent body required to make and review decisions about the detention, treatment, and care of people who have a mental condition that impedes their ability to make personally consequential decisions. In essence, the MHRT is an arbiter of the lawfulness of the state to involuntarily treat people for a mental condition.⁴¹

The MHRT has original jurisdiction to hear applications for examination authorities,⁴² the approval of regulated treatment,⁴³ such as electroconvulsive therapy ('ECT'),⁴⁴ and the approval of transfer of particular patients in and out of Queensland.⁴⁵ The MHRT has the jurisdiction to periodically review the continuation of a treatment authority.⁴⁶

The nature, effect, and severity of mental conditions change overtime. Therefore, it is necessary that patients' treatment plans and fitness for trial be periodically reviewed. The MHRT is responsible for undertaking periodic reviews of the MHC's decision to issue

³⁸ *Mental Health Act 2016* (Qld) ch 9 'Rights of Patients'.

³⁹ These prescribed hearings include: when the Attorney-General is represented, hearings concerning minors, and when medical practitioners have applied for involuntary electroconvulsive therapy.

⁴⁰ *Mental Health Act 2016* (Qld) s 739.

⁴¹ Terry Carney, 'Australian Mental Health Tribunals — 'Space' for Rights, Protection, Treatment and Governance' (2012) 35 *International Journal of Law and Psychiatry* 11.

⁴² *Mental Health Act 2016* (Qld) s 28(2)(a); An examination authority authorises a doctor or other listed mental health practitioner to enter premises for the purposes of detaining and involuntarily examining a person in order to decide if a recommendation for assessment should be made: See generally *Mental Health Act 2016* (Qld) pt 8 ch 12.

⁴³ *Ibid* s 28(2)(b).

⁴⁴ *Ibid* pt 9 ch 12.

⁴⁵ *Ibid* pt 10 ch 12 s 28(2)(c).

⁴⁶ See, eg, 'jurisdiction to review' ss 28(1)(a) and 705(1)(a), and 'periodic reviews' ss 413–414.

forensic orders, treatment support orders, as well as the MHC's determination that a person is unfit for trial.⁴⁷ The Act provides when these periodic reviews are to occur.⁴⁸ Additionally, the MHRT undertakes periodic reviews of its own decisions. For instance, the MHRT must review a treatment authority within 28 days after the authority is made and again within six months.⁴⁹ The MHRT also has appeal jurisdiction.⁵⁰ The above overview of the MHRT powers and responsibilities demonstrates that the MHRT is not a one-dimensional administrative body. Rather, the MHRT has a complex jurisdiction to review and make a variety of decisions regarding treatment and care of patients.

B *Tribunal Members*

Mental health law, including Queensland's Act, requires MHRT members to consider not only legal tests but also any medical and social implications for patients. As Dawson observes, the multidisciplinary structure of the legislation makes reliance on legal perspectives alone for its interpretation problematic.⁵¹ There are three types of tribunal members: a legal member,⁵² a medical member,⁵³ and a community member.⁵⁴ Community members have a wide variety of backgrounds and experiences but cannot be a lawyer or a doctor.⁵⁵ Generally, a community member is a non-government health care professional, a person of Indigenous heritage, or a person from a minority cultural and linguistic background.⁵⁶

The multidisciplinary nature of the MHRT is consistent with the *United Nations Mental Health Principles*. Principle 17 provides that signatory nations must establish a body that impartially and independently reviews domestic mental health law. Principle 17 states

⁴⁷ Ibid s 28(1).

⁴⁸ Ibid s 28(2); The MHRT only reviews a person's fitness for trial if the MHC held that a person's unfitness for trial was not permanent: See *Mental Health Act 2016* (Qld) s 21(5).

⁴⁹ Ibid s 413(1)(a)(b); See further s 413(1)(c)(d) for subsequent reviews.

⁵⁰ Ibid s 705(1)(c).

⁵¹ John Dawson, 'Judicial Review of the Meaning of Mental Disorder' (2003) 10(1) *Psychiatry, Psychology and Law* 164, 169–70.

⁵² *Mental Health Act 2016* (Qld) s 707(4)(a)(i); The member must be an admitted lawyer under s 716(2)(a) of the Act.

⁵³ Ibid s 707(4)(a)(ii); The member must be a psychiatrist under s 716(2)(b) of Act. However, if a psychiatrist is not readily available, then the member may be a doctor.

⁵⁴ Ibid s 707(4)(a)(iii).

⁵⁵ Ibid.

⁵⁶ Queensland Government, *About Our Members* (2017) Mental Health Review Tribunal <https://www.mhrt.qld.gov.au/?page_id=17>; The most recent data indicates that 17 per cent of members were of Indigenous heritage or were from a minority cultural or linguistic group: See Queensland Mental Health Review Tribunal, *Annual Report 2015–16* (4 October 2016) 7.

that the review body 'shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account'. It has been suggested that principle 17 may be interpreted as requiring tribunal proceedings to include a medical member.⁵⁷

For all proceedings under the Act, the MHRT must be constituted by at least three but no more than five members.⁵⁸ There must be at least a legal member, a medical member, and a community member for every proceeding.⁵⁹

Under its review jurisdiction, as it is in all proceedings, 'the tribunal must act fairly and according to the substantial merits of the case'.⁶⁰ The usual requirement for the Tribunal to be constituted by not less than three members can be dispensed with in three situations (hearing of an application for an examination authority, proceedings for a review of a treatment authority, or in an application for approval to perform electroconvulsive therapy) but only if the President is satisfied of both criteria specified in the Act.

There is no available data on the amount of single member hearings. However, this paper contends that every effort should be made to ensure all hearings have at least all three types of members. Each member serves a distinct purpose that compliments the expertise of each other member.⁶¹ Legal members are able to synthesise legal arguments and perform complex statutory interpretation which helps ensure the legality of MHRT decisions. Typically, legal members are deeply steeped in human rights law and therefore proactively aim to uphold patient rights. On the other hand, community members broaden the MHRT's practical and social experience, while also aiding patients in coping with the stresses of hearings.⁶² Community members can draw on their extensive experiences with the mental health regime to identify with patients' perspectives and are generally highly knowledgeable about the service standards and institutional practices

⁵⁷ Carney and Beaupert, 'Mental Health Tribunals: Rights Drowning in Un-"Chartered" Health Waters?' (2008) 13(2) *Australian Journal of Human Rights* 181, 198.

⁵⁸ *Mental Health Act 2016* (Qld) s 716(2); For an application for the approval to perform non-ablative neurosurgical procedure, the MHRT must be constituted by five members: See *Mental Health Act 2016* (Qld) s 718.

⁵⁹ *Ibid* s 716(2).

⁶⁰ *Ibid* s 733(2).

⁶¹ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 100–4.

⁶² *Ibid* 102.

of mental healthcare facilities, which enables them to uniquely address patient concerns during hearings. Finally, the medical member acts as a translator by ascribing clinical issues and terminology with legal meaning.⁶³

Given their expertise, medical members are uniquely qualified.⁶⁴ Even though there may be a registered psychiatrist on the Tribunal panel, the MHRT may not impose a condition or order that requires a person to take a particular medication or a particular dosage of medication.⁶⁵ Therefore, in this sense the medical member is, as Richardson and Machin state, an expert, witness, and decision-maker.⁶⁶

The pooling of differing professional skills and perspectives through the presence of all types of members is necessary to safeguard patients' rights and ensure that the MHRT satisfies its statutory obligation to be procedurally fair.⁶⁷ Further, on a practical level, the presence of all three types of members reduces the workload burden, which in turn assists the MHRT in meeting its statutory objective of conducting proceedings as efficiently as possible.⁶⁸ Therefore, if a hearing is not constituted by all three types of members, there is a risk that the hearing would be unfair.

Despite the strengths of multidisciplinary membership, it has been suggested that factors such as value judgments and stigma can undermine the fairness of tribunal hearings.⁶⁹ For example, one study looking at Australian Tribunals found that many patients feel stigmatised during hearings — believing members focus on 'the illness rather than the person'.⁷⁰ Furthermore, it has been posited that the multidisciplinary feature of mental health tribunals can adversely affect compliance with procedural fairness. Richardson and Machin claimed that disciplinary members may favour their own professional background. Although their sample was small, Richardson and Machin's study found that while the aim of a multidisciplinary tribunal is to bring different expertise together, in

⁶³ Ibid 96–8.

⁶⁴ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 96–8.

⁶⁵ See eg, ss 426, 447, 451, 478.

⁶⁶ Genevra Richardson and David Machin, 'Doctors on Tribunals: A Confusion of Roles' (2000) 176 *British Journal of Psychiatry* 110, 110.

⁶⁷ *Mental Health Act 2016* (Qld) s 733.

⁶⁸ Ibid s 733(3)(b).

⁶⁹ See Jill Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983* (Clarendon Press, 1989) 219.

⁷⁰ Terry Carney et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?' (2008) 26(2) *Law in Context* 125, 138.

practice, members may favour evidence from their own professional field and be suspicious of submissions derived from other fields.⁷¹ However, without further studies, and in the absence of any evidence relating to Queensland, it is not possible to assume the existence or extent of disciplinary bias in the MHRT.

The statutory criteria for various orders and authorities require consideration of medical evidence. Consequently, both legal and community members rely heavily on the opinion of the medical member. Richardson and Machin found in 2000 that medical members can undermine procedural fairness through the timing and extent of the release of their views, and at times they ‘over-influenced’ the panel as a whole.⁷² This concern is exacerbated if the medical member’s opinion is privately expressed during deliberations.⁷³ In order to minimise the risk of medical members dominating the decision-making process, tribunals should publish reasons for their decisions. Until the commencement of the Queensland Act, the MHRT was unable to publish its decisions. The MHRT now has the discretion to publish redacted reasons that ‘may be used as precedent[s]’.⁷⁴ The publication of decisions will enhance the transparency and public accountability of the MHRT — which in turn will better ensure that the MHRT does not arbitrarily exercise its power. Greater transparency and public accountability will promote public confidence in the MHRT as well as increase public awareness of mental health in general.⁷⁵

The above analysis shows that the medical, social, and legal factors statutorily required to be considered by the MHRT necessitates a multi-disciplinary membership and any possibility of ‘over-influence’ by medical members or indeed any professional is likely to be minimised by the publication of redacted reasons for decisions.

IV MHRT HEARING PROCESS

MHRT hearings aim to be more inquisitorial than adversarial in nature and can be described as quasi-inquisitorial proceedings.⁷⁶ Patients subject to a MHRT proceeding

⁷¹ Richardson and Machin, above n 66, 114.

⁷² *Ibid* 114-15.

⁷³ *Ibid* 112.

⁷⁴ *Mental Health Act 2016* (Qld) s 758.

⁷⁵ See generally Alison Smith and Andrew Cople, ‘Transparency in Mental Health: Why Mental Health Tribunals Should Be Required to Publish Reasons’ (2014) 21 *Journal of Law and Medicine* 942.

⁷⁶ See generally Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2.

must be given notice of their right to personally appear at the hearing.⁷⁷ This statutory right accords with article 14(1) of the ICCPR which provides that every person has the right to a fair and public hearing in any suit at law. The MHRT may still conduct all or a part of the proceeding entirely on the basis of documents if the patient does not wish to attend, or be represented by another person at a hearing, or if the patient is not fit to appear.⁷⁸ The MHRT is required to make every reasonable effort to ensure that patients who wish to attend are able to be physically present at hearings; however, in certain circumstances this is not possible. For instance, when performing its periodic review function of forensic orders, the MHRT uses videoconferencing for patients who are serving a custodial sentence.⁷⁹

The default position is that hearings are closed from the public.⁸⁰ The closed nature of MHRT hearings is consistent with the approach of most Australian States and Territories and other comparable international jurisdictions (England, Ireland New Zealand and Scotland).⁸¹ Therapeutic jurisprudence is often cited as a justification for the informal, non-adversarial, and closed nature of tribunal hearings — on the basis that this approach is therapeutically beneficial for patients.⁸²

Oral hearings are not only therapeutically beneficial but are also a vital process in upholding patients' legal rights.⁸³ However, the MHRT's ability to ensure fair hearings is undermined by two main issues: first, the lack of patient attendance and second, the inadequate duration of hearings.

A Patient Attendance

Patients must be present in order to realise the therapeutic benefits of the hearing process. Additionally, the presence of patients greatly improves the fairness of hearings as members are able to question patients about such matters as their desired treatment

⁷⁷ *Mental Health Act 2016* (Qld) ss 735–6.

⁷⁸ *Ibid* s 747.

⁷⁹ *Mental Health Act 2016* (Qld) s 746.

⁸⁰ *Ibid* s 741.

⁸¹ Smith and Caple, above n 75, 944.

⁸² *Ibid* 950.

⁸³ Carney et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?', above n 70, 129–30.

plan. Patient attendance therefore accords with the supported decision-making model prescribed by the Act.

The positive effect of patient attendance at hearings is illustrated by the fact that a patient who attends a hearing is 10 times more likely to have a treatment authority revoked than a non-attending patient.⁸⁴ In the context of Queensland's MHRT, this finding supports Carney, Tait, Perry, Vernon, and Beaupert's assertion that the fairness of tribunal hearings is dependent on the opportunity of patients to participate during hearings.⁸⁵

Despite the importance of patient attendance, the MHRT's most recent annual report indicates that only 14.4 per cent of inpatients and 27.3 per cent of outpatients attended their hearing.⁸⁶ These low-attendance figures pose a serious challenge for the MHRT to uphold patient rights and make decisions in the best interests of patients' welfare.⁸⁷ The low attendance of hearings is a result of a number of factors. One primary reason is the difficulty in notifying patients of their hearing. This difficulty is illustrated by the fact that the MHRT receives up to 40 'return to sender' hearing notifications per week.⁸⁸ Anecdotal evidence indicates that the deficiency with postal communication is a result of the high mobility of the patient population, increasing homelessness, and reluctance by some patients to open official letters from the government.⁸⁹ In order to address this challenge, the MHRT intends to implement two measures. First, the MHRT will use 'priority post for all notices of hearings and decisions to ensure the statutory timeframes for patient notification can be met'.⁹⁰ Second, the MHRT will make every effort to communicate important information directly to patients' case managers and clinical teams.⁹¹ In its 2015/16 annual report (the final report under Queensland's previous *Mental Health Act*), the MHRT stated: 'It is envisaged that the new legislation will generate much higher

⁸⁴ Queensland Mental Health Review Tribunal, above n 56, 13.

⁸⁵ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 308–16.

⁸⁶ Queensland Mental Health Review Tribunal, above n 56, 17.

⁸⁷ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 140–2, 274–307.

⁸⁸ Queensland Mental Health Review Tribunal, above n 56, 12.

⁸⁹ *Ibid* 12.

⁹⁰ *Ibid* 13.

⁹¹ *Ibid*.

attendance from supporting networks and clinical teams and work is underway to facilitate this during the implementation activities'.⁹²

It remains to be seen whether the commencement and implementation of the Act in March 2017 has increased patient attendance. The MHRT should continue to engage with relevant stakeholders in an effort to find areas of procedural and administrative improvement that will increase patient attendance in accordance with the objectives of the Act — namely the promotion of patient rights through the supported decision-making approach.

B No Queensland Data on the Duration of Hearings

There is a need for further research into the duration of Queensland hearings and whether duration has any bearing on outcomes. While there has been research of this kind into other Australian tribunals, there is no available data about Queensland. This may be significant because Carney and Beaupert found that in other Australian jurisdictions the average mental health tribunal hearing time was one-fifth the hearing time of British mental health tribunals.⁹³ In a related study, Carney found that the median hearing time for Australian mental health tribunals (excluding Queensland) was approximately 20 minutes.⁹⁴ Carney compared this figure to the two-hour median hearing time for the Social Security Division of the Administrative Appeals Tribunal.⁹⁵ Given the complexity of the statutory tests, the sensitiveness and diversity of the patients, and the significance of the legal rights affected by decisions, shorter hearing times may run the risk of undermining fairness. In contrast, longer hearing times carry the potential to better realise the legal, social, and medical goals of review.⁹⁶

However, it should not be implied from this research that longer hearings do not occur or that complex cases do not receive the necessary time to be heard. As Carney explains, 'complex cases do receive the time MHTs believe is warranted, sometimes extending to several hours'.⁹⁷ Still, 'for every extension beyond the median duration of 20 minutes,

⁹² Queensland Mental Health Review Tribunal, above n 56, 13.

⁹³ Carney and Beaupert, above n 57, 193.

⁹⁴ Carney, 'Australian Mental Health Tribunals — 'Space' for Rights, Protection, Treatment and Governance', above n 41, 3.

⁹⁵ *Ibid.*

⁹⁶ Carney and Beaupert, above n 57, 196.

⁹⁷ Carney, above n 41, 3.

there is another case (or cases) which ran for less than the median period'.⁹⁸ In the absence of any available data about Queensland, it is impossible to know whether the MHRT fits the pattern of the other Australian jurisdictions. Therefore, there is a need for further research.

V LEGAL REPRESENTATION AND MHRT HEARINGS

A Overview

Patients have a statutory right of 'support' during hearings.⁹⁹ Specifically, a patient can be represented by a nominated support person, a lawyer, or another person, such as a family member or carer.¹⁰⁰ Alternatively, patients can represent themselves and may choose to be accompanied by one member of the patient's support network.¹⁰¹ Representatives of patients are required to represent a patient's views, wishes, and preferences to the greatest extent possible as well as act in a patient's best interest.¹⁰²

In an effort to increase the number of patients who are legally represented in MHRT hearings, the Act now requires patients be legally represented if the hearing concerns: a patient who is a minor, an application for ECT, a review of a patient's fitness for trial, or if the Attorney-General is represented.¹⁰³ Additionally, the MHRT now has the power to appoint legal representation for a patient if it considers it to be in the patient's best interests.¹⁰⁴ An adult patient can waive the right to be represented if the patient has legal capacity.¹⁰⁵ In this situation the person would have the necessary capacity if they have the 'ability to understand the nature and effect of a decision to waive the right, and the ability to make and communicate the decision'.¹⁰⁶

If the Tribunal decides 'it would be in the person's best interests to be represented at the hearing' or if the Tribunal is required to appoint a representative for the patient under s

⁹⁸ Carney, above n 41, 3.

⁹⁹ *Mental Health Act 2016* (Qld) s 739.

¹⁰⁰ *Ibid* s 739(1).

¹⁰¹ *Ibid* s 739(2); 'Support network' is defined as a patient's nominated support person or a patient's family, carer, or other person: See *Mental Health Act 2016* (Qld) s 739(4).

¹⁰² *Ibid* s 739(3).

¹⁰³ *Ibid* s 740.

¹⁰⁴ *Ibid* s 740(2).

¹⁰⁵ *Ibid* s 740(4).

¹⁰⁶ *Ibid* s 740(5).

740(3), the legal representation is at no cost to the patient.¹⁰⁷ It would be unfair and impractical to require patients to pay for the mandatory appointment of legal representation considering patients' unique vulnerability. Given the vulnerability and usually incapacitated state of patients, in order to ensure proper access to justice, it is necessary that patients are adequately supported via competent representation. While other support persons, such as family members, can provide moral support, the complexity of mental health law means that in general patients should be legally represented in order to ensure a fair and just outcome.

B Legal Representation: Advantages

The recent measure to require legal representation for patients should help to ensure that the MHRT fulfils its purpose to uphold both the welfare and legal rights of patients. Lawyers might 'fully investigate and comprehend a patient's circumstances prior to' a hearing 'leading to critical decision-making between counsel and client as to how best to proceed'.¹⁰⁸ They might also help 'the person to present' any 'counterbalancing' information concerning their medical history or an agency's representation.¹⁰⁹

Lawyers are able to cogently advocate on behalf of patients as well as raise patient concerns with the MHRT.¹¹⁰ In most matters, patients are unable to effectively advocate for themselves.¹¹¹ Patients' inability to effectively self-advocate is attributable to numerous factors, which include but are not limited to: poor communication skills, a general fear of authority, sedative effects of medication, and other cultural or social barriers. Advocacy by lawyers allows patients to participate in the decision-making process about their treatment plan. Through legal representation, the focus of hearings is not only on the statutory criteria of the relevant order, but also the issues of most concern for patients.¹¹² Beaupert and Vernon assert that analysing statutory criteria is the primary focus of tribunal hearings rather than addressing patient concerns. The

¹⁰⁷ Ibid s 740(6).

¹⁰⁸ Fleur Beaupert, 'Mental Health Tribunal Processes and Advocacy Arrangements: "Little Wins" Are No Small Feat' (2009) 16(1) *Psychiatry, Psychology and Law* 90, 96.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 98.

¹¹¹ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 251.

¹¹² Fleur Beaupert and Alikki Vernon, "'Odyssey of Hope": The Role of Carers in Mental Health Care' (2011) 18(1) *Psychiatry, Psychology and Law* 44, 57.

disproportionate focus on statutory criteria is a reason why, as Grundell posited, the positive therapeutic potential of administrative review was under-realised.¹¹³ It has been found that patients believe that tribunals listen to their case more when it was being presented by a legal advocate.¹¹⁴ Therefore, lawyers advocating for patients not only enhances patients' ability to actively participate in hearings but also improves the therapeutic benefits of the review process.

While informality, flexibility, and efficiency are desired in MHRT hearings, these features may result in the inadequate testing of medical evidence.¹¹⁵ A failure to adequately test medical evidence would result in an unfair hearing. Studies have found that tribunals often defer to medical opinion even when the preponderance of evidence showed it to be unsubstantiated.¹¹⁶ A patient's legal representative would be able to argue against the admission of irrelevant or unreliable evidence. Further, a patient's legal representative would be able to question the validity of the treating practitioner's medical report and ensure that the practitioner was able to justify the submitted treatment plan.¹¹⁷ In short, the provision of legal representation would ensure that the MHRT more rigorously tests evidence.

Studies indicate that overall mental health tribunal hearings were longer when patients were legally represented.¹¹⁸ This is because legal representatives would ensure that patient concerns are raised, that sufficient regard is made to statutory criteria, and that medical evidence is properly tested — all of which would naturally lengthen the average duration of hearings.

Increased legal representation also increases the level of systemic advocacy that helps positively change community culture and raises awareness of the needs of people with mental conditions. In Victoria, the Mental Health Legal Centre embraces such a systemic

¹¹³ Erica Grundell, 'Psychiatrists Perceptions of Administrative Review: A Victorian Empirical Study' (2005) 12 *Psychiatry, Psychology and Law* 68, 79; See also Erica Grundell, 'Burden to Benefit? Psychiatric Perspectives on the Impact of Administrative Review in Victoria, Australia' (Paper presented at the 30th Congress of the International Academy of Law and Mental Health, Padua, Italy, June 2007).

¹¹⁴ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 253.

¹¹⁵ Carney et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?', above n 70, 137–8.

¹¹⁶ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 301.

¹¹⁷ *Ibid* 251, 253.

¹¹⁸ *Ibid* 255.

advocacy role, enabling it to openly criticise the processes of the Victorian Legal Aid Commission.¹¹⁹ The implementation of Queensland's new Act may also result in the establishment of a similar body performing systemic advocacy that highlights areas of future reform. Irrespective of whether a formal advocacy body is established, increased legal representation will ensure that MHRT hearings are more transparent and accountable. This is because lawyers who regularly appear before the MHRT can identify and raise procedural issues with professional bodies, advocacy and welfare groups, the Queensland Government, and the MHRT itself.

This paper argues that legal representation does not infringe patients' rights of self-determination or autonomy as lawyers cannot legally substitute their clients' will with their own. Rather, lawyers extend the communicative capacities of patients during hearings.¹²⁰ Consequently, the provision of legal representation for patients fulfils the aims of supported decision-making, and this is supported by the fact that lawyers are required to follow a client's lawful, proper, and competent instructions.¹²¹ However, an overwhelming number of patients do not have legal capacity and therefore would not be competent to provide lawful or proper instructions. While representing an incapacitated patient may not amount to professional misconduct or unprofessional conduct, lawyers are nevertheless placed in a precarious ethical position.

It has been found that tribunals are critical of lawyers who blatantly follow incompetent instructions — yet these criticisms were directed more at private lawyers rather than lawyers who operated frequently in mental health law.¹²² Furthermore, lawyers are required to act in their client's best interests.¹²³ Therefore, lawyers face a further ethical dilemma as not all instructions are in the best interests of patients.¹²⁴ Specifically, some

¹¹⁹ Carney et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?', above n 70, 130.

¹²⁰ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 241.

¹²¹ Queensland Law Society, *Australian Solicitors Conduct Rules* (1 June 2012) r 8.

¹²² Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 249.

¹²³ Queensland Law Society, *Australian Solicitors Conduct Rules* (1 June 2012) r 4.1.1; *Mental Health Act 2016* (Qld) s 739(3).

¹²⁴ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 250.

lawyers noted the difficulty of having patients not remember or change their instructions during the hearing.¹²⁵

There is strong agreement in the legal profession that more resources are needed to allow for more consultative time with patients prior to hearings. Sufficient preparation time with patients is necessary to ensure that lawyers are able ascertain competent instructions and to properly explain the MHRT's decision-making process and its implications to patients.¹²⁶ In short, sufficient preparation is vital to ensure the reform to mandatorily appoint legal representation is effective in achieving fairer hearings.

Under Queensland's newly implemented Act, the number of legally represented patients will significantly increase. In order to address the ethical dilemmas faced by lawyers and to ensure they are properly equipped to act in the best interests of patients, necessary resources, training, and specialised guidelines must be established — a need which the MHRT President has acknowledged.¹²⁷

C Legal Representation: Disadvantages

In essence, it is contended that legal advocacy is incompatible with the MHRT's institutional architecture and therefore should not be permitted. The principal argument against legal representation is that the adversarial approach taken by some lawyers can be contrary to the spirit of Tribunals as informal, flexible, and hybrid administrative arbiters.¹²⁸ Research concerning the ACT, NSW and Victorian tribunals observed that lawyers at times found it difficult to adopt a less adversarial approach in tribunal hearings given their training and experience in courts.¹²⁹ Adversarial advocacy, whether intended or not by lawyers, may cause medical practitioners to become combative during hearings, which could erode the collaborative nature of hearings that aim to achieve a result in the patient's best interest.¹³⁰

¹²⁵ Ibid 249.

¹²⁶ Ibid 247.

¹²⁷ Queensland Mental Health Review Tribunal, above n 56, 7.

¹²⁸ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 252.

¹²⁹ Ibid 256, 292.

¹³⁰ Ibid 252.

Samuel Jan Brakel claims legal representation is a potentially 'excessive' measure that is based on a false analogy with criminal law.¹³¹ Brakel further contends that the 'adversarial inclination' represented by lawyers may actually interfere with promoting therapeutic outcomes.¹³² The provision of legal representation for patients may result in an 'arms race' where medical practitioners also appoint legal advocates. There is a risk that legal advocates representing both patients and practitioners could result in hearings focusing excessively on legal arguments which may lead to, as Treffert describes, patients 'dying with their rights on'.¹³³

Since the MHRT is required to assess a patient's mental and legal capacity,¹³⁴ legal representation could be viewed as counterproductive to the MHRT's ability to assess capacity and to directly engage with patients.¹³⁵ Furthermore, resource constraints could lead to inadequate training for lawyers and insufficient preparation time with patients. Perlin characterised this issue as 'inexpert representation' and postulated that such representation would cause more harm than good for patients.¹³⁶

VI RECOMMENDATIONS

There is no infallible method to decide or review the course of treatment for patients; however, legal representatives can help ensure that administrative arbiters, such as the MHRT, uphold the rights and welfare of patients. This paper therefore supports the recent statutory change that will see an increase in the number of legally represented patients. Lawyers are best placed to represent and navigate patients through the complexity of the hearing process. Nevertheless, lawyers who represent patients must undertake necessary training in order to effectively communicate and fully understand the unique needs of patients. This training should focus on enhancing greater patient participation

¹³¹ Samuel Jan Brakel, 'Searching for the Therapy in Therapeutic Jurisprudence' (2007) 33 *New England Journal on Criminal and Civil Confinement* 455, 469.

¹³² *Ibid.*

¹³³ See Darold Treffert, 'Dying with Their Rights On' (2006) 130(9) *American Journal of Psychiatry* 1041, 1041.

¹³⁴ See *Mental Health Act 2016* (Qld) s 3(1)(a).

¹³⁵ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 253.

¹³⁶ Perlin, above n 14, 26–9; See also, Carney, et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?', above n 70, 142.

and respect for self-determination as well as on employing both adversarial and inquisitorial advocacy styles necessary for collaborative decision-making processes.

Social workers are considered part of the treating medical team and are usually employed by the government.¹³⁷ Social workers are therefore generally not suited to providing objective advice — as they are perceived to be too closely connected with the treating practitioners. Nevertheless, social workers and case managers must be engaged by both legal representatives and the MHRT in order to communicate important, and usually statutorily mandated, information to patients and ensure patient attendance at hearings. Equally, support persons must be better engaged in order to ascertain patients' views and preferences and thereby realise the supported decision-making approach. Support persons usually lack expertise in advocacy and would therefore not be a superior substitute to legal representation. Nevertheless, support persons should still be strongly encouraged to attend hearings and provide a statement to the members regarding the health of patients. Support persons are instrumental in achieving a therapeutically beneficial hearing for patients. This is because support persons alleviate patient anxieties and help patients understand the hearing process and its implications. Additionally, support persons can aid the MHRT by providing critical evidence in the form of a testimony. Beaupert and Vernon found that there is reluctance amongst some support persons to attend hearings because 'they are concerned about saying things in front of the [patient], such as how the patient is unable to look after themselves, as this may place unnecessary stress on their relationship'.¹³⁸ This concern could be resolved by allowing support persons to make written submissions to the MHRT — thus allowing support persons to *support* patients at hearings without compromising their relationship with patients.

Within the broader mental health regime, there are patient advocates and consultants as well as community advocates.¹³⁹ While some of these roles are performed by employees of government agencies and non-government organisations, many are volunteers.¹⁴⁰ Community advocates are therefore not a suitable substitute for legal representation as

¹³⁷ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 283.

¹³⁸ Beaupert and Vernon, above n 112, 58.

¹³⁹ Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?*, above n 2, 257–9.

¹⁴⁰ *Ibid.*

the serious duty of representing, assisting, and advising patients is generally too onerous for volunteers. Lawyers, on the other hand, are required to act independently and in accordance with stringent professional duties. Further, lawyers have experience in providing clients with multiple legal options and recommending the best alternative without substituting a client's decision. Therefore, lawyers are better placed to advocate for the interests and welfare of patients — especially in complex cases.

Despite the benefits lawyers can bring to hearings, the customary adversarial approach adopted by lawyers is inappropriate for the MHRT setting. It is recommended that a mixed model of advocacy be universally embraced by lawyers for MHRT hearings. A mixed model of advocacy employs adversarial, inquisitorial, and collaborative styles and includes elements of self-advocacy and systemic advocacy.¹⁴¹ Crucially, it is also recommended that lawyers do not simply follow client instructions but also engage with a variety of stakeholders such as carers, family members, and health care professionals. This approach to advocacy is characterised as 'the middle ground' and the 'delicate balance test' which encompasses the best qualities of both the adversarial and inquisitorial approach.¹⁴² The middle ground approach should not be regarded a strict and rigid approach but rather a flexible and ideal model for advocates to aspire to continually practice.

In order for legal representation to enhance the fairness of hearings, lawyers must be cognisant of patients' unique needs as well as be more nuanced in their advocacy style when appearing before the MHRT. Lawyers should therefore adopt the middle ground approach, and this should be facilitated through the provision of specialised training for those lawyers who do represent patients. Finally, in order to promote consistency, transparency and public accountability as well as increase the MHRT's normative impact, the MHRT should regularly exercise its discretion to publish redacted reasons for decisions. The body of precedent that will grow from this measure will guide, as persuasive authority, both lawyers and the MHRT toward consistency in upholding legal rights and patient welfare.

¹⁴¹ Carney et al, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?', above n 70, 125, 141–3.

¹⁴² Ibid 131.

VII CONCLUSION

Mental health tribunals, including Queensland's MHRT, have a complex jurisdiction to make and review decisions regarding the treatment and care of people with mental conditions. When exercising its power, the MHRT must balance several competing rights and interests. In essence, the MHRT must protect patients' legal rights while ensuring patients' welfare is not harmed. While the MHRT performs a crucial role in preventing the arbitrary detention and forced treatment of some of the most vulnerable community members, there is minimal academic analysis of the MHRT — especially regarding its unique relationship with the MHC.

There is near universal academic agreement that oral hearings are fairer than proceedings on the papers. However, the fairness of oral hearings may in some instances be undermined by low patient attendance, the potential for inter-disciplinary flaws, and where there is an unreasonably short hearing duration. Queensland's recent reform to increase the number of legally represented patients will minimise the potential for any risk from these sorts of factors. That is not to say that social workers, support persons, and lay advocates do not have a role to play in MHRT proceedings — as their continued engagement through proceedings is crucial in ensuring both fair and therapeutically beneficial outcomes — but that in legally, complex, and "high-stakes" cases, specialist lawyers are better placed to advocate on behalf of patients. In order to avoid MHRT hearings from becoming too adversarial and therefore less therapeutically beneficial for patients, lawyers who represent patients must be provided with necessary professional training that equips them to effectively communicate and advocate for the needs and wishes of patients. Further, specific ethical guidelines must be drafted that allow for lawyers to act upon instructions from legally incapacitated clients. Greater legal representation will likely enhance the fairness, transparency, and public accountability of MHRT processes and decisions as long as legal representatives adopt the 'middle ground approach'. Queensland's new mental health regime should be welcomed as it strengthens patient rights, uses non-stigmatising language, and better achieves the supported decision-making approach that is promoted by international bodies, such as the United Nations. The reform to mandatorily appoint lawyers for patients in prescribed circumstances should be regarded as another step in better regulating civil commitment.

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RAPE IN SOUTH KOREA: BREAKING THE SILENCE

AIRDRE MATTNER*

This article is a personal recount of being drugged, abducted, and raped in a foreign country. The expectation after reporting this horrific experience to the police was that justice would be served, following a thorough, effective investigation. However, this was not to be, as this article indicates. Because of the systemic difficulties encountered, I resorted to taking on both the investigation of my case and the police themselves in my pursuit of justice, leading to significant and unprecedented outcomes.

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I INTRODUCTION

This article continues the efforts I have been undertaking to break the social silence of rape, especially in South Korea, and to enable women to make informed decisions in a context of respect. Based on first-hand experiences, this article argues for further reform of Chapter 12 of the South Korean Penal Code and the 1994 *Act on the Punishment of Sexual Assault Crimes and Protection of Victims*. I also argue for reform of the South Korean police's approach to rape cases based on my experience of events.

In September 2015, having just turned 25 years of age, I was carefree, adventurous, and independent. An avid traveller and qualified teacher, I had just moved from Adelaide, my home town in Australia, to Nagasaki in Japan to teach English there. I had fallen in love with Japan ever since visiting for the first time with my mother the year before and couldn't wait to explore both Japan and other countries in Asia. Living within a couple of hours of Fukuoka, I had easy access to neighbouring countries like China, Taiwan, and South Korea. It was during my first international holiday, since moving to Japan, that my life changed forever.

II FROM JAPAN TO SOUTH KOREA

Seoul, South Korea, immediately attracted me as a holiday destination. Taking less than ninety minutes from Fukuoka by plane, and costing less than A\$120, it was ideal for a quick, cheap getaway. Many other English teachers in Japan had visited cities like Seoul and Busan, so I had been given lots of recommendations for places to shop, eat, and sightsee. I had visions of a super high-tech metropolis, with K-Pop idols and famous cosmetic stores on every street corner. The reality was not too far off — I saw semi-famous K-Pop idols performing to screaming fans on a small stage near a shopping centre and certainly an abundance of skyscrapers, flashy lights, and cosmetic stores.

Initially, I went sightseeing with my boyfriend and a close friend. We visited Lotte World — one of the various theme parks in Seoul — shopped, took a cruise down the Han River at night, and went out for dinner together with some of my boyfriend's Korean friends. We had a blast, and both my boyfriend and my friend were disappointed to have to leave before I did to go back to work in Japan. Having a few extra days to myself, I had planned a multitude of things to do. I had travelled alone a few times before in other countries, so

the idea certainly did not worry me. On my first day alone, I shopped for make-up, visited quaint cafes, and spent hours wandering the grounds of Gyeongbokgung Palace, watching the guard performances, and taking photos.

I arrived back at my hostel that day (Friday 25 September) in the early evening. I had been told about a pub crawl, supposedly a great event to see some of Seoul's nightlife in a safe group environment and an opportunity to meet many other travellers. Both my friend and boyfriend were a little concerned (safety-wise) about me going out alone but agreed that it seemed like a wise idea to join a group such as this, as opposed to going solo. I was not too worried as I had heard, and assumed, that Seoul was a safe, tourist-friendly city.

On my way to the first bar during the pub crawl, at around 8:30pm, I was looking forward to meeting some other travellers and having a couple of drinks after a long day of exploring the city. After some initial confusion, I found the bar down a side street near a park. I paid the pub-crawl organiser, received my pub-crawl wristband, and was introduced to a couple of other Australians, as well as two female expatriates who lived locally — one from America and one from the United Kingdom ('UK').

By the time we got to the second bar, a slightly larger venue, the number of pub crawlers had easily tripled, and we were certainly filling the space. I was having a great time, talking and laughing with my new friends while enjoying the music.

The third stop was a playground and park space. The pub-crawl organisers passed around what I was told was 'Soju', an extremely strong Korean liquor similar to vodka. Participants were drinking it from cups or in some cases straight from bottles. I had drunk a couple of drinks by that point, purchased at the first two bars we had been at, and was not interested in partaking in this Soju drinking. I had no desire to be intoxicated (though many others were already) and instead decided to wait until the next bar to buy one or two more drinks there. I watched and laughed at my new friends making faces of disgust as they drunk the straight Soju and chatted to other pub crawlers.

After initially lining up for fifteen or so minutes, we finally made it in to the third venue of the night. It was less of a bar and more like a small club. Our pub-crawl group changed from being relatively quiet to just about bursting at the seams. Trying to get to the bar to get a drink was a mission in itself due to the sheer volume of people, so I was quickly

separated from the friends I had made earlier. Instead, I was striking up a conversation with the girls who were lining up to get a drink next to me. There were three or four of them, all Korean, who spoke very good English. We chatted about life in Japan versus life in South Korea, each bought a drink, and then danced for a while. This is the last clear memory that I have of being there.

III DRUGGED, ABDUCTED, AND RAPED

The next thing I remember is being in the back of a taxi. I was violently ill, throwing up everywhere, and could barely hold my head up. I knew immediately that something was very wrong as I had not drunk anywhere near enough to be in that kind of state. There was a man next to me in the back of the taxi, on my left side. He was giving instructions to the taxi driver about where to go. As I was slipping in and out of consciousness, I mustered all the will and energy I had left, managed to get my phone out and find the address of my hostel, then showed it to the taxi driver. I begged him to take me there. The man next to me immediately grabbed my phone, held onto it, and told the taxi driver to go somewhere else.

The next memory I have is of being completely naked, in a hotel room, with the man from the taxi on top of me and trying to force himself inside me. Again, I felt extremely nauseous and dizzy, and struggled to hold my head up and keep my eyes open. I tried to push him away and then blacked out again.

When I finally regained consciousness the next morning, it was around 10:40am. I found myself naked, on the bed in the hotel room. I still felt extremely dizzy and weak. My immediate fear was that there was still someone else in the room somewhere. I managed to crawl off the bed and saw that my white dress was lying in one corner of the room, ripped open, and my blood-stained underwear was in the other corner. The bloody tampon that had been inside me was now discarded on the floor. I pulled my dress on, but it gaped terribly in the front from having all the buttons ripped off. I found my bag on the floor and noticed that my phone was in it. After having had my phone taken from me by the man in the taxi, I had assumed I would never see it again.

I quickly checked the bathroom. Nobody appeared to be in the room. Shaking and in total shock, I managed to pull my shoes on. I opened the door to the room and started

stumbling down the corridor, but after a few steps I realised my dress was on inside out. I stumbled back into the room, corrected it, and again started down the corridor, trying to hold the dress closed. As I was leaving I noted the room number so that I could inform the police.

Walking from the hotel room to the street, I did not encounter a single staff member nor anything that looked like a reception. The only person I saw was a lady out on the street collecting some trash. She looked like a cleaning lady and did not notice me.

The tears started randomly and uncontrollably, in floods, as I ran down the street. The adrenaline of the obvious “flight” response I was experiencing was the only thing propelling my body forward. Two Caucasian men stood a little further down the street on the left, drinking. One called out to me: ‘Are you ok?’ I obviously looked like I was in quite a state. He walked over to me and looked me up and down worriedly. I told him ‘no’ in between sobs and asked him where we were. ‘Itaewon’ was the response. I thanked him and ran off down the road. At the T-junction at the end of the street, I saw a taxi. I waved it down, collapsed inside, and gave the driver the name and address of the hostel where I was staying. I soon realised that I did not have any money to pay for the taxi, as the man had taken it from my bag. I called my friend (the one who I had been travelling with earlier) and managed to stammer an explanation of the situation in between sobs. At this point, the taxi driver passed me some tissues. My friend was understandably shocked and upset. He told me to phone the hostel and tell them what had happened. I did so, and the man who answered the phone told me that the lady who owned the hostel would pay for the taxi for me.

After what felt like hours, we finally arrived at the hostel. I asked the taxi driver to wait a moment and ran in to the reception, collapsing into the arms of the woman who was waiting there. She guided me to a chair and went out to pay for the taxi. When she returned, she took me to one of the private single-person rooms at the hostel, so I could lie down. Despite still feeling extremely weak and dizzy, I could not rest. My mind was still racing as I was still in shock. I phoned my boyfriend and my friend again; my boyfriend called one of his Korean friends to come and see me at the hostel. Both my boyfriend and my friend were extremely distressed and felt terrible for having let me stay on my own. However, I was adamant that it was not their fault whatsoever; it had been

entirely my own decision. I obviously had no clue things would happen in the way that they did.

IV REPORTING MY RAPE IN SOUTH KOREA

The woman from the hostel took me to a hospital. From there, we were re-directed and finally made it to the “One-Stop” hospital that would later “treat me”, “collect evidence”, and take my statement. Despite being a designated unit for sexual assault victims, it seemed quite disorganised. Initially, the hostel owner and my boyfriend’s friend explained the situation, specifying that I believed I had been drugged and raped. None of the staff spoke any English, so a volunteer translator was called to assist. When she eventually arrived, the police officer in charge briefly asked a few further questions via the translator. We were then told to wait for quite some time so that a rape kit could be obtained, as I had made it clear that I wished to formally complete this process and make a report. During an subsequent interview, the officer acknowledged that she was not trained to fulfil the role that she had undertaken during this whole process, as the woman who should have completed this was already busy with another sexual assault victim. This officer then sent me to an adjoining room, where I was told to sit in a chair. My legs were put in stirrups and a curtain shielded my body from my view. The translator was not permitted to enter this room or be present during this process, and neither of the women examining me and collecting evidence said anything to me. From what I could feel, I was very briefly scraped, swabbed, and prodded in and around my genitals and chest area. Despite telling the officer (via the translator) that my anus was very sore and I believed I had also been anally raped, I later discovered that no evidence or photographs were ever taken of this area.

After these procedures, I was taken into a separate room to be interviewed and to give my report to the police officer. My boyfriend’s friend was allowed to sit in the corner of the room for moral support but was not allowed to speak or interact with me. As soon as we began, I gave a detailed description of the man, as well as the full schedule of the pub crawl I had been on (which showed each bar and the times they were visited) and the contact details of the organiser. However, throughout the whole interview I felt like I was the criminal — that I had committed a crime and must be interrogated and was treated accordingly. I was asked numerous times to describe what I was wearing — the length of

my dress, how much skin I had exposed. I was asked numerous times how much alcohol I had drunk and how much alcohol I usually drank — daily, weekly, monthly. In their 2016 paper, Shaw et al support this view of alcohol being an influencing factor for general police mentality, finding that ‘cases in which the victim used drugs or alcohol during or prior to the assault’ were ‘less likely to have their cases classified as rape, a suspect identified or arrested, and be referred to the prosecutor’ and thus ‘more likely to be deemed unfounded’.¹ This serves as a protection for the patriarchy and ideology that men are not to blame for their behaviour in cases of sexual assault, nor are they responsible for their actions; instead the fault lies with the woman for drinking too much, wearing too little, or letting herself get into that kind of situation.

V THE CONTEXT OF RAPE IN SOUTH KOREA

I later found out that this kind of repeated questioning was horrifyingly common in rape cases in South Korea with Fielder, a Professor of Law at Wonkwang University, stating that ‘if a woman was wearing a short skirt or a low cut blouse prior to the attack she will be blamed for having “lit a fire” that a man cannot control and the result of which he cannot be blamed for’.² This observation reinforces the notion of victim blaming which is supported by the societal belief that women, who are believed to be scantily clad, are “asking for it” and deserve any kind of assault they become victims of.

More shocking still in South Korea is the ‘oft cited concept that rape is merely a man’s mistake that should be forgiven’.³ The perception of rape as being both forgivable and commonplace does nothing but trivialise and dismiss this as a crime in South Korea. The combination of these factors results in fewer rapes being reported or prosecuted lightly, if at all, and cases most commonly settled with the victim being pressured by both the legal system and the rapist/their family to accept a ‘monetary settlement ... effectively in return for services rendered’.⁴ One such example is a case in 2013 where, ‘despite the man’s confession, the woman [said] a police officer tried dissuading her from pressing charges’, with the officer stating ‘he would only spend six months in jail ... He was drunk

¹ Jessica Shaw, Rebecca Campbell and Debi Cain, ‘The View from Inside the System: How Police Explain Their Response to Sexual Assault’ (2016) 58 (3–4) *American Journal of Community Psychology* 446, 448.

² Daniel Fielder, ‘Redefining Rape in South Korea’, *Korea Herald* (online), 24 April 2012 <<http://www.koreaherald.com/view.php?ud=20120424001151>>.

³ *Ibid.*

⁴ *Ibid.*

and won't do it again'.⁵ This example provides an insight into South Korean society, which has a history rooted in Confucianism that esteems men and devalues women.⁶

At one point after the physical examination, an officer pointedly asked during interrogation: 'How do you even know you were raped when you don't accurately remember the moment of penetration?' I stared at her in disbelief, before slumping over the interview table in total exhaustion and desperation, an intravenous drip still attached to my arm.

VI INVESTIGATION OF RAPE IN SOUTH KOREA

Around twelve hours later, after multiple trips between the police and hospital sections of the building, I eventually made it back to my hostel. The owner led me back to the private room I had been in earlier, but I told her I was too frightened to sleep alone. I went back to my bed in the female dormitory I had been in previously and collapsed quickly, weak with fatigue now that the adrenaline that had flooded me had well and truly left my body.

The next day, I was awoken by some of the other girls in the room chatting. They were discussing their plans for the evening. One suggested a club she had heard was good. I pulled the privacy curtain on the bunk back and looked out at them. Noticing that I had awoken, one of the girls stared at me with concern. I realised it was Sunday, and I was still wearing the remains of the make-up on from preceding night — now smudged and tear-stained. I still had my hospital band around my wrist. 'Are you okay?' she asked me. 'Not really,' I mumbled truthfully. 'Look out for each other tonight.' I pulled the curtain back across the bed and slipped into sleep again. Sometime later, I awoke again and checked my phone. I immediately realised it was almost evening and I had a number of messages from the friends I had informed about the situation, including my boyfriend, who were all worried sick. I replied to them and then noticed that one of my notifications was a friend request. Despite the fact that the profile picture accompanying this request

⁵ Jason Strother, 'South Korea Struggles to Confront Stigma of Sexual Assaults', *Wall Street Journal* (online), 25 October 2013 <<https://www.wsj.com/articles/south-korea-struggles-to-confront-stigma-of-sexual-assaults-1382601988?tesla=y>>.

⁶ Kyungja Jung, 'Practising Feminism in South Korea: The Issue of Sexual Violence and the Women's Movement' (2003) 29(2) *Hecate* 261; Judy Postmus and Sur Ah Hahn, 'Comparing the Policy Response to Violence against Women in the USA and South Korea' (2007) 50(6) *International Social Work* 770.

was very small, I immediately recognised the face. It was the man who had raped me.

Adrenaline surged through me for the second time in as many days, and I lurched out of bed and down to reception to tell the hostel owner. I was shaking and stammering so much that I could barely get the words out. 'That's *him*', I told her, wide eyed and breathless. She immediately phoned the police and told them what had happened. They instructed her to tell me to email them screenshots of the request and of his profile. I immediately did so, using the email address of the female police officer who had interviewed me — the one point of contact they had given me for all matters concerning my case. I could not believe it. Why would he do this? Who would be so brazen? It made no sense to me. I realised with terror that he had probably found out a lot of information about me when he took my phone off me in the taxi. I wondered if he would try to find me, to come after me again. Later I realised that this tactic — adding the victim on Facebook or contacting them after the offence — was often used for two main reasons: either to send a threatening message to them (I know who you are, do not try anything stupid) or to make it appear as though there was a relationship between the victim and attacker (thus making the act appear consensual).

Despite my shock and disbelief, a tiny sense of relief came over me. Surely this would be enough to identify the man, catch him, prosecute him, and lock him up. Again, my assumption could not have been further from the reality of what was to come.

VII HOPE FOR A PROSECUTION

The next day, I boarded the plane to fly back to Japan. Despite travelling all my life, I have never been a good flier. I always felt a sense of fear whenever I flew, despite how irrational I knew it was. This journey was no exception. The flight was turbulent from start to finish. Any adrenaline my body was able to produce, for a third time, surged through me. I became absolutely convinced that the plane was going to go down. I grabbed the Valium tablets I had been given by the hospital staff to help calm me down and immediately swallowed a few of them. Just as I was considered finishing the rest of them off to try to make myself completely unaware of what I perceived as being my unavoidable death, the lady sitting next to me told me encouragingly in Japanese, 'It's okay, don't worry!' I grabbed her hand and held it tight to try to keep myself from finishing the rest of the tablets. I did not let go until the plane landed. That woman will

never know how much she helped me, in a moment of pure terror.

My boyfriend was waiting for me at the airport, his face ashen. By this stage, I was well and truly feeling the effects of having self-medicated during the flight and was having trouble walking. He led me to his car, without a word, and drove me home. We sat in silence the whole way, his hand on mine. Every so often he would glance over at me. I stared out the window. The normally two-hour drive felt like five minutes, a total blur. For the next week, he only left my side to go to work. Had he not been there, I probably would not have eaten, washed, or even left my bed at all. I survived on a cocktail of medications I had been prescribed by a local psychiatrist — high dosages of anti-depressants, anti-anxiety, and sleeping tablets. The psychiatrist did not speak a word of English, and there was no mental health facility in the city that had English-speaking staff, so my work supervisor had to relay everything to her. It was only recently, nearly two years later, that I found out I had been prescribed, and was taking (for my severe insomnia and night terrors), the very substance I was more than likely drugged with on the night I was raped — Rohypnol. To say this was a horrific shock is an understatement.

On 29 September 2015, I informed the Australian embassy in Seoul about what had happened. I told them I had still not received any of my medical results nor heard from the South Korean police since they had confirmed receiving the screenshots I had sent them. They advised me to wait the period of time suggested by police (two weeks) and if I had not received anything by then, to contact them again. Despite waiting and sending multiple emails to the police officer, I heard nothing. I became convinced that the reason I had still not received my medical records was because they discovered I had contracted AIDS or some other terrible STD. Paranoia took over. I was forced to provide the embassy with Power of Attorney documents in order for them to obtain the results on my behalf. When I finally received my medical results, weeks later on 21 October 2015, I was faced with a number of devastating realisations. The first was that the documentation indicated I had not been treated for any potential Sexually Transmitted Infections ('STIs'). To this day I still do not know why; when I met the hospital staff in person, there was no explanation. Thankfully, I was subsequently able to determine that I did not have any.

The second realisation was that parts of the report had been left blank with no explanation given for this. The third realisation was that some of the report's content was

incorrect. It stated I had told staff that I had drunk too much, became unconscious, and did not remember anything about what had happened. It also stated that I had answered 'no' to multiple questions that staff had not asked me, such as whether I had urinated and whether I had brushed my teeth. Had they asked, I would have been able to accurately answer each and every one of these questions. Finally, I realised they had not attempted to collect any evidence from my mouth, hair, or nails. When I later questioned the officer in person as to why she had not done this, she stated that 'there was no struggle' and 'we decided it wasn't necessary'. This was despite my clear emphasis of the fact that I had fought against the attacker and tried to push him off me.

Further, there was no record of any DNA having been successfully collected. The results of my blood alcohol content conclusively showed that I could not have been drunk enough to have become unconscious — supporting my claim that I had been drugged. Nowhere on this documentation was it stated that staff had done any kind of testing for rape drugs. To this day, I have still not been provided with any proof that this testing took place, despite the South Korean police's claims that it had taken place and that the results were negative.

On 6 October 2015, the police were informed by immigration that the man, who I had identified and sent screenshots of, had been in Korea from 1 to 29 September for a business conference. However, they told me on 11 October, via the embassy, that immigration records showed the man was NOT in the country at the time of the attack. I still do not have any explanation from them as to why they said this, other than that it was a 'mistake' and an 'error in translation'. Despite securing CCTV footage from the motel I told them I was taken to, it seemed as though the police did little to nothing more to investigate my case.

On 18 January 2016, the consulate informed me via email that there had been 'several new developments' in my case. I genuinely believed that these new developments would be the first positive news I had heard in months regarding my case. I naively started to think that perhaps they had even arrested the man. These new developments turned out to be: 'The police have decided, unfortunately, to close the case and marked [sic] as unsolved'. After months of waiting and hoping, I was convinced that the police were definitely not on my side in this case.

My whole life I had been of the belief, and expectation, that police had the victims' interests at heart in prosecuting crime, that they cared and would do everything within their power to "catch the bad guys" and make sure justice was served. However, the realisation that, at least in my case, this did not seem to be the reality was earth-shattering. I felt an immense sense of despair, unlike anything I had felt before in my life.

On 4 February 2016, the embassy confirmed that the South Korean police had never attempted to investigate or obtain any CCTV footage from the last bar I had been at before being abducted. The police's explanation later was that it was not part of my statement and had not been raised by me in the interview. This, of course, was incorrect (as evidenced in my police statement). Due to the time that had passed, that footage was now lost forever. It was then that I realised that nothing was going to change unless I took matters into my own hands.

VIII BECOMING MY OWN LEGAL INVESTIGATOR

I became a super sleuth. I obsessively devoted hours and hours to finding every tiny piece of information I could about the man I knew had raped me. I quickly discovered that he had two Facebook profiles — the one he used to try to add me, consisting of a small number of exclusively female friends (many of whom appeared to be sex workers), and his primary account, where his friends included both males and females as well as members of his family. His secondary account had him listed as living in Qatar, while his primary account stated that he resided in London. One day, I eventually stumbled upon a shocking fact — this man worked for the UK police. He was listed as a Police Community Support Officer for one of the boroughs in London. I believe, to this day, that this may have been an influencing factor in the handling of his case and the discrepant information regarding his immigration dates. This thought spurred me into action.

On 15 March 2016, I made a decision I had considered very seriously: to go public with my case. After encouragement from friends and family, I published a GoFundMe in an attempt to raise money for my medical, legal, and recovery-related expenses. I did not want to burden my family with these costs and knew that, in order for anything to change regarding my case, I was going to need a lawyer. I also wanted to spread awareness of the prevalence of sexual-related crimes in South Korea and the way they were being dealt with. I never anticipated the enormity of the response that would be generated from this

one decision, and I truly believe this completely changed the course of my experience.

My campaign spread incredibly quickly and soon attracted the attention of newspapers, magazines, and television programs. It snowballed and ended up making international news when the BBC published an article about it.⁷ This international attention eventually reached the South Korean police. On 31 March 2016, the South Korean police released a statement through a Korean news source that seemed to be designed to both discredit me and clear them of any wrongdoing. They stated that they had collected DNA evidence (despite never informing me or the embassy of this and not providing any evidence of having done so to this day), that the DNA evidence was not listed in their database, that I did not remember when or where I was raped (incorrect), and that I had only specified that it was a black male (also incorrect). They stated that drug tests were negative (to date, no evidence has been provided of this), that they did not, and could not, have asked any insensitive questions as I had a friend present (which did not even make sense), and that the man I had identified was an entrepreneur from Nigeria who visited South Korea to attend a conference in Busan. This had never been acknowledged to the embassy or me, and in fact, as mentioned earlier, the police previously stated that he was not in the country at the time and therefore did not believe he was a suspect. They said that they had compared the CCTV with this man which confirmed he was not a suspect; however, they have never provided any concrete proof of this claim whatsoever despite repeated requests.

The South Korean police then stated that for a more definite result, they asked for a DNA sample of this man from the Korean embassy in Nigeria. To this day, this has never been communicated or explained to me or the Australian embassy, and despite repeated requests, no evidence or documentation has been provided. The police stated that they were 'investigating the shop owners' in the area and believed they would be able to 'specify the suspect and arrest him soon'. This was a huge and sudden revelation to make.

As news of my case gained further attention internationally, the South Korean police resorted to extreme and bizarre measures. On 1 April 2016, they posted a letter addressed to me on their public Facebook page. This letter contained statements such as:

⁷ Royce Kurlmelovs, 'Public Battle over S Korea Rape Claim', *BBC News* (online), 4 April 2016 <<http://www.bbc.com/news/world-australia-35931431>>.

that they needed to “clarify facts”, that someone took me to a hotel where I got ‘addicted by drug’, that someone ‘got you drugs’ but there was no evidence of ‘drug addiction’, that there was ‘no insulting question’ during the interview, and that ‘we the Korea Police are doing our best’ and ‘we wish your best luck’. I was incredulous. The post was slammed by hundreds of Facebook users — both expatriates and Korean nationals — who were enraged about the police’s behaviour, their willingness to post confidential information about an ongoing case on Facebook, and their suggestion that I was a drug addict. How could a police organisation condone such unprofessionalism?

Through this attempt to minimise the negative publicity they were getting, the police had literally “shot themselves in the foot”. I had never named the specific police agency, and yet in doing this they outed themselves as being the one responsible. Following on from this, the police continually attempted to engage with me publicly, by posting comments on my GoFundMe campaign website and directing me to their Facebook post. When the onslaught of negativity refused to cease, and they realised that I was not going to indulge their desire for a public stand off, they posted again. This time they stated, ‘We do apologize [for] the fact that we caused some unintended troubles [sic]’ and that they had deleted the previous post.

It was at this point that things began to precipitously progress. The pub-crawl organiser informed me that the police had been in contact for the first time, and then suddenly and without warning, on 20 April 2016, the police contacted me personally via email. Despite being ordered to only make contact with me via the Australian embassy, they disregarded this on multiple occasions (twice on Facebook and this time via email). Their email contained photos taken from the CCTV footage in the motel where I was raped, showing me being led by not one but two men. This was the first time I had become aware that there were multiple men involved. Despite the email stating that they had arrested both men, they later acknowledged that this was also a “mistake” and an “error in translation”, as they had only arrested one of them. I was at work when I received the email from the South Korean Police with the photos attached, and my supervisor had to remove me from my work place as I went into shock, instigating a panic attack caused by this shocking revelation.

In May 2016, I flew to Seoul in South Korea with my mother to meet with police, hospital,

and embassy staff. The meetings lasted for more than six hours and it was an intensely draining and traumatic day. The hospital staff seemed to blame the police. The police seemed to blame the hospital staff and me. The police stated that the man they had arrested on 17 April was being charged with 'semi-specialised rape' In South Korean law, this was categorised as "semi-rape" as I was 'unconscious and therefore unable to provide consent' and "specialised" due to the involvement of multiple men, the robbery, and other factors.⁸

Police stated that the arrested man's DNA had been a match to that found on my breast. Despite this, the man was charged with "semi sexual harassment" instead. The police stated that he was an illegal immigrant whom they had discovered when they found a man with a 'similar walk' in Itaewon and followed him. The police stated that he was running away but that they enlisted help from another police department and caught up with him, questioned him, and asked for his ID which he said he did not have. They said he then ran away again, at which point they caught him after a 'physical conflict' wherein one of the officers was 'physically injured'.

During the meetings my mother and I attended, police staff frequently yawned, appeared to be sleeping or disinterested, laughed, took phone calls, and repeatedly left the room with no explanation. It seemed as though they were placing blame not only on me but also on the media, the embassy, the hospital, and their translator. The police refused to accept any responsibility for their actions (or lack thereof) or my consequent suffering. I asked them multiple times if they thought there was anything they needed to apologise for. They stated definitively that they did not want to make any apologies for their actions. Indeed, they clarified the "apology" on Facebook, making sure I understood that it was definitely not addressed or intended for me but instead intended for the public to rectify any "misunderstandings". I was physically triggered again when they showed the CCTV footage during the meetings and had to leave to vomit. In my absence, my mother watched them laugh.

IX THE LEGAL SYSTEM AND RAPE IN SOUTH KOREA

I discovered, contrary to my assumptions, that victims in South Korea needed to have

⁸ Claire Lee, 'Korea's Rape Laws Self-Contradict', *Korea Herald* (online), 27 April 2015 <<http://www.koreaherald.com/view.php?ud=20150427001282>>.

their own legal representation in order to ensure the legal process takes place and occurs appropriately; I had thought only the accused needed a lawyer. We had great trouble even securing a lawyer, trying in Australia and England, as most Korean lawyers did not want to be part of such a highly controversial case.

Months later in 2016, trial proceedings in the prosecution's case against the accused finally came to an end. This was after multiple delays, such as the judge ordering the DNA evidence taken from the accused to be redone (in the final stages of the trial). As the police did not inform the man of his rights before taking this evidence, it was deemed to have been unlawfully collected by the police. Honestly, what hope is there when the police are the ones breaking the law?

The process of the trial involved a number of opinion letters submitted by my lawyer, a young Korean woman, to the Prosecutor. I had to travel to South Korea again to meet with the Prosecutor. The final verdict, as the only evidence that could be used was DNA in the form of saliva found on my breast, was "semi forcible sexual harassment". The accused, a 37-year-old Nigerian, who had been living illegally in South Korea, was sentenced to 2 years and 6 months in prison 'on charges of quasi indecent act by compulsion and negligent injury, among other offenses'.⁹ This result was widely reported as being a very rare and profound victory, and an unprecedented sentence for this type of charge. On a worldwide scale, Shaw et al discuss how 'only a tiny handful of rapists ever serve time for rape, a shocking outcome given that we view rape as close kin to murder in the taxonomy of violent crime'.¹⁰ This is ultimately a lens I used when processing the above result in my case; I was torn between being furious that it had not been given anywhere near the same weight or sentencing as a crime such as murder would have, but at the same time amazed that I had achieved a sentence involving jail time at all, given the refusal to even classify the crime as rape.

This result, however, is something that I hope will enable better recognition and sentencing for both sexual assault and rape in South Korea. I wholeheartedly believe that this result eventuated because of all the media attention that my case generated. Fielder similarly states that currently in South Korea, the only factor that brings justice to cases

⁹ Ock Hyun-ju, 'Man Convicted of Sexual Assault after Australian Victim's Campaign', *Korea Herald* (online), 2 November 2016 <<http://www.koreaherald.com/view.php?ud=20161103000663>>.

¹⁰ Shaw, Campbell and Cain, above n 1, 449.

is the ‘minor celebrity status’ of victims and a media presence causing public uproar.¹¹ This is also supported by prominent New York attorney, Sean Hayes, who stated that many judges see cases as being ‘political statements’ and are often swayed and influenced by politics.¹² I believe this concept manifested in my case as the police seemed to be spurred into action by the widespread local and international media attention my case was receiving. Similarly, the prosecutor, when I met with him, informed me that he had “accidentally” seen my story on 60 Minutes,¹³ something that is very unlikely to happen by accident as the story only screened in Australia.

At the end of the day, the horrifying reality is that ‘every woman in South Korea who drinks even moderately is at risk of being forced into sexual intercourse with any man she happens to accompany or even meets that evening’.¹⁴ Additionally, it seems that the South Korean police’s response and actions in my case are indicative of a common trend — a recent rape and murder case in Suwon, South Korea, is a prime example of this. In that case, ‘the lackadaisical response of the police to the victim’s call for help during a rape eventually resulted in more than 13 hours passing before her body was found hacked into over 300 pieces and stuffed into 14 trash bags’.¹⁵

Shaw et al state that although ‘post assault resources and services are made available to survivors in many communities, there are systemic problems in many formal response systems’.¹⁶ One such systemic problem lies with the mentality of police in South Korea, namely that rape seems to be categorised as either a domestic dispute or a fabrication by women trying to blackmail ex-lovers out of money as retribution rather than as a serious crime. Further to this, they highlight the fact that most sexual assault cases in the United States — 73 to 93 per cent in fact — are dropped during the initial police investigation stage before they are ever referred for prosecution,¹⁷ which is what the South Korean

¹¹ Daniel Fielder ‘Redefining Rape in South Korea’, *Korea Herald* (online), 24 April 2012 <<http://www.koreaherald.com/view.php?ud=20120424001151>>.

¹² Jon Rabirot, Ashley Rowland and Yoo Kyong Chang, ‘Korea Rape Sentences: Each Case Has “Unique Set of Circumstances”’, *Stars and Stripes* (online), 3 November 2011 <<https://www.stripes.com/news/pacific/korea/korea-rape-sentences-each-case-has-unique-set-of-circumstances-1.159654#.WXnDUMeFfJ>>.

¹³ Alison Langdon, 9Now, ‘Fighting Back: Part 1’, *60 Minutes*, 2016 <<https://www.9now.com.au/60-minutes/2016/clip-ciosjh42p002m0knp6tgptr3c>>; Alison Langdon, 9Now, ‘Fighting Back: Part 2’, *60 Minutes*, 2016 <<https://www.9now.com.au/60-minutes/2016/clip-ciosjl574002n0knp5k0wmx49>>.

¹⁴ Fielder, above n 11.

¹⁵ *Ibid.*

¹⁶ Shaw, Campbell and Cain, above n 1, 446.

¹⁷ *Ibid* 447.

police seemed to try to do with my case. With regard to most jurisdictions in the United States, Shaw et al note that the decision to refer a case to a prosecutor is entirely up to police; this ‘fundamental control’ can commonly manifest in an abuse of power.¹⁸ This concept is evident as police ‘frequently decide independently if the entire criminal justice system will have the opportunity to hold an offender accountable for his or her crime’, which is ‘perhaps too great a burden to place on a single group of professionals in the criminal justice system’, especially as, despite being professionals, each has their own personal and cultural biases.¹⁹

Shaw et al also refer to the existing body of research which fails to shed light on the ‘less-than-thorough response’ commonly used by police:²⁰ why only ‘7–27 [per cent] of reported sexual assaults’ in the United States are referred by them to the prosecutor and why they have a ‘tendency to respond in ways that discount the experiences of specific victims’. This is exactly how I felt throughout the ordeal of reporting my case.²¹ Shockingly, a study undertaken by Shaw et al suggested that ‘police decide on a case outcome prior to conducting a thorough investigation and completing all possible investigative steps’,²² which, again, is what I believe happened to my case before I took matters into my own hands and went to the media. Shaw et al ultimately recommend a worldwide push for the need for sexual assault cases ‘to transition from the investigation stage, overseen by law enforcement, to the prosecution stage, overseen by the prosecutor’s office’.²³

South Korea, specifically, should first change its legislation. There, rape is defined as being ‘specifically limited to penetration of the female genitals by the male sex organ, and other forms of forced sexual penetration are defined as “like-rape” — which carry ‘lighter penalties’.²⁴ At present, the punishment for “rape” in South Korea is a prison term of at least three years, ‘the heaviest among all forms of criminalized sexual activities against able-bodied adults’.²⁵ “Like-rape”, as of 2013, is defined as ‘inserting one’s genitals into

¹⁸ Ibid 446.

¹⁹ Ibid 460.

²⁰ Ibid 447.

²¹ Ibid.

²² Ibid 457.

²³ Ibid 459.

²⁴ Claire Lee, ‘Korea’s Rape Laws Self-Contradict’, *Korea Herald* (online), 27 April 2015

<<http://www.koreaherald.com/view.php?ud=20150427001282>>.

²⁵ Ibid.

the inner part of another person's body such as mouth or anus except genitals, or inserting a part of his or her body other than genitals, such as a finger, or any foreign objects into another person's body', and is punishable by a jail sentence of at least two years.²⁶ The International Criminal Court defines rape as 'penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body'.²⁷ This would be an ideal goal if it were accepted everywhere.

There should be significant change, not only in the attitude South Korean police demonstrated to me in this case and similar documented cases, by acknowledging their prejudice and stereotyping, but also in their process of investigating rape crimes and their trivialisation of rape. Shaw et al highlighted this, stating that 'changes to current system policies regulating sexual assault case investigations could leverage change in the rates of case attrition'.²⁸ Specifically, a change in policy, which I believe would have been immensely beneficial to the outcome in my case, and potentially also beneficial in future like-cases, is the requirement that 'a supervising officer will not sign-off on a case until all possible investigative steps have been completed and/or documented rationale is provided for any steps that have not been completed'.²⁹ As discussed earlier, there was no explanation given for why, in my case, officers left substantial sections of paperwork blank or did not complete what many would view as logical investigative steps. Additionally, "model investigations" or "model policies" 'delineating and detailing the necessary steps for a thorough victim-centered, offender-focused investigation', which have already been implemented in some American states, could have significant advantages in South Korea.³⁰

One potential roadblock to implementing such changes is Korea's 'traditional patriarchal values stemming from Confucianism' which contribute to providing a framework for Korean families, as well as expected family roles such as that of women being firmly subservient.³¹

²⁶ Ibid.

²⁷ Ibid; International Criminal Court, *Elements of Crimes*, Doc No ICC-RC/11 (adopted 31 May–11 June 2010) art 7(1)(g)-1.

²⁸ Shaw, Campbell and Cain, above n 1, 459.

²⁹ Ibid.

³⁰ Ibid 460.

³¹ Kyungja Jung, 'Practising Feminism in South Korea: The Issue of Sexual Violence and the Women's

These values and cultural beliefs heavily influence the willingness of women to report rape or violence, for fear of shaming their families or affecting their families' social statuses.³² Further to this, Postmus and Hahn highlight the reality that '[t]he USA and South Korea are historically patriarchal societies where much of the political, social and economic power remains vested in men' and that at the heart of South Korea specifically, there is a non-interventionist government.³³ It was not until 1997 that the *Prevention of Domestic Violence and Victim Protection Act* was finally legislated in South Korea.³⁴ This *Protection Act* was however strongly opposed by both 'conservative media' and advocates of 'male privilege', who believed that it went against the deeply-held cultural belief that a family should never be broken.³⁵ It appears that these issues are deeply rooted in South Korean society: a society whose Global Gender Gap score is extremely low (proportionate to Gross Domestic Product and development) at 0.649, ranked 116 out of 144 countries worldwide, with equality lower than countries such as Ethiopia and Cambodia, ranked 109 and 112 respectively.³⁶

In my case, I believe that either the men involved were devious enough to use condoms as part of an organised group or, more likely, that a large amount of evidence was lost or never collected properly in the first place by the police. For this reason, though justice was served on one of the men involved, now being in prison, it is unlikely that I will ever be able to get justice against the other man, still residing in London. This is a painful reality to accept, to say the least. However, until that last door closes, I will continue to doggedly pursue justice, both for myself and the countless women worldwide who have endured, and continue to endure, these atrocities.

X CREATING A PRECEDENT

From the horror of this experience, I have learned not to blindly trust authorities; I have

Movement' (2003) 29(2) *Hecate* 261; Postmus, J and Hahn, S.A, "Comparing the policy response to violence against women in the USA and South Korea", (2007) 50(6) *International Social Work* 770.

³² Judy Postmus and Sur Ah Hahn, 'Comparing the Policy Response to Violence against Women in the USA and South Korea' (2007) 50(6) *International Social Work* 770, citing Eunju Lee, 'Marital Conflict and Social Support of Korean Immigrants in the United States' (2005) 48(3) *International Social Work* 313, 320.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ World Economic Forum, *Global Gender Gap Report* (2016) World Economic Forum

<<http://reports.weforum.org/global-gender-gap-report-2016/rankings/>>.

learned of the ability of people in power to abuse their positions; I have learned about the selfless generosity and consideration of strangers all over the world whose involvement gave significant voice to my case. I have learned that it is a woman's right merely to decide whether or not to pursue her case of rape as this is an immensely personal, emotional, and potentially harmful path to take which can often come at a far greater cost than the value of any justice achieved. I gained a unique insight into why rates of reporting and convictions for rape are so low globally.

I have learned the immense frustration of having to feel like an outsider in my own case because of my inability to be present for most of the proceedings and my lack of knowledge of South Korean law and process. I could not speak the language and had to rely entirely on others to speak and act on my behalf from beginning to end. South Korean lawyers expect that the victim will have little involvement, so my questions and desire for information were not easily understood or accepted. I had to continually delegate power to others throughout the process and in doing so became further removed from the case. However, this experience has motivated me to pursue a career in law in order to be a strong voice for those unable to speak out for themselves in similar circumstances.

I am now in the final stages of suing the South Korean Police for their negligence, malpractice, and their role in the immense secondary damage I suffered. This action has been partly funded by a feminist organisation in South Korea in the hope that a precedent will be set. For example, a number of women have informed me of their own experiences with the South Korean police that have been very traumatic for them. It is my hope that this case will be a catalyst for the many necessary and critical changes that must occur surrounding rape cases in South Korea.

I also hope that the awareness and international exposure will have repercussions for rape victims in Australia. So many women, both known to me (to my surprise) and previously unknown to me, have personally shared their own shocking experiences as victims of rape and sexual assault, and they have been invisible to the justice system. I would like the attitudes towards rape to change so that women can feel safe and respected in reporting their experiences without fear of judgement, stigmatisation, and backlash. Rape affects all of society, and therefore society must take responsibility for changing endemic prejudice and ingrained social ignorance.

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DEFINING RAPE IN WAR: CHALLENGES AND DILEMMAS

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This paper is an analysis of the International Criminal Court ('ICC') decision in the case of The Prosecutor v Jean-Pierre Bemba, handed down in 2016. This case was the first at the ICC to deliver a conviction for the crime of rape during armed conflict and marks the most recent attempt to accurately and comprehensively define the crime of wartime rape. In assessing the ICC's definition, we have drawn significantly from the case law in relation to wartime rape that emerged from the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia. These international tribunals provided a space for significant development in this area of law and were the catalyst for rich feminist academic discourse. We argue that the ICC has inadequately addressed gender stereotypes that have dominated the process of criminalising wartime rape since it was first introduced into international law.

We base this argument on the ICC's decision to adopt a definition of wartime rape that is over-reliant on a consideration of the surrounding circumstances of the act and does not link these circumstances to a consideration of the victim's lack of consent. We identify three ways in which the Bemba definition has failed to challenge the generalising and over-simplification of gender roles in armed conflict. The first is that it has diminished female sexual agency by representing armed conflict as a zone in which consensual sexual penetration is a legal impossibility. Second, this

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has contributed to the perpetuation of the ideal victim archetype that plagues narratives of wartime rape and sexual violence. The representation of victims as powerless, female civilians or refugees creates a dangerous binary construct of the victim and perpetrator roles that only serves to flatten the complex and nuanced ways in which sexual agency is exercised during times of war. Finally, the perpetuation of the ideal victim/perpetrator archetype also threatens the ICC's ability to appropriately protect the right of the accused to a fair trial and a presumption of innocence.

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I INTRODUCTION

This article will critically analyse the International Criminal Court's ('ICC') definition of rape in armed conflict, specifically within the case of *The Prosecutor v Jean-Pierre Bemba* ('*Bemba*').¹ The ICC *Bemba* judgment has brought the crime of rape during armed conflict ('wartime rape') into ICC case law and provided a precedent for potential future ICC prosecutions. The purpose of examining the definition of this crime within the *Bemba* judgment is to assess the ICC's progress in addressing some of the pertinent issues that arose during the criminalisation of wartime rape and the subsequent international case law. This can be used as a measure for how responsive international criminal law ('ICL') is in addressing gender-based violence and violations of women's rights during armed conflict.

It has been acknowledged that the crime of rape is a gender-based crime that is disproportionately committed against women.² This is not to say that there are no male victims of rape and sexual violence. However, due to the disproportionate number of female victims of rape and the specific effects that rape has on women, such as pregnancy and other bodily harms, rape is considered a female gender-based offence.³

Sexual violence is a global problem that is not confined to circumstances of armed conflict or the level of development in a region.⁴ It is not necessarily constituted by a purely sexual act but is also an act of aggression and not always perpetrated for sexual gratification.⁵ It is arguable that the parameters of sexual violence are only limited by the human imagination and include, but are not limited to, instances of rape, sexual slavery, genital mutilation, enforced pregnancy, and forced prostitution.⁶

Throughout history, there have been reports of women being subjected to sexual violence during periods of armed conflict.⁷ It is undisputed that rape, sexual slavery, forced

¹ *Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016).

² Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288.

³ Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford Scholarly Authorities on International Law, January 2009).

⁴ Stuart Casey-Maslen (ed), *The War Report* (Oxford University Press, 2012) 295.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Askin, above n 2, 297.

pregnancy, sexual mutilation, and multiple other sexually violent crimes have been used as weapons of war and genocide.⁸ Despite this long history of sexual violence that occurs during armed conflicts, wartime rape has largely been ignored on the international level of criminal prosecution.⁹ During World War II, the use of rape was widespread by Nazi and Japanese forces as a policy of war; however, this was not reflected in the Charter of either the Nuremberg or Tokyo War Tribunals.¹⁰ Further, while the Tokyo Tribunal included the crime of rape within public records and an indictment for war crimes, it failed to adequately address the crime given its pervasive occurrence within the conflict.¹¹

Rape has only begun to be seriously prosecuted at the international level as recently as the 1990s, but international humanitarian law has a long history of prohibiting rape, reaching back to the 1863 Lieber Code.¹² This Code made violence, including rape, against inhabitants of an invaded region punishable by death.¹³ However, it was only in 1949 with the creation of the Geneva Conventions that a codified set of international humanitarian law principles was universally accepted.¹⁴ In 1949, a universal obligation to prosecute rape was created under Article 27 of the Fourth Geneva Convention.¹⁵

Further, in response to the outcry from human rights activists about the exclusion of rape from the list of grave breaches within the Geneva Conventions, the International Committee of the Red Cross ('ICRC') adopted Rule 93 which explicitly recognises rape as a grave breach of human rights.¹⁶

During the 1990s, rape and other sexual violence was used as a means of ethnic destruction in conflicts in Rwanda and the former Yugoslavia.¹⁷ As a result, rape was incorporated into the Statutes of the International Criminal Tribunal for Rwanda ('ICTR')

⁸ Ibid.

⁹ Cassese, above n 3, 478

¹⁰ Kelly D Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, 1997).

¹¹ Ibid 203.

¹² Ibid.

¹³ Ibid.

¹⁴ Askin, above n 2, 302.

¹⁵ Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 *The Australian Feminist Law Journal* 57.

¹⁶ Casey-Maslen, above n 4, 303.

¹⁷ Catharine MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' (2006) 44 *Columbia Journal for Transnational Law* 940, 942.

and the International Criminal Tribunal for the Former Yugoslavia ('ICTY') respectively.¹⁸ The subsequent prosecutions of rape in the ICTR and ICTY resulted in two diverging definitions of the crime and further advanced the criminalisation of rape and other gender-based offences in ICL. The recent judgment in *Bemba* has re-defined the crime of wartime rape that was previously established in the ICTR and ICTY. This paper will argue that the *Bemba* judgment has undermined female sexual agency and has potentially reinforced the authentic victim stereotype that has plagued international prosecutions of wartime rape. In doing so, the *Bemba* definition has perpetuated the false dichotomy of the ideal victim and perpetrator roles resulting in a failure to challenge gender stereotypes and impinging on an accused's right to fair trial.

II DEFINING RAPE THROUGH INTERNATIONAL JURISPRUDENCE

A The International Criminal Tribunal for Rwanda ('ICTR')

The offence of rape was first explicitly defined in the International Criminal Tribunal for Rwanda ('ICTR') within the Trial Chamber Judgement of *The Prosecutor v Jean Paul Akayesu (Akayesu)*.¹⁹ Jean Paul Akayesu was charged on 15 counts including rape as a crime against humanity and as a violation of Article 3 to the Geneva Conventions (conflicts not of an international character) and Additional Protocol II.²⁰ Akayesu was politically active within the community and eventually became area president of a new political party called Mouvement Democratique Republican ('MDR').²¹ At least 2000 Tutsi were killed in Taba during the conflict and the Trial Chamber considered that there was sufficient evidence to show that Akayesu had ordered, instigated, and done nothing to prevent the crime of rape occurring, therefore being convicted of command responsibility for his crimes.²²

In defining rape, the Trial Chamber took the same conceptual approach that is applied to torture under international law. This approach consists of using the essential

¹⁸ Ibid.

¹⁹ *The Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998).

²⁰ Ibid.

²¹ Ibid [52].

²² Ibid.

characteristics of a crime rather than exhaustively listing mechanical elements.²³ The Chamber specifically rejected a mechanical description of rape and instead defined it as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.²⁴ Despite the reference to the ‘sexual nature’ of the offence, the Chamber noted that rape is ultimately a crime of aggression that is unable to be captured through a mechanical description of possible objects and body parts.²⁵

In addition to the Chamber’s decision to avoid mechanical descriptions of rape, it removed the element of consent from the definition and instead set the parameters of its criminality as sexual penetration that occurs during circumstances that are coercive. The ICTR *Akayesu* definition identified that any form of implied consent to sexual penetration is inapplicable in an environment as coercive as that during armed conflict.²⁶ The *Akayesu* definition did not reappear in the ICTR until *Prosecutor v Gacumbitsi*,²⁷ in which the Appeals Chamber returned to the core insight of *Akayesu*: non-consent should be implied from the surrounding circumstances of the crime rather than being an element to be proven by the prosecution.²⁸ While the issue of non-consent was not a substantial ground of appeal, the Appeal Chamber chose to consider the matter as a point of significance for the jurisprudence of the ICTR.²⁹

The Prosecutor appealed to the Chamber on the grounds that non-consent should not have been considered as an element of the crime but instead could be used as an affirmative defence.³⁰ This was argued on the basis that the crime of rape is only brought before the ICTR when it occurs in the context of genocide or armed conflict and that this should make genuine consent impossible.³¹ The Appeal Chamber agreed with the Prosecutor’s argument that the matter was significant for the ICTR’s jurisprudence and

²³ Alison Cole, ‘*Prosecutor v Gacumbitsi*: The New Definition for Prosecuting Rape under International Law’ (2008) 8 *International Criminal Law Review* 55.

²⁴ *The Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998), [597] - [598].

²⁵ *Ibid* [597].

²⁶ Cassese, above n 3, 79.

²⁷ *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-2001-64-T, 17 June 2004).

²⁸ Catharine MacKinnon, ‘The Recognition of Rape as an Act of Genocide — *Prosecutor v Akayesu*’ (2008) 14(2) *New England Journal of International and Complementary Law* 101, 102.

²⁹ Cole, above n 23, 63.

³⁰ *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006), [47].

³¹ *Ibid* [48].

therefore sought to further elucidate the issue.³² The Appeal Chamber confirmed that the ICTY Trial Chamber had adopted a definition of rape that established non-consent as an element of the crime of rape and that this shifted the burden to the Prosecution to prove non-consent beyond a reasonable doubt.³³ Further, it was mentioned that Rule 96 of the ICTR *Rules of Procedure and Evidence* provides that consent may be used as a defence to rape but that this did not necessarily rule it out as an element of the crime.³⁴ The Appeals Chamber tended towards the argument that consent was vitiated in coercive circumstances and that non-consent can be inferred by the Chamber in circumstances such as genocide or detention of the victim, rather than requiring the Prosecution to introduce evidence.³⁵

B The International Criminal Tribunal for the Former Yugoslavia

The armed conflict in the former Yugoslavia erupted in April 1992, and rape became an integral part of the Serb campaign of ethnic cleansing.³⁶ The conflict continued until 1995 and included systematic sexual violence and gender-based assaults including rape, sexual slavery, castration, forced pregnancy, and sexual torture.³⁷ Serb forces were the principal aggressors and responsible for overwhelming numbers of human rights violations; however, violations were committed by all sides of the conflict.³⁸ Reports of rape being used as a weapon of war on a mass scale emerged towards the end of 1992.³⁹ Frequently, rapes were committed in front of relatives or neighbours and rape survivors were often subjected to forced pregnancy and maternity.⁴⁰ In February 1993, the United Nations Security Council ('UNSC') authorised the creation of an international tribunal to hold accountable those responsible for human rights violations.⁴¹ In May 1993, UNSC Resolution 827 established the ICTY for the prosecution of genocide, war crimes, and

³² Ibid.

³³ Ibid [153].

³⁴ Ibid [154].

³⁵ Ibid [155].

³⁶ Krishna R Patel, 'Recognising the Rape of Bosnian Women as Gender-Based Persecution' (1994) 60 *Brooklyn Law Review* 929, 930.

³⁷ Hilmi M Zawati, 'Book Review: Rethinking Rape Law' (2014) 10 *Journal of International Law and International Relations* 31.

³⁸ Women in the Law Project, 'No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia' (1994) 5(1) *Hastings Women's Law Journal* 91, 94.

³⁹ Ibid.

⁴⁰ Ibid 95.

⁴¹ Ibid 99.

crimes against humanity occurring in the former Yugoslavia.⁴² The temporal jurisdiction extended back to 1991.⁴³

The first rape prosecution to occur in the ICTY was in the *Celebici case*,⁴⁴ which affirmed the *Akayesu* definition, but this was not re-affirmed in subsequent rape trials within the ICTY. The next trial for rape in the ICTY presented an alternate definition for rape in armed conflict and so began a series of cases that took the international definition of rape back into the direction of including non-consent and mechanical descriptions of rape.⁴⁵ In *Furundžija*,⁴⁶ the Trial Chamber considered that in defining rape, the prominent principles of criminal law that are common to major domestic legal systems were necessarily required to determine an accurate definition.⁴⁷

The Trial Chamber settled on a definition that lists the physical mechanics of rape as penetration 'of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator',⁴⁸ or 'of the mouth of the victim by the penis of the perpetrator.'⁴⁹ This description of sexual penetration combined with the requirement for coercion or force became the requisite elements for rape in *Furundžija*. The Trial Chamber rationalised this particular definition through considering that without such specification, alleged perpetrators may not have sufficient *mens rea* to satisfy the crime.⁵⁰ The ICTY Trial Chamber in *Kunarac* applied the *Furundžija* definition more broadly and found that 'sexual penetration will constitute rape if it is not truly voluntary or consensual' for the victim.⁵¹ The substitution of coercion or force with voluntariness or

⁴² Nadya Nedelsky and Lavinia Stan (eds), *Encyclopedia of Transitional Justice* (Cambridge University Press, 2012) 233, 237.

⁴³ Women in the Law Project, above n 38, 99.

⁴⁴ *The Prosecutor v Delalic, Mucic, Delic, and Landzo (Judgment)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('*Celebici Trial Judgment*').

⁴⁵ MacKinnon, above n 17, 944.

⁴⁶ *The Prosecutor v Anto Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998).

⁴⁷ Cole, above n 23.

⁴⁸ *The Prosecutor v Anto Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998).

⁴⁹ *The Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998).

⁵⁰ MacKinnon, above n 17, 946.

⁵¹ *The Prosecutor v Kunarac, Kovac, and Vukovic (Judgment)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001) [440].

consent was intended to broaden the definition and bring it into alignment with what is required by international law.⁵²

The *Kunarac* definition of rape re-introduced non-consent as an element of the crime. The Trial Chamber's argument behind this re-introduction in *Kunarac* was that in surveying principles common to domestic definitions of rape, *Furundžija* erred in not recognising the concept that rape occurs if sexual violation is not truly voluntary or consensual.⁵³ The Appeals Chamber addressed the re-definition by the Trial Chamber in the *Kunarac* appellate decision. The Chamber did not hold against the non-consent definition but strongly and explicitly stated the need to presume non-consent in circumstances such as those in *Kunarac*. On the facts of the case, the Appeal Chamber held that consent was impossible given that the victims were held in detention by the perpetrators and the language of coercive circumstances from *Akayesu* was echoed in the judgment.⁵⁴ The mechanical description of sexual penetration remained in *Kunarac*'s definition and this approach was affirmed in the Appeals Chamber.⁵⁵

The *Kunarac* and *Akayesu* definitions became the two leading approaches to be adopted in subsequent ICTY and ICTR, and in some cases a merge of the two was attempted.⁵⁶ These two cases, while significant in ensuring that rape is treated as a serious offence, are also seen as representing a divide between consent-based definitions of rape and coercive-circumstances approaches to defining rape.⁵⁷

C The International Criminal Court

The ICC Statute (Rome Statute) was adopted in Rome in 1998. Twenty-two months later, the Elements of Crimes and the Rules of Procedure and Evidence ('RPE') were adopted with full consensus from the State parties.⁵⁸ The ICC has jurisdiction over sexual crimes when there is a contextual nexus to crimes against humanity, war crimes, genocide, and

⁵² Ibid [438].

⁵³ Ibid 950.

⁵⁴ Ibid 951.

⁵⁵ *The Prosecutor v Kunarac, Kovac, and Vukovic (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-96-23-I & IT-96-23/1-A, 12 June 2002).

⁵⁶ Cole, above n 23, 63.

⁵⁷ Kiran Grewal, 'The Protection of Sexual Autonomy under International Criminal Law' (2012) 10 *International Criminal Justice* 373, 374.

⁵⁸ Roy S Lee, 'An Assessment of the ICC Statute' (2001) 25(3) *Fordham International Law Journal* 750.

crimes of aggression.⁵⁹ The ICC recognised in its *Policy Paper on Sexual and Gender-Based Crimes (Policy Paper)* that 'sexual and gender-based crimes are amongst the gravest under the Statute'.⁶⁰ This policy identifies that the Rome Statute is the first instrument to include into international law an expansive list of gender-based crimes in relation to both international and non-international armed conflicts.⁶¹ One of the core objectives of the policy for gender-based and sexual crimes is to contribute to the development of international jurisprudence in this area.⁶²

The ICC delivered its first conviction for the offence of rape in *Bemba*,⁶³ in which it attempted to merge the two divergent definitions from the ICTY and ICTR. The ICC Trial Chamber found Jean-Pierre Bemba guilty of murder and rape under crimes against humanity and murder, rape, and pillaging under war crimes.⁶⁴ He was charged with command responsibility as he was president of a political party, *Mouvement de liberation du Congo* ('MLC') and was, during a violent military operation, Command-in-chief of the *Armée de libération du Congo*.⁶⁵ Article 21 of the Rome Statute provides a hierarchy of external sources which the Court can use to interpret and apply the crimes in the State.⁶⁶ The first among these is the Rome Statute itself and the Element of Crimes.⁶⁷ In considering the crime of rape in criminal trials, the ICC has drawn the definition from the Elements of Crimes. This definition is:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

⁵⁹ Marie-Alice D'Aoust, 'Sexual and Gender-Based Violence in International Criminal Law: A Feminist Assessment of the *Bemba* Case' (2017) 17 *International Criminal Law Review* 208, 211.

⁶⁰ International Criminal Court, 'Policy Paper on Sexual and Gender-Based Crimes' (Policy Paper, June 2014) 5.

⁶¹ *Ibid* 9.

⁶² *Ibid* 10.

⁶³ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016).

⁶⁴ *Ibid*.

⁶⁵ D'Aoust, above n 59.

⁶⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

⁶⁷ International Criminal Court, *Elements of Crimes*, Doc No ICC-RC/11 (adopted 31 May–11 June 2010) ('*Elements of Crimes*').

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁶⁸

The first case to consider rape before the ICC and apply the Elements of Crimes definition was *Prosecutor v Katanga*.⁶⁹ While the defendant in the case was not convicted, the Trial Chamber did identify that the requisite elements of the crime of rape were found within the Elements of Crimes. The ICC identified that the mechanical description within the definition extends to instances in which the perpetrator has not physically penetrated a victim but has caused or prompted another individual to either penetrate the perpetrator or a third party.⁷⁰ The Trial Chamber in *Katanga* did establish beyond reasonable doubt that combatants had committed rape constituting crimes against humanity and war crimes under Articles 8(2)(e)(vi) and 7(1)(g) of the Rome Statute. However, the Chamber could not sufficiently establish Katanga's hierarchical power over all combatants and therefore found that there was not sufficient evidence to establish command responsibility under Article 25(3)(a) of the Rome Statute.

As in *Katanga*, the *Bemba* judgment applied the definition adopted from the Elements of Crimes to the factual circumstances. In determining the material elements of the offence of rape, the *Bemba* judgement identified and applied the two limbs of the definition.⁷¹ The first limb draws directly from the definitions adopted in *Furundžija* and *Kunarac* that rejected the conceptual approach taken up by the Trial Chamber in *Akayesu*. It narrows the scope of rape to a particular set of physical actions done by and to the perpetrator and victim. An explicit statement about the gender neutrality of the definition follows the list of mechanical requirements for the crime of rape.⁷² The Chamber states, 'the term invasion is intended to be broad enough to be gender-neutral' and can include same-sex penetration, encompassing both male and female perpetrators.⁷³ In adopting their

⁶⁸ *Elements of Crimes* arts 7(1)(g)-1, 8(2)(e)(vi)-1.

⁶⁹ *The Prosecutor v Germain Katanga (Judgment)* (International Criminal Court, Judgment, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).

⁷⁰ *Ibid* [963].

⁷¹ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [99].

⁷² *Ibid* [100].

⁷³ *Ibid*.

definition, the ICC Trial Chamber relied on the ICC Elements of Crimes, specifically Article 7(1)(g)-1 which specifies that invasion is intended to be gender-neutral.

According to the ICC's *Policy Paper*, the explicit gender-neutral statement regarding the Elements of Crimes, was part of an effort to 'consolidate important advancements with respect to the definition of these crimes'.⁷⁴ It appears to be in response to an integration of gender perspective and analysis that involves examining underlying inequalities and the ways in which gender norms and inequalities relate to gender-based crimes.⁷⁵ The second limb draws from *Akayesu* in order to identify the criminal nature of the physical invasion. *Bemba* sets out four circumstances, taken from the Elements of Crimes, in which a rape may occur. These are by force, by threat or coercion, by taking advantage of a coercive environment, or against a person who is incapable of giving genuine consent.⁷⁶ The Trial Chamber interpreted the concept of a coercive environment in relation to the *Akayesu* conceptualisation of coercive circumstances. The scope of coercive circumstances was extended to include not only armed conflict or military presence but also the number of people involved in the conduct, the context in which the rape occurs, or whether it is committed at the same time as other crimes.⁷⁷

The Trial Chamber in *Bemba* described the second limb of the definition as circumstances in which the act of penetration or invasion is given its criminal nature.⁷⁸ In considering this limb of the definition, the Chamber emphasised that 'the victim's lack of consent is not a legal element of the crime of rape'.⁷⁹ Instead, the Chamber relied on the application of Rule 70 of the RPE, which provides that consent cannot be inferred from the words, conduct, silence, or lack of resistance of the victim in situations where the physical elements of rape are shown.⁸⁰ It also drew from 'preparatory works' that indicate the intention of the drafters of the Rome Statute to exclude consideration of

⁷⁴ International Criminal Court, 'Policy Paper on Sexual and Gender-Based Crimes' (Policy Paper, June 2014) 9.

⁷⁵ *Ibid* 13.

⁷⁶ *Elements of Crimes* arts 7(1)(g)-1, 8(2)(e)(vi)-1.

⁷⁷ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [103].

⁷⁸ *Ibid*.

⁷⁹ *Ibid* [105].

⁸⁰ International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 70 ('*Rules of Procedure and Evidence*').

consent from the definition of wartime rape.⁸¹ The criminal nature of the sexual penetration, therefore, arises from whether the perpetrator used force, threat, or coercion or took advantage of coercive circumstances as opposed to a violation of the victim's voluntary or genuine consent. This was applied in alignment with the reasoning in the previous ICC case, *Katanga*, where the Chamber noted that if the element of criminality within the Elements of Crimes was established, sexual penetration would amount to rape.⁸² The ICC has treated the surrounding circumstances of the sexual penetration as important in their own right and removed from a consideration of how they limit or vitiate an individual's ability to give genuine consent.⁸³

The *Bemba* definition in fact hardly referenced the concept of consent in its discussion of wartime rape and instead reinforced the distinction between coercive circumstances and the consent-based definition set out in the Elements of Crimes. This distinction is created by the difference in nature of the first three instances of criminal nature set out in the Elements of Crimes, which do not include the concept of consent, from the fourth.⁸⁴ The fourth is intended to cover circumstances in which an individual is unable to give consent due to natural, induced, or age-related incapacity.⁸⁵ This definition reflects the discussion within *Akayesu* in the ICTR that required the Trial Chamber to look at broader factors contributing to situational coercion. However, in considering the third circumstance, the ICC avoided linking the concept of coercive circumstances with that of consent as was done in *Kunarac*.⁸⁶ *Kunarac* found rape was penetration that occurs without the consent of the victim and determined that the *Furundžija* definition, 'coercion, force or threat of force against the victim or third person', was too narrow to encompass all factual circumstances in which penetration is non-consensual or non-voluntary. While *Kunarac* endorsed a consideration of circumstances, this was in order to determine whether consent could be freely given in the context.

⁸¹ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [105].

⁸² *The Prosecutor v Germain Katanga (Judgment)* (International Criminal Court, Judgment, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).

⁸³ Janine Natalya Clark, 'The First Rape Conviction at the ICC: An Analysis of the *Bemba* Judgment' (2016) 14 *Journal of International Criminal Justice* 667, 677.

⁸⁴ *Ibid* 678.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

Consent remained the fundamental element for consideration in the *Kunarac* definition whereas the Trial Chamber in *Bemba* reinforced the clear distinction made in the Elements of Crimes between consent and coercive circumstances. The Chamber did this by treating the circumstances of the penetration as a consideration in its own right rather than in terms of whether the circumstances vitiate consent. Further, the *Bemba* judgment determined that there is no need for the Prosecution to prove non-consent where ‘force, threat of force or coercion or taking advantage of a coercive environment’ are established.⁸⁷ The Trial Chamber also noted that the inclusion of non-consent as an element of the crime of rape could ‘undermine efforts to bring perpetrators to justice’.⁸⁸ The *Bemba* judgment, rather than strengthening the relationship between coercive circumstances and an individual’s ability to consent, reinforced the existing dichotomy in international case law and commentary. In the event that coercive circumstances are established, which is far more likely during armed conflict, the consent or non-consent of the “victim” is irrelevant. In terms of contributing to case law for the prosecution of rape in armed conflict, the *Bemba* judgment appears to have moved the definition of wartime rape even further away from a non-consent-based consideration.

III THEORISING WARTIME RAPE AND ITS TREATMENT IN ICL

A The Criminalisation of Rape in Armed Conflict

The intense work of feminist theorists and scholars towards the criminalisation of rape within ICL has led to international law containing some of the most feminist rules and procedures relating to rape.⁸⁹ The Statutes of the ICTY and ICTR are evidence of feminist intervention particularly in relation to the definitions of rape, scope of available defences, allocations of burdens of persuasion, and the accompanying rules of evidence.⁹⁰ It is also evident that the experiences of the ICTY and ICTR in applying and prosecuting the law informed the drafting of the Rome Statute for the ICC. While there has been a partial feminist success with the crime of rape having evolved from mere evidence to an

⁸⁷ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [106].

⁸⁸ *Ibid* [105].

⁸⁹ Janet Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in International Law of Armed Conflict’ (2008) 9 *Melbourne Journal of International Law* 78.

⁹⁰ *Ibid* 81.

individual, nominated crime and therefore being moved up the hierarchy of ICL criminality, there remain some concerns regarding the criminalisation of rape.⁹¹

Kiran Grewal examined the ways in which the international process makes distinct the act of rape during wartime from the act during peacetime. This purposeful distinction, she argues, limits ICL's positive impact on broader women's rights outside the context of armed conflict.⁹² While Grewal acknowledges that the case law from the ICTY and ICTR represents relatively ground-breaking advances for women's rights in ICL, she warns that there remains much work to be done. Grewal highlights that there has been a dearth of rape indictments across international criminal case law and that this reflects the struggle feminist scholars and advocates have faced in the process of criminalising rape.⁹³ This struggle has been to address the counter-productive nature of law to historically prohibit rape but simultaneously and implicitly condone and legitimise it by failing to prosecute.⁹⁴

Advocates for ICL have celebrated the development of the criminalisation of wartime rape as a success for human rights and the advancement of women's rights.⁹⁵ The focus of feminist advocates has been on the development of sexual violence and rape crimes due to the disproportionately large number of women victims.⁹⁶ Grewal posits three areas that feminist scholars hoped ICL would contribute to the broader movement for women's rights. These are in deterrence, impunity, and advancement of women's rights more generally.⁹⁷ Grewal identifies the hope of feminist legal scholars for the prosecution of rape to contribute to the long-term deterrence of the crime for future armed conflicts.⁹⁸ One of the central issues for the feminist legal project of criminalising wartime rape has been the need to re-cast women's bodies from passive to active legal subjects in order to provide a way for women to assert agency and underline the seriousness of crimes committed against women's bodies.⁹⁹ Grewal states that it appeared this project was beginning to bear fruit, particularly with the final version of the Rome Statute reflecting

⁹¹ Ibid 110.

⁹² Grewal, above n 15.

⁹³ Ibid 67.

⁹⁴ Ibid.

⁹⁵ Ibid 60.

⁹⁶ Ibid.

⁹⁷ Ibid 62.

⁹⁸ Ibid 61.

⁹⁹ Ibid.

the focus in its provisions relating to gender-based crimes such as rape and the possibility of future prosecutions.¹⁰⁰

Grewal also links the continuing prosecution of rape as an indicator of ICL's challenge to impunity.¹⁰¹ The frequent criticism of feminist scholars in the past that rape and sexual violence in conflict zones have been trivialised or ignored began to be challenged with the emergence of prosecutions from the ICTR and ICTY. For this reason, the judgments emerging from the ICTY and ICTR such as *Akayesu* and *Kunarac* were held to be representative of a positive shift in the characterisation of wartime rape.¹⁰² The nature of wartime rape had finally been re-characterised from an inevitable facet of armed conflict to an act of significant violence. Finally, it was hoped by legal scholars that the criminalisation of wartime rape would have far-reaching consequences for the advancement of women's rights more broadly.¹⁰³ According to many feminist scholars, international prosecutions have the potential to advance women's rights both in and out of the context of armed conflict, particularly in relation to the ICC.¹⁰⁴ This has contributed to the considerable effort that has gone into attempting to establish a best practice in international prosecutions and judgments.

The criminalisation of rape in ICL has unarguably been an overall positive step towards the legal recognition of women's rights and the ending of impunity for crimes committed against women's bodies. There are, however, issues that have either been preserved or have arisen from the criminalisation process and outcome. Some feminist advocates, such as the Women's Initiatives for Gender Justice, have declared that the Rome Statute represents a victory for the over-arching feminist mission of criminalising wartime rape.¹⁰⁵ Karen Engle offers a critique of this blanket positivity about the criminalisation of wartime rape. She points out that this declaration of success is problematic because the ICTY has continued the tendency of women's rights advocacy and jurisprudence to diminish female sexual agency within its approaches to prosecuting wartime rape.¹⁰⁶ This has occurred through the perpetuation of assumptions surrounding sexual agency,

¹⁰⁰ Ibid.

¹⁰¹ Ibid 63.

¹⁰² Askin, above n 2.

¹⁰³ Grewal, above, n 15, 63.

¹⁰⁴ Ibid.

¹⁰⁵ Karen Engle, 'Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778, 784.

¹⁰⁶ Ibid 785.

for example, the traditional, dominant understandings of what it means to be a victim, which is not to be on the same side as the perpetrator.¹⁰⁷

While feminist theorists largely put aside their different opinions in favour of unified lobbying for the rules and procedures to be adopted by the ICTY, Engle argues that the problematic assumption about victim agency continued to emerge in the subsequent ICTY prosecutions for rape. She states that this assumption manifested in the approaches taken by the ICTY, which unwittingly denied sexual and political agency to victims of rape.¹⁰⁸ It also appears that this assumption has now been transferred into the case law of the ICC through the *Bemba* judgment. This has been done through the exclusion of the element of consent from considerations of criminal nature in relation to sexual penetration in wartime rape prosecutions.

B Consent and Coercion: The Feminist Discussion

One of the main areas in which ICL has shown to be inconsistent in defining the crime of wartime rape is in determining whether lack of consent is an element of the crime.¹⁰⁹ The dichotomy between non-consent-based and coercive-circumstance approaches has been a controversial topic among feminist legal theorists and appears to have had a significant impact on the formulation of the ICC's definition of rape in armed conflict. The role of consent within the definition of wartime rape was a contentious issue even during the drafting of the ICC's Elements of Crimes and RPE. It took six weeks to reach a consensus on the issue, and the delay was largely due to the differences in cultural and legal assumptions about the relationship between women and sex.¹¹⁰ During the negotiations over the ICC materials regarding rape, two legal principles emerged. The first is that individuals should be free from violence, and the second is that individuals should be free to exercise autonomy by consenting to sexual relations.¹¹¹ However, with these principles in mind, the standards of consent within domestic legal traditions could not just be implanted into ICL.

¹⁰⁷ Ibid 796.

¹⁰⁸ Ibid.

¹⁰⁹ Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 54(3) *Boston College Law Review* 1207, 1208.

¹¹⁰ K Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2000) 32 *Columbia Human Rights Law Review* 625, 639.

¹¹¹ Ibid 641.

Non-consent has not always been treated as an element of the crime of rape in armed conflict in ICL, but instead affirmative consent has been used as a defence to rape in armed conflict.¹¹² This is because it is argued that in the circumstances of armed conflict involving genocide, war crimes, and crimes against humanity, genuine consent on the part of the victim is impossible.¹¹³ The exclusion of non-consent as an element of the crime also aligns it further with crimes such as torture and enslavement where non-consent must not be proven for the crime to be established. In each case, to consider the crime of rape during armed conflict, the relationship between the establishment of non-consent and contextual circumstances has been considered.¹¹⁴ It has generally been agreed that there may be coercive circumstances in which genuine consent to sexual intercourse cannot be given and that there are numerous factors which could vitiate consent and establish coercion.¹¹⁵ So far, ICL has not effectively established a mandatory presumption of non-consent or coercion in factual circumstances relating to detention or other war crime situations.¹¹⁶

Nicola Henry emphasises the importance of considering the individual/collective nature of sexual violence when examining wartime rape.¹¹⁷ Henry identifies that rape committed as part of a genocide or a crime against humanity — in that it is part of a broader, widespread, or systematic attack — are not individual crimes and argues that victims are targeted based on their membership of a targeted group.¹¹⁸ Therefore, wartime rape must also be considered as part of a crime against a collective as well as its individual dimension. Henry, however, does not use this logic to undermine the centrality of consent to the determination of criminality of sexual penetration during armed conflicts. Instead, she uses it as a stepping off point for discussing the ways in which feminist discourse has contributed to a more complex understanding of the victim experience of wartime rape. Henry critiques the existing feminist jurisprudence in the

¹¹² Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) *The American Journal of International Law* 121, 123

¹¹³ *Ibid.*

¹¹⁴ Weiner, above n 109, 1224.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* 1226.

¹¹⁷ Nicola Henry, 'Theorizing Wartime Rape: Deconstructing Gender, Sexuality and Violence' (2016) 30(1) *Gender and Society* 44.

¹¹⁸ *Ibid.* 45.

area on the basis that it does not address the individual perpetrator or the underlying determinants of sexual aggression in conflict.¹¹⁹

The Rome Statute imposes an obligation on the ICC to ensure that the accused retains the right to the presumption of innocence and the right to an adequate defence.¹²⁰ The ICC's approach to defining wartime rape must, therefore, ensure that balance is maintained between protecting the victim during prosecution and preserving the accused's rights. According to Grewal, an approach that attempts to protect women during the prosecution process can limit or remove the defence possibilities for the perpetrator and ultimately undermine the rights of both the accused and the victim.¹²¹ She argues that this is because conservative provisions perpetuate the traditional authentic victim subject construction of women as passive subjects without agency.¹²²

Grewal believes that the way in which the rights of the accused, gender inequality, and individual agency during armed conflict can best be achieved is through ensuring that the protection of sexual autonomy is at the heart of rape laws.¹²³ Grewal also posits that making sexual autonomy the focus for the definition of rape in armed conflict will reveal the artificiality of the dichotomy of consent-based and coercive-circumstances approaches to defining wartime rape. She identifies an individual's right to sexual autonomy as being a common element at both the international and national level.¹²⁴

For Grewal, sexual autonomy combines the consent-centric approach that was favoured in *Kunarac*,¹²⁵ with the coercive-circumstances approach that developed in *Akayesu*,¹²⁶ and is reflective of the definition adopted in the ICTR Trial Chamber judgment in *Gacumbitsi*.¹²⁷ Grewal cites the Trial Chamber in *Kunarac* as identifying sexual autonomy as 'the true common denominator that unifies the various systems'.¹²⁸ The Trial Chamber

¹¹⁹ Ibid 48.

¹²⁰ *Rome Statute* arts 66–7.

¹²¹ Grewal, above n 57, 390.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid 375.

¹²⁵ *The Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001).

¹²⁶ *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998).

¹²⁷ *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-2001-64-T, 17 June 2004).

¹²⁸ Grewal, above n 57, 379.

viewed sexual autonomy as being violated whenever an individual subjected to the act is not a voluntary participant or has not freely agreed to it.¹²⁹ Grewal picks up on this application of sexual autonomy as the measure for the crime of rape and argues that it encompasses consideration of contextual, coercive circumstances and the impact of these circumstances on an individual's ability to give free and informed consent.¹³⁰ Grewal argues that the determination of whether an individual's sexual autonomy has been violated necessitates a consideration of the wishes of the individual that is generally ascertained through the matter of consent.¹³¹ The distinction between consent-based definitions of wartime rape and coercive-circumstances approaches is therefore largely artificial as both "sides" are necessarily applicable to effectively defining wartime rape. Further, the inclusion of the victim's consent within the consideration provides acknowledgement not only of the violation of sexual agency but also that the victim has sexual agency to exercise and is not merely a harmed body.

C Capturing the Complexity of Female Sexual Agency

The *Akayesu* judgment marked the first international prosecution for rape and sparked discussion among feminist legal theorists about the appropriateness of the ICTR's definition of rape in armed conflict. The Trial Chamber had definitively stepped away from a non-consent-based approach to defining wartime rape, and this was a clear divergence from the approach taken by many domestic legal systems. *Akayesu* also developed a principle that was not consistently reflected in subsequent judgments of the ICTR and ICTY or the recent *Bemba* judgment of the ICC.

Feminist lawyers and activists, such as Catharine MacKinnon, played a large role in the feminist contribution to the work of the ICTY and ICTR.¹³² MacKinnon views the definitions of wartime rape that emerged from the ICTY and ICTR as existing in a binary where non-consent is either an element of the crime or not worth considering in light of the establishment of coercive circumstances. MacKinnon's discussion on the role of consent in defining the crime of rape set the foundation in the early 1990s for a robust

¹²⁹ *The Prosecutor v Kunurac (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001) [457].

¹³⁰ Grewal, above n 57, 380.

¹³¹ *Ibid* 386.

¹³² Doris E Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 *Feminist Legal Studies* 145, 149.

feminist discussion concerning sexual agency during armed conflict. Importantly, MacKinnon accepted that coercive circumstances are established whenever the nexus crimes of genocide, crimes against humanity, or war crimes are found.¹³³ Rape, therefore, is seen to occur whenever sexual penetration of one person by another happens within an armed conflict that has resulted in establishing these crimes.

MacKinnon's argument is that non-consent as an element of the crime is damaging to the achievement of gender equality because consent obviates the inherent inequality of the genders by relying on an artificial equality for its very operation.¹³⁴ She states that consent should be eliminated completely from the rape definition because gender inequality is the foundation of rape and the definition should be reflective of the power imbalance between victims and the accused.¹³⁵ Therefore, the consideration of circumstances of coercion that may surround a sexual assault is more likely to address and reflect the existing gender imbalance. MacKinnon supports her argument by comparing the crime of rape to other violent crimes and asserting that no other violent crime requires an element of non-consent to be established. She relies on the example of homicide and states that it would be implausible for murder trials to take into account whether the victim provided consent to be killed.¹³⁶ It would indeed be implausible for this to be an element of a crime in which, no matter the circumstances, the taking of human life is prohibited. However, as MacKinnon views rape as a manifestation of the 'gendered war of aggression of everyday life',¹³⁷ it may seem that consideration of the criminal nature of sexual intercourse, placed in this context, is not contingent on consent.

MacKinnon further distinguishes the dichotomy of consent-based and coercive-circumstances ICL approaches through her dissection of the nature of each. She views the consideration of non-consent as an element of the crime of rape as a representation of sexual penetration involving love and passion gone wrong.¹³⁸ MacKinnon also argues that the element of non-consent focusses on the mental state of the victim and perpetrator.¹³⁹ In contrast, she positions the focus of coercive circumstances on the

¹³³ Catharine MacKinnon, 'Rape Redefined' (2016) 10 *Harvard Law and Policy Review* 431.

¹³⁴ *Ibid.*

¹³⁵ *Ibid* 474.

¹³⁶ *Ibid.*

¹³⁷ Catharine MacKinnon, 'Rape, Genocide, Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5, 8.

¹³⁸ MacKinnon, 'Rape Redefined', above n 133.

¹³⁹ *Ibid.*

external and physical acts of the sexual penetration and as representing power acted out through domination. MacKinnon sees the ICTR *Akayesu* definition of rape in armed conflict as a breakthrough definition and that 'arguably, for the first time, rape was defined in law as what it is in life'.¹⁴⁰ She asserts that the ICTY's following judgments in *Furundžija* and *Kunarac* were ill-conceived and regressive as they returned to a focus on non-consent as definitive of the crime of rape.¹⁴¹ In contrast to the definition of wartime rape used by the ICTR in *Akayesu*, the *Furundžija* definition required the prosecution to prove the existence of coercion rather than non-consent. While the ICTY retained discussion of coercive circumstances in *Kunarac*, it was still considered within the paradigm of non-consensual penetration. The Appeal Chamber in *Kunarac* found that where coercive circumstances were established, it would be presumed that the sexual penetration of the victim was non-consensual.¹⁴²

The consideration of individual sexual agency, particularly that of women, does not fit within the definition endorsed by MacKinnon because her focus is on the external power dynamics rather than the internal experiences of sex, desire, and autonomy that are expressed by women during armed conflict. The re-engagement with non-consent as an element of wartime rape in *Furundžija* and *Kunarac* therefore becomes symptomatic of a reluctance to recognise the everyday gender imbalance that affects women. Further, in relation to the Appeals Chamber in *Kunarac*, Karen Engle argues that this determination effectively makes consensual sexual intercourse a legal impossibility during circumstances such as armed conflict.¹⁴³

Engle points out that in the former Yugoslavia before the outbreak of armed conflict, intimate relationships between members of different ethnic or religious groups was not uncommon.¹⁴⁴ However, if the *Kunarac* definition were to be applied, sexual relations between people of different groups would likely be legally viewed as rape once armed conflict existed in the region, despite the apparent consent of the victim. While it has been posited that prosecutorial discretion would prevent non-valid cases being elevated to the

¹⁴⁰ MacKinnon, 'Defining Rape Internationally', above n 17, 944.

¹⁴¹ Ibid.

¹⁴² *The Prosecutor v Kunarac, Kovac, and Vukovic (Judgement)* (International Criminal Tribunal for Former Yugoslavia, Appeals Chamber, Case No IT-96-23-I & IT-96-23/1-A, 12 June 2002).

¹⁴³ Engle, above n 105, 804.

¹⁴⁴ Ibid 809.

level of international criminal law,¹⁴⁵ the implication this has for the acknowledgement of sexual agency during armed conflict is significant. For example, for Engle, the Appeals Chamber in *Kunarac* effectively made consensual sex during armed conflict a legal impossibility due to its determination that non-consent is established by proving that coercive circumstances, such as armed conflict, exist.¹⁴⁶ Janet Halley describes this as a process of flattening and collapsing 'the political and moral ambiguities of sexual violence, sexual desire and sexual conjunction of civilians with armed combatants'.¹⁴⁷ The preference of a coercive circumstance-based definition over a consent-based approach emphasises the external environment of the sexual penetration over the internal experience of the victim; therefore, this disempowers and makes irrelevant the decisions and actions of the victim. This removes the focus of the crime from its underlying principle of the protection of sexual autonomy.¹⁴⁸

Halley also comments on the approach of the Appeals Chamber in the case of *Kunarac*. The Trial Chamber determined that coercive circumstances and non-consent could be *inferred* in the event that it occurred between a combatant and an enemy civilian.¹⁴⁹ The Appeals Chamber, however, applied a *presumption* of coercive circumstances and non-consent in the event of these factual circumstances.¹⁵⁰ It, therefore, increased the reliance of establishing the crime on the identity of the victim and perpetrator and perpetuates the misplaced value of the authentic victim subject in rape prosecutions. In interviews conducted by Olivera Simić with Bosnian women who had engaged in sexual relationships during and after the conflict, the prevailing image of Bosnian women as victims only became fractured.¹⁵¹ While the focus of these interviews was on sexual relationships between Bosnian women and UN peacekeepers, it remains evident that the experiences of individuals within a specific cultural group cannot be generalised and removed of sexual agency on the basis of the surrounding circumstances in which they made their decisions.¹⁵² These decisions may, in fact, be driven by desires such as sexual

¹⁴⁵ Interview with Patricia Viseur Sellers, legal advisor to the ICTY, 17 May 2004.

¹⁴⁶ Engle, above n 105, 804.

¹⁴⁷ Halley, above n 89, 101.

¹⁴⁸ Grewal, above n 57, 375.

¹⁴⁹ Halley, above n 89, 89.

¹⁵⁰ *Ibid.*

¹⁵¹ Olivera Simić, 'Challenging Bosnian Women's Identity as Rape Victims, as Unending Victims: The "Other" Sex in Times of War' (2012) 13(4) *Journal of International Women's Studies* 129, 130.

¹⁵² *Ibid.*

attraction, love, or friendship and not in need of the paternalistic protection that a presumption of non-consent would afford women during armed conflict.¹⁵³

Halley argues that the ambivalence between approaches to defining wartime rape in armed conflict within ICL has been brought forward into the Rome Statute and the ICC's RPE.¹⁵⁴ The Rome Statute permits the RPE to 'guide' the Court in its application of the law, and the RPE, particularly Rule 70, is an attempt to mediate between the 'permitted inference' of the non-consent approach of the ICTY Trial Chamber and the 'mandatory presumption' of non-consent from the Appeals Chamber.¹⁵⁵ This ambivalence results in a flattening of victim subject acknowledged by the ICC and silences the complex and nuanced experiences of rape and sexual intercourse during wartime.

D Creating an Ideal Victim/Perpetrator Dichotomy

The concept of the "Raped Woman" has been a historically recurring subject of ICL either as a method of regulating wartime conduct, constructing propaganda, or identifying rape narratives.¹⁵⁶ This construct of a female victim, when combined with the notion of rape as an instrument of war that is used by 'one side' of the armed conflict against the other,¹⁵⁷ creates what Shana Tabak labels a 'false dichotomy' that emerges from ICL's treatment of wartime rape. One of the false dichotomies that Tabak identifies within ICL consists of the ideal representation of the female victim and the male perpetrator.¹⁵⁸ Tabak examines the complex reality of female agency, accountability, and the danger of false dichotomies when attempting to reconcile armed conflict. The complex roles that women played in the armed conflict in Columbia are used by Tabak as an example of the ways in which false dichotomies only generalise and homogenise the experiences of women in wartime.¹⁵⁹ The reality is that female experiences of war are far more nuanced and that the efficacy of ICL is limited by its ability to address the false dichotomy of the female victim, male perpetrator narrative.¹⁶⁰ According to Tabak, this false dichotomy

¹⁵³ Ibid 131.

¹⁵⁴ Halley, above n 89.

¹⁵⁵ Ibid.

¹⁵⁶ Buss, above n 132, 154.

¹⁵⁷ Ibid 155.

¹⁵⁸ Shana Tabak, 'The False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Columbia' (2011) 44 *International Law and Politics* 103, 126.

¹⁵⁹ Ibid 105.

¹⁶⁰ Ibid.

has emerged from the criminalisation process of wartime rape and that the focus on women as perpetual victims has ultimately positioned men as the perpetual perpetrators. This is, as Tabak proposes, an oversimplification of the complex roles and experiences of men and women during armed conflict and an over-reliance on a false dichotomy.¹⁶¹ There is a tendency to ignore the involvement of women as combatants by the media and human rights discourse despite the fact that women have taken up arms in numerous armed conflicts.¹⁶²

An example of the reliance of ICL on the victim/perpetrator false dichotomy is evident in the case law and feminist discourse arising from the conflict in the former Yugoslavia. Muslim women were the ideal victim subjects during the conflict in the former Yugoslavia, and the concept of Serb women as rape victims did not fit within the ideal narratives of mass rapes used as a weapon of war during the conflict.¹⁶³ The feminist research that emerged from this conflict was focused on the voices and experiences of these ideal victim subjects and, as a result, failed to acknowledge the more diverse experiences of wartime rape.¹⁶⁴ The idea that victimhood may be realistically complex enough to include elements of complicity, responsibility, or agency appears to challenge ICL's ability to protect victims when there is suspicion of guilt or inauthenticity.¹⁶⁵

This difficulty in recognising instances in which agency or responsibility may exist has re-emerged in the *Bemba* judgment's definition of wartime rape. The nuanced and complex ways in which sexual agency is violated or exercised during armed conflict, has been silenced in favour of protecting those that comfortably fit within the ideal victim subject construct.¹⁶⁶ For example, in considering circumstances in which rape occurs, the focus of the judicial reasoning lies on a discussion of coercive circumstances and the

¹⁶¹ Ibid.

¹⁶² Ibid 126.

¹⁶³ Olivera Simić, 'Feminist Research in Transitional Justice Studies: Navigating Silences and Disruptions in the Field' (2016) 17 *Human Rights Review* 95, 99.

¹⁶⁴ Ibid 104.

¹⁶⁵ Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (The University of Wisconsin Press, 2013), 7.

¹⁶⁶ Erin Baines, *I am Evelyn Amony: Reclaiming My Life from the Lord's Resistance Army* (University of Wisconsin Press, 2015); Mats Utas, 'Victimcy, Girlfriending, Soldiering: Tactic Agency in a Young Woman's Social Navigation of the Liberian War Zone' (2005) 78(2) *Anthropological Quarterly* 403; Maria Eriksson Baaz and Maria Stern, 'The Complexity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo' (Working Paper on Gender Based Violence, The Nordic Africa Institute and SIDA, May 2010).

environmental factors that could create such circumstances.¹⁶⁷ The Chamber did not take the opportunity to elaborate on how those circumstances relate to the victim but instead directed attention to setting out when and how coercive circumstances may be shown.¹⁶⁸ This reinforces the idea that there is a seductive quality to the acknowledgement of how vulnerable the powerless are when an armed conflict breaks out and that the ICC has allowed itself to be seduced.

IV RE-CONSIDERING WHAT BEMBA MEANS

A The Impacts of Removing Consent

The Trial Chamber in the *Bemba* judgment stated that Article 21 of the Rome Statute obliges the Chamber to apply ‘the provisions of the Statute, Elements of Crimes and Rules of Procedure and Evidence’ and further requires the Elements of Crimes to be applied subject to any conflicts with the Rome Statute.¹⁶⁹ These sources apply before consideration can and should be turned towards the case law of other international courts and tribunals such as the ICTY and ICTR.¹⁷⁰ The Trial Chamber even has discretion to apply its own case law for making determinations but, while not bound by ICC precedents, the Trial Chamber acknowledges the desirability of following previous ICC case law in the ‘interests of expeditiousness, procedural economy, and legal certainty’.¹⁷¹

As a result of the Trial Chamber’s hierarchy of applicable legal documents and principles, it has directly adopted the definition of rape set out within the ICC’s Elements of Crimes without any apparent influence from the wealth of feminist legal jurisprudence or the case law that has emerged since its creation. This resulted in the *Bemba* judgment defining wartime rape as sexual penetration that occurs by force, by threat of force, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.¹⁷² The Chamber elaborated the concept of a coercive environment as being guided by the *Akayesu* judgment in which it was found that the presence of hostile

¹⁶⁷ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [102]–[103].

¹⁶⁸ *Ibid* [103–104].

¹⁶⁹ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [66].

¹⁷⁰ *Ibid* [72].

¹⁷¹ *Ibid* [74].

¹⁷² *Ibid* [102].

forces among the civilian population would satisfy the requirements of coercive circumstances.¹⁷³

In relation to the treatment of rape by the ICC, the Elements of Crimes does not expressly include non-consent as an element of the crime of rape in armed conflict and Rule 70 of the RPE provides restrictions on when consent may be inferred from a set of circumstances.¹⁷⁴ Previous international cases involving the crime of wartime rape have, despite discussing the coercive circumstances surrounding the physical invasion, maintained a link between circumstances and an individual's non-consent. The ongoing critique among ICL commentators about the essentiality of non-consent in judicial consideration has been reflected in the drafting of ICC materials and ultimately in the definition adopted by the Trial Chamber in *Bemba*.¹⁷⁵ The Chamber relied on the finding of the ICC Pre-Trial Chamber that military forces had committed rape as part of a widespread attack directed against the civilian population.¹⁷⁶ The threshold of the *Akayesu* requirement for coercive circumstances is therefore satisfied, and it remained for the Trial Chamber to determine whether the alleged acts that occurred amounted to sexual penetration done by force, coercion, or by taking advantage of the established coercive circumstances. In doing so, the Chamber notes that the perpetrators of the alleged rapes 'were of the same group and possessed the same identifying characteristics' as soldiers who had murdered civilians.¹⁷⁷ This evidence is used to establish that the perpetrators were hostile soldiers as opposed to civilian perpetrators.

The element of non-consent is discussed by the Chamber in relation to it not being a legal element of the crime of rape under the Rome Statute and that, where the second limb of the definition is established, lack of consent need not be proven.¹⁷⁸ The Chamber also notes that this is indicative of the intention of the drafters of the Rome Statute for the Prosecution not to have to establish non-consent so that efforts to bring perpetrators to justice are not undermined.¹⁷⁹ The ICC Chamber in the *Bemba* judgment identified that it was guided by Rule 70 of the RPE when considering the elements constituting the crime

¹⁷³ Ibid [103].

¹⁷⁴ *Elements of Crimes; Rules of Procedure and Evidence* r 70.

¹⁷⁵ Grewal, above n 57, 374.

¹⁷⁶ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016), [631].

¹⁷⁷ Ibid [634].

¹⁷⁸ Ibid [106].

¹⁷⁹ Ibid [105].

of wartime rape and for analysis of the relevant evidence.¹⁸⁰ However, Rule 70 provides that in cases where it has been established that a perpetrator used force or coercion or took advantage of coercive circumstances to undermine a victim's ability to give voluntary or genuine consent, the individual's consent cannot be inferred by their words or conduct.¹⁸¹ It would appear that this necessarily requires the Chamber to consider whether the victim's lack of consent is due to the surrounding circumstances and therefore binds the consideration of coercive circumstances with that of consent.

Yet, the ICC Chamber stated in *Bemba* that the Rome Statute did not identify a victim's lack of consent as an element of the crime of wartime rape.¹⁸² The ICC's determination that deliberation of lack of consent is irrelevant is reliant only on the basis of secondary sources that demonstrate the intention of the drafters of the Rome Statute.¹⁸³ The ICC was able but unwilling to apply a consideration of the victim's lack of consent to the elements of the crime of wartime rape as detailed in the Elements of Crimes. Instead of following the precedent that had been established in *Furundžija*, *Kunarac*, and *Gacumbititsi*, the ICC chose to explicitly sever the link between the consideration of a victim's lack of consent and the consideration of coercive circumstances. This decision has ramifications for the representation of female sexual agency: it perpetuates ideal constructs of the victim and perpetrator roles of wartime rape, and it potentially conflicts with an accused's right to a fair trial.

The consideration of the circumstances surrounding penetration or invasion is necessary to contextualise the choice and consent of the victim involved. Given the presentation of a dichotomy of definitions of wartime rape within the relevant jurisprudence, the *Bemba* judgment should have effectively articulated the artificiality of this dichotomy and reinforced the important relationship between these approaches. Instead, the Trial Chamber attempted to sever the link between consideration of the coercive circumstances of the case and how this affects a victim's ability to give genuine consent. It should be noted that while the ICC is guided by the Elements of Crimes and the RPE, neither document specifically excludes non-consent from being considered as an element

¹⁸⁰ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [109].

¹⁸¹ *Rules of Procedure and Evidence* r 70(a).

¹⁸² *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [105].

¹⁸³ *Ibid.*

of the crime. The Elements of Crimes does not refer to consent, and the RPE only limits the circumstances in which consent can be inferred.¹⁸⁴ Therefore, the exclusion of non-consent from the consideration of wartime rape was a discretionary decision made by the ICC in defining the crime.

There are two prominent ways in which the definition of wartime rape adopted by the ICC in the *Bemba* judgment will impact on the conceptualisation of women during armed conflict. The dismissal of the relevance of non-consent to the criminal nature of sexual penetration will have a considerable impact on how sexual autonomy and agency is viewed during armed conflict. If the consent of individuals to sexual intercourse is relegated to an affirmative defence of the crime of rape in armed conflict, then this essentially elevates any sexual intercourse during armed conflict to potentially meeting the threshold of being an indictable offence of rape at the ICC.

One argument raised by Patricia Viseur Sellers, legal advisor to the ICTY, during an interview in 2004, is that wrongful prosecution of consensual sexual relations will be unlikely due to prosecutorial discretion.¹⁸⁵ The Prosecutor of the ICC will, therefore, be responsible for determining which sexual intercourse during armed conflict is more likely to satisfy coercive-circumstances requirements. This argument only raises the second issue that stems from an over-emphasis on the coercive circumstances for establishing the criminal nature of sexual intercourse. Prosecutorial discretion will become the means by which intercourse is classified as rape, which is problematic due to the multiple other considerations that prosecutors will need to take into consideration before prosecuting a rape charge. The relevance of the identity of the victim and the perpetrator will become a central issue for consideration given that coercive circumstances may be more easily proven if the identities conform to the stereotypical “aggressor” and “persecuted” roles. The exercise of prosecutorial discretion may become dictated by the characteristics and roles that the victim and perpetrator occupied during the armed conflict.¹⁸⁶

¹⁸⁴ *Elements of Crimes; Rules of Procedure and Evidence*.

¹⁸⁵ Engle, above n 105, 806.

¹⁸⁶ Doris Buss, ‘Knowing Women: Translating Patriarchy in International Criminal Law’ (2013) 23(1) *Social and Legal Studies* 23, 73–92; Buss, above n 132; Grewal, above, n 15; Engle, above n 105.

This will only increase the problematic “ideal victim” conceptualisation that already exists and became a significant challenge to overcome within feminist discourse during the conflict in the former Yugoslavia. Further, the perpetuation of the ideal victim subject within prosecutions of wartime rape creates a binary representation of the ideal perpetrator that creates a serious and legitimate risk to an accused’s right to a fair trial.

B Recognising Sexual Agency

The presence of armed conflict should not be held to immediately vitiate individual sexual autonomy. ICL has given preference to the protection of perceived powerless women over the acknowledgement of female sexual agency by placing consideration of coercive circumstances beyond the paradigm of a victim’s capacity to give genuine consent. While it is important to protect the rights of the victim and attempt to deter future atrocities committed during armed conflict, the ICC has failed to account for the complexity of female sexual autonomy and the nuanced ways that it is expressed during armed conflicts. The *Bemba* judgments move away from a consent-linked consideration of coercive circumstances means that the ICC has in fact taken a step back towards a protectionist and paternalistic treatment of wartime rape victims rather than progressing forward to a definition that is representative and reflective of female experiences of sexual autonomy during armed conflict. The same women that the ICC is intending to protect can be inadvertently harmed by a construction of women during armed conflict as mere victims, deficient of sexual agency and unable to exercise sexual autonomy.¹⁸⁷

The reliance on the establishment of coercive circumstances to provide the necessary criminality of sexual penetration is an attempt to mediate and resolve the complexity of sexual agency in armed conflict. Instead of successfully representing or progressing the issues of sexual violence, rape, and sexual agency in armed conflict, the *Bemba* definition acts as a ‘flattening of the rape-war dilemma’ and prevents ICL from accurately reflecting wartime experiences of violence and sexual agency.¹⁸⁸ In forcefully rejecting consent-based approaches to defining wartime rape, feminist theorists have marginalised the experiences of individuals living through armed conflict. While the generic and universal

¹⁸⁷ Simić, above n 151, 132.

¹⁸⁸ Halley, above n 89.

application of female agency is a problematic, western, secular forced consciousness, coercive circumstances-based approaches that sever any connection to the sexual agency of the victim are dismissing the reality of non-criminal sexual intercourse. There must be recognition of the middle ground between the victim or agent roles. Otherwise, individuals are provided recognition of agency up until the point that an armed conflict emerges within the region in which they reside. At this point, all individuals must either become perpetrators or victims if the paradigm of consent is removed from the conceptualisation of wartime sexual penetration.

The move away from a consent-based definition also places emphasis on the external circumstances of a crime that is, essentially, a violation of an individual's sexual autonomy.¹⁸⁹ The Chamber determined that coercive circumstances sufficiently established that the perpetrators 'knowingly and intentionally invaded the bodies of the victims by forcefully penetrating their vaginas and/or anuses, and/or other bodily openings with their penises'.¹⁹⁰ The reason that this is problematic is because there is no consideration of the agency for the victim. The victim becomes a body against which harms are committed, and their experience of the crime, although discussed earlier in the judgment, is silenced. It is no longer a violation of an individual's sexual autonomy and freedom that is being prohibited but instead a physical assault of a powerless body that occurs within a set of external circumstances.

The ICC has, by excluding a consideration of the link between consent and coercive circumstances, denied female sexual agency and therefore the existence of consensual sexual relationships during armed conflict. The denial of sexual agency is gendered, despite the ICC's explicit disclaimer of gender neutrality, because of the reliance by the ICC on force, coercion, or the taking advantage of coercive circumstances to establish the criminal nature of the sexual penetration. This positions the penetrated as the subject without agency against whom the sexual agency is exercised. The perception of the female as the penetrated and, therefore, devoid of sexual agency in the ICC's definition of

¹⁸⁹ Engle, above n 105.

¹⁹⁰ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [637].

wartime rape is linked to traditional assumptions of gender, sexuality, and sexual intercourse, which construct a 'naturally gendered' victim of rape as female.¹⁹¹

The ICC's lack of acknowledgement of female sexual agency also re-enforces the idea of an ideal victim subject. This is a victim who is vulnerable, powerless, innocent, and at the mercy of the surrounding circumstances. Without consideration of consent, an individual must either be a victim or a perpetrator during armed conflict because there is no middle ground in which sexual penetration is removed of its criminality.

C Re-Enforcing the Ideal Victim Subject

The ICC has positioned women as victims during armed conflict by adopting a definition of wartime rape that assumes consent as irrelevant when given in the context of armed conflict. The subsequent diminishment of female sexual agency results in the perpetuation of a narrative that endorses a false dichotomy of an ideal victim/perpetrator archetype. The efficacy of ICL will be limited if the role that the *Bemba* definition of wartime rape plays in perpetuating these false dichotomies is not adequately addressed.¹⁹² The *Bemba* judgment included a thoughtful and well-executed account of the varying harms that victims of wartime rape can experience, but the precedent that it set in terms of legally defining the crime is problematic for the continued consideration of the complexities of sexual violence in armed conflict. The way in which the ICC reflected the victim experiences of trauma, social stigma, and ongoing physical issues resulting from wartime rape are important for its function as a means of transitional justice. The ICC has shown that it will provide a means of visibility for victim narratives and acknowledgement of the harms they have suffered. While these are positive aspects of the ICC's treatment of wartime rape, the legal definition adopted by the ICC does not support the progress achieved in other areas of the judgment.

The ICC expressly identified the gender-neutral application of the legal definition; however, the exclusion of consent from the consideration of wartime rape opens the gates for the perpetuation of the ideal victim subject. This is done by an over-reliance being placed on the external circumstances in which the sexual penetration occurs in order for the act to pass the criminality threshold for the crime of wartime rape. If the

¹⁹¹ Buss, above n 132.

¹⁹² Tabak, above n 158, 113.

Prosecution becomes focussed on instances of sexual penetration that fit the pre-conceived notion of coercive circumstances, then there is a risk that many legitimate experiences of wartime rape will be silenced.

The premise of an “ideal” or “popular” victim is not new to ICL and much of the previous attention within international, feminist discourse regarding rape and sexual violence has been predicated on a victim perceived as belonging to the “innocent” nation and attacked by the “aggressor” nation.¹⁹³ The ICC was presented with an opportunity to deliver a judgment in *Bemba* that set a new definition of wartime rape that would end the previous inconsistency and provide for a more nuanced understanding of victims of wartime rape. Instead, the decision not to link the establishment of coercive circumstances with a consideration of how these circumstances have vitiated the victim’s ability to give voluntary or genuine consent has only strengthened ICL’s reliance on the false dichotomy of the victim and perpetrator narratives.

In reinforcing the false dichotomy of the victim and perpetrator roles, the *Bemba* definition of wartime rape has marginalised the experiences of victims that do not fit the ideal archetype of the victim and perpetrator role. If, as Patricia Viseur Sellers argues, prosecutorial discretion is the safeguard against the international prosecution of consensual sexual penetration, then it is the Prosecutor who determines what instances of sexual penetration are likely to satisfy the required coercive circumstances. In instances of wartime rape with factual circumstances that fit outside the ideal narrative, the likelihood of prosecution may be reduced due to a reasonable belief that it is less likely to result in a conviction. An instance of wartime rape in which the victim is male or a female combatant is likely to be less sure of conviction than one in which the victim is a non-armed, civilian female and assaulted by a male combatant. The involvement of women as combatants in numerous armed conflicts challenges the stereotype of female victimhood during armed conflict and threatens the certainty of a conviction reliant on the establishment of coercive circumstances.

Armed conflict affects men and women in ways that can challenge preconceived assumptions about gender roles and experiences.¹⁹⁴ Despite the gender-neutral

¹⁹³ Olivera Simić, ‘Engendering Transitional Justice: Silence, Absence and Repair’ (2016) 17 *Human Rights Review* 1, 6. See also Olivera Simić, *Silenced Victims of Wartime Sexual Violence* (Routledge, 2018).

¹⁹⁴ Tabak, above n 158, 127.

intention of the *Bemba* judgment, in explicitly removing consent from the consideration of the criminal nature of sexual penetration, the ICC has failed to challenge preconceived assumptions of gender and victimhood. The *Bemba* definition of wartime rape does not allow for the recognition of non-consensual sexual penetration that falls outside the false dichotomy of civilian, female victim and combatant, male perpetrator. For instance, in a situation in which one combatant sexually penetrates another combatant during an armed conflict, without their consent, only the surrounding circumstances will be taken into account to determine whether this is wartime rape. It may appear logical that this would still amount to a case of wartime rape, but the current definition, as set by the *Bemba* judgment, does not allow for such clarity. The victim's consent is irrelevant and, therefore, the weight of the prosecution's argument must go to establishing the use of force or coercion or that the perpetrator took advantage of coercive circumstances. However, if both the alleged victim and perpetrator are from the same "side" of the armed conflict and both are male, how can evidence of coercive circumstances or force not be seen as relevant to establishing non-consent?

Further, what does it say about the current definition that, if the victim was female, it may be easier to establish the use of force or coercive circumstances without the necessary link to consent? The answer is that the definition is reliant on the prosecution establishing the existence of the ideal victim and perpetrator archetype to satisfy the requisite criminal nature of wartime rape. The perpetuation of this archetype further marginalises the experiences of male victims of wartime rape because it reinforces the construct of men as perpetrators and silences the far more complex ways that men experience armed conflict. This hypothetical situation reveals that the *Bemba* definition, in relying on the establishment of external circumstances to determine the criminal nature of sexual penetration, is insufficient to address the range of experiences of wartime rape. It also reveals that, despite the explicit statement of the definition's gender-neutrality, it in fact perpetuates gender stereotypes and false dichotomies that undermine the achievement of gender equality within ICL. While this clearly perpetuates the construct of female victimhood, it also has ramifications for the ICC's duty to protect the right of the accused to a fair trial.

D The Effects of the False Dichotomy on the Rights of the Accused

In the event that cases fitting the ideal archetype are brought to trial, a significant consequence is that the reliance on the characteristics and role of the accused in the armed conflict threatens the balance between the rights of the accused and those of the victim. If the identity of the accused correlates to the identifying characteristics of a combatant of the conflict, then the acknowledged 'coercive circumstances' present during an armed conflict operate to create a presumption of rape in the event that the mechanical elements are proven. In considering coercive circumstances, the Trial Chamber in *Bemba* cited *Akayesu*, specifically in that 'coercion may be inherent in certain circumstances, such as armed conflict or the military presence'.¹⁹⁵

The reliance of the ICC on the *Akayesu* consideration of established coercive circumstances contributes to the issues that arise from the exclusion of non-consent as an element of the crime of wartime rape. This is because it essentialises all sexual penetration that occurs during an armed conflict to rape with the caveat being that the perpetrator must have sufficiently 'taken advantage' of the coercive circumstances.¹⁹⁶ The Chamber does not, however, elaborate on what "taking advantage" may embody.

This leaves a gap in the case law that may be seen to provide a threshold of conduct that protects the rights of the accused to a fair trial but in fact has negative implications for the rights of a specific type of alleged perpetrator. The ICC's perpetuation of the ideal victim subject necessarily creates the over-simplified binary discussed by Tabak as the false dichotomy of the victim/perpetrator roles. This means that it is not only an ideal victim subject that is created by the removal of the element of non-consent from the crime, but it is also the creation of an ideal perpetrator subject.

The ICC's provision, that when sexual penetration is not done by force or coercion but instead by 'taking advantage of coercive circumstances',¹⁹⁷ contributes further to the construct of an ideal perpetrator because it suggests that, in the event that coercive circumstances are established by combatant forces being present among female civilian

¹⁹⁵ *The Prosecutor v Jean-Pierre Bemba Gombo (Judgement)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [103].

¹⁹⁶ *Ibid* [104].

¹⁹⁷ *Ibid*.

refugees,¹⁹⁸ a combatant may have sufficiently taken advantage of those circumstances by engaging in sexual intercourse with one of the female civilian refugees. This has implications for the accused's right to a fair trial as it suggests that whether the perpetrator has taken advantage of coercive circumstances may be determined based on characteristics by which they can be identified as belonging to the combatant group. For example, an individual's race, ethnicity, or gender become tools to determine not only their role in the armed conflict but also their role as either perpetrator or victim in the event of sexual intercourse. Once an individual's characteristics are found to align with those of the combatant group, the effect of excluding non-consent from the definition of wartime rape is to create a bias against the presumption of that individual's innocence.

Common Article 3 of the Geneva Convention establishes an international standard for a right to a fair trial.¹⁹⁹ This right has been incorporated into the Rome Statute and, therefore, operates at the ICC to ensure that the accused receives a fair, impartial, and public hearing.²⁰⁰ In Article 66(a) of the Rome Statute, the accused is provided with the right to the presumption of innocence and that the accused's guilt must be established beyond a reasonable doubt.²⁰¹ The decision by the Chamber in the *Bemba* judgment to exclude consent and rely solely on the establishment of coercive circumstances to satisfy the criminality of sexual penetration, therefore, has ramifications for the ICC's ability to comply with Article 66 of the Rome Statute. This is because an individual who easily fits within the ideal perpetrator role has less access to a presumption of innocence than one who does not.

This is relevant to the rights of the accused as the ICC's decision to construct the definition of wartime rape in this way conflicts with Article 21 of the Rome Statute. Article 21 provides for the sources that the ICC may draw from to determine the applicable law for a crime. It states that the ICC should first apply the Rome Statute, then the Elements of

¹⁹⁸ This example is similar to that used by the Trial Chamber in *Akayesu* which determined that coercion may be inherent in circumstances such as 'military presence of Interahamwe among refugee Tutsi women at the bureau communal': *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Judgment, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [688].

¹⁹⁹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

²⁰⁰ David Weissbrodt and Kristin K. Zinsmaster, 'Protecting the Fair Trial Rights of the Accused in International Criminal Law: International Criminal Court and the Military Commissions in Guantanamo' in *Research Handbook on International Criminal Law* (Edward Elgar Publishing Ltd, 2011) 261, 265.

²⁰¹ *Rome Statute* art 66.

Crime and the RPE. It may then, if appropriate, look to treaties and the principles and rules established by international law as well as those that arose in previous ICC decisions.²⁰² Finally, under Article 21(3), the application of these sources of law must be consistent with internationally recognised human rights and not have an adverse distinction based on 'age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin'.²⁰³ Given the impact of the exclusion of non-consent on the accused's right to a fair trial and its potential for adverse distinction on the basis of a number of characteristics outlined in Article 21(3), it is relevant to consider Article 51(5) of the Rome Statute. Article 51(5) requires that in the event that there is a conflict between the Rome Statute and the Rules of Procedure, the Statute shall prevail.²⁰⁴ This is an explicit indication of the intent of the drafters of the Rome Statute that its provisions should prevail over other, secondary sources of law.

The ICC stated that it was relying on the Elements of Crimes and secondary sources that provided insight into the intentions of the drafters of the Rome Statute to formulate the definition for wartime rape. Therefore, in this instance, it is not a conflict between the RPE and the Rome Statute; however, Article 51(5) still provides guidance as to managing conflicting sources of law. In this instance, the ICC has relied on documents to the extent that it has defined wartime rape in a way that has diminished an accused's right to a fair trial under Article 64 of the Rome Statute and their right to the presumption of innocence under Article 66.²⁰⁵

If the guidance provided by Article 51(5) is complied with, the rights of the accused should prevail over the sources relied upon by the ICC to exclude a consideration of the victim's ability to consent from the broader consideration of coercive circumstances. A re-introduction of non-consent to the definition of wartime rape would acknowledge the complexity of identity and sexual agency that exists in conflict, including the understanding that identity does not uniformly dictate the exercise of sexual agency. The effect of the ICC's decision in *Bemba* may be that the wartime definition of rape is contrary to the Rome Statute which provides the opportunity for future prosecutions to reconsider

²⁰² *Rome Statute* art 21.

²⁰³ *Ibid* art 21(3).

²⁰⁴ *Ibid* art 51(5).

²⁰⁵ *Ibid* arts 64, 66.

how the consideration of consent may maintain a balance between the rights of the accused and the rights of the victim.

V CONCLUSION

Through examining the ICC's definition of wartime rape in the *Bemba* judgment, this paper has revealed how this definition has failed to address two key issues that arose during the criminalisation of wartime rape and in previous ICL definitions. These issues are not new to feminist critique or analyses of ICL's treatment of wartime rape. The tendency to diminish female sexual agency and create a false dichotomy of ideal victim/perpetrator roles has been both identified and perpetuated within feminist discourse, and the ICC has fallen into the same problematic pattern of attempting to de-homogenise the wartime rape victim but protecting those that are disproportionately affected by the crime.

In attempting to avoid generalisation of the victim narrative, the ICC explicitly articulated the gender neutrality of the crime and detailed its socio-cultural effects on the victim. However, the decision to exclude the victim's non-consent from the elements of the crime of wartime rape has contradicted the ICC's initial intention, and instead the construct of the powerless, rapeable woman, devoid of sexual agency, has been perpetuated. The ICC relied heavily on the Elements of Crimes and the preparatory works of the Rome Statute to ensure that efforts to bring perpetrators of this crime to justice were not undermined. In doing so, the *Bemba* judgment undermined the work of certain feminist campaigners to challenge stereotyped portrayals of the victim and perpetrator binary.

Starting with the ICTR's landmark prosecution of wartime rape in the *Akayesu* judgment, the definition of the crime has been inconsistent within ICL. While this first case established a coercive circumstances-based definition that did not rely on the non-consent of the victim, subsequent cases at the ICTY such as *Furundžija* and *Kunarac* reintroduced a consideration of a victim's capacity to give genuine consent to international case law. The ICTR also moved towards a definition that linked consent and coercive circumstances in the Appeal Chamber's consideration of the *Gacumbitsi* case where it was determined that an affirmative defence of non-consent does not rule it out as an element of the crime but that, on the facts of the case, the coercive circumstances

would vitiate a victim's ability to give genuine consent.²⁰⁶ This effectively linked the consideration of coercive circumstances with a consideration of a victim's ability to give consent and attempted to link the ICTR's previous *Akayesu* coercive circumstances-based definition with the ICTY's consent-based *Kunarac* definition.

The previous inconsistencies within ICL definitions of wartime rape indicate the difficulties that have arisen in attempting to address the range of factual circumstances in which wartime rape can occur. It is also reflective of the inconsistency and conflict within feminist discourse regarding the criminalisation of wartime rape. This paper has attempted to canvas some of the significant arguments for and against the inclusion of consent within the consideration of wartime rape; however, there is a wealth of research and academic discussion on the topic that reveals the diverse range of views among scholars. Any rape committed in armed conflict should be capable of being prosecuted at the ICC if it is tied to war crimes, crimes against humanity, or genocide that fall within the ICC's jurisdiction. This is an inherently different concept to any act of penetration between one person and another that occurs during armed conflict being considered as rape. The fundamental difference between these two concepts is the consent of both parties. If one party to the penetration does not consent, then it is rape occurring during armed conflict. In order to then be prosecuted at an international level, the rape must be related to war crimes, crimes against humanity, or genocide.

In failing to address the recurring diminishment of female sexual agency and perpetuating the ideal victim subject within narratives of wartime rape, the ICC has reinforced traditional patriarchal notions within ICL's treatment of rape victims. This has had the effect of diminishing female sexual agency, perpetuating the ideal victim construct, and threatening the balance of the rights of the accused and those of the victim. While the arguments against the requirement of the prosecution to prove non-consent contain validity, the refusal to consider a victim's capacity to provide genuine consent is not the answer as this only creates or reinforces problematic gender assumptions. A consideration of coercive circumstances is fundamental to the understanding of rape during armed conflict, but this should not necessitate the reduction of all sexual interactions during armed conflict to abuses of power. Coerced consent is not genuine

²⁰⁶ *The Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006) [154].

consent because the victim is placed in a position where he or she must act in a way that may be contrary to how they would have acted without the element of coercion. The argument should not be whether to include coercive circumstances or non-consent within the definition of rape. Instead, future feminist legal discourse concerning the ICL treatment of wartime rape should focus on how to place the consideration of coercive circumstances within the framework of non-consensual sexual penetration.

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THE KAPO ON FILM: TRAGIC PERPETRATORS AND IMPERFECT VICTIMS

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The Nazis coerced and enlisted detainees into the administration of the labour and death camps. These detainees were called Kapos. The Kapos constitute a particularly contested, and at times tabooified, element of Holocaust remembrance. Some Kapos deployed their situational authority to ease the conditions of other prisoners, while others acted cruelly and committed abuse. This project explores treatment of the Kapo on film. This paper considers two films: Kapò (1959, directed by Pontecorvo, Italy) and Kapo (2000, directed by Setton, Israel). These two films vary in genre: Kapò (1959) is a feature fiction movie, whereas Kapo (2000) is a documentary. Both films nonetheless vivify themes of agency, blame, survival, shame, sacrifice, and recrimination. This paper interrogates how these creative works speak of victims who victimise others and the pain that results; how these works contribute to history, memory, and recollection; and didactically how they explain 'what happened,' 'why,' and 'what to do now'. This paper additionally contrasts cinematographic accounts and criminal law's accounts, in particular, those in Israel's Kapo trials. In the 1950's, the Knesset passed legislation — the Nazi and Nazi Collaboration Punishment Act — to criminally charge suspected Jewish Kapos who had immigrated to the state of Israel following the Holocaust. Authorities conducted approximately forty prosecutions. The trials were awkward, the language of judgment gnarly, the absolutes of conviction or acquittal crudely reductionist, and the judges 'trembled' at having to sentence. This paper contends that cinematographic depictions of victim-

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victimisers can sooth the criminal law's anxieties by filling spaces it poorly serves.

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I INTRODUCTION

[E]ither one counts the cadavers or one tells the story of the victims.¹

Nazi concentration and forced labour camps, as well as Jewish ghettos, required relatively limited SS (*Schutzstaffel*) oversight. Instead, the Nazis deployed inmates and ghetto residents in “prisoner self-administration”. Some concentration camps involved up to ten per cent of the prison population in this regulatory structure.² Participants in prisoner self-administration straddled a broad spectrum. The *Sonderkommando* (“special squads”) precariously occupied the lowest echelons. They cleared the dead from the gas chambers and incinerated the corpses. *Sonderkommando* mainly worked in this capacity for just a few months before the SS murdered them. The *Prominenz* (“Prominents”)³ stood above the *Sonderkommando*, while the *Kapos* — who supervised forced labourers and the barracks — stood further above still.⁴

The origin of the term *Kapo* has been alternately attributed to the Italian word “capo” (meaning “head” or “boss”) or as a contraction of the German term *Kameradschaft polizei* (“comrade police”). Many *Kapos* were compelled to serve, but others made their services

¹ Paul Ricoeur, *Time and Narrative* (Kathleen McLaughlin and David Pellauer trans, University of Chicago Press, 1988) vol 2, 188–189.

² Yizhak Ahren, *Revital Ludewig-Kedmi: Opfer und Täter zugleich?* (2002) Leo Baeck Bookshop <<http://www.leo-baeck.org/leobaeck/sachbuchallgemein/buch-03917.html>>.

³ This category included ‘doctors, messengers, musicians, interpreters, kitchen hands, shoemakers’ and ‘comprised the majority of survivors’: Adam Brown, *Judging “Privileged” Jews: Holocaust Ethics, Representation and the “Grey Zone”* (Berghahn, 2015) 12.

⁴ Cf Michael Marrus, *The Holocaust in History* (New York, Penguin, 1987) 129: describing the *Kapo* as ‘[t]he Nazis ... empowered camp elders, clerks, block leaders, and so forth to supervise the inmates and assume primary responsibility for the routines of daily life’.

available — at times readily — so as to prolong their lives or the lives of their families. Kapos were organised in pyramidal fashion. More influential Kapos included the *Blockälteste* (mid-level barracks “elder”) going up to the chief Kapo. While still tenuously positioned, and always occupying liminal spaces;⁵ more senior Kapos exercised considerable situational authority. Referencing all Kapos, Primo Levi noted that ‘the power of these small satraps was absolute’.⁶

In the concentration and labour camps, the ranks of the Kapos initially were filled by inmates detained on account of criminal behaviour (marked with green inverted triangles), political prisoners (red triangles), and asocials (black triangles). Over time, Kapos entered from other inmate categories, including Jewish inmates (two yellow triangles).⁷ In the ghettos, moreover, Jews were routinely enlisted as police (*Ordnungsdienst*) and other supervisory functionaries: they maintained “order”, enforced Nazi regulations through truncheons and whips, escorted persons selected to be transported to the death camps, and arrested resisters.

The Kapos, notably Jewish Kapos, ‘have proven an especially controversial subject’.⁸ Some Kapos were very cruel. Others did what they could to ease the lives of the prisoners under their watch. Some Kapos were sadistic one day and merciful the next. In the end, most Kapos were killed by the Nazis, although at a lower rate than other prisoner categories. Some were assailed by inmates — or by the Red Army — following the liberation of the camps. Some committed suicide, and some surviving Kapos emigrated outside Europe after the war, including to the newly-established state of Israel. Despite, or perhaps because of, this controversial position, ‘the *Kapo* is an omnipresent figure in [Holocaust] survivor testimonies’.⁹

In the 1950s, the Israeli Knesset passed legislation — entitled the *Nazi and Nazi Collaborators Punishment Act* — to criminally charge suspected Jewish Kapos and

⁵ Brown, *Judging “Privileged” Jews*, above n 3, 12: ‘Kapos were subject to punishment by Nazi guards for any problems arising from the prisoners they were responsible for’.

⁶ Primo Levi, *The Drowned and the Saved* (Raymond Rosenthal trans, Michael Joseph, 1st ed, 1988) 31.

⁷ The vast majority of the *Sonderkommando* were Jewish.

⁸ Adam Brown, “‘No One Will Ever Know’: The Holocaust, “Privileged” Jews and the “Grey Zone”” (2011) 8(3) *History Australia* 95, 99; See also Brown, *Judging “Privileged” Jews*, above n 3, 12: ‘Kapos are infamous in survivor literature for their brutal treatment of their subordinates, with some even taking part in “selections” for the gas chambers’.

⁹ Brown, *Judging “Privileged” Jews*, above n 3, 55.

collaborators who had come to Israel in the wake of the Holocaust.¹⁰ Authorities conducted approximately 40 prosecutions.¹¹ These trials, however, were painfully awkward. The legislators' refusal to legally distinguish Nazis from persecuted collaborators proved too crude. The criminal law flailed in its attempt to conceptualise Kapo violence. Law lacked the vocabulary or finesse; the courtroom was a poor conduit. Many of the records of the Kapo proceedings have since been sealed (for 70 years as of the time of the judgment). Records of other proceedings were destroyed in a flood. Documentation nonetheless exists regarding 23 of the Kapo indictments: nine of these ended up in acquittals following a trial, 14 in convictions.¹² Acquittals proved as unsatisfying as convictions.

In a recently published paper, I juxtapose Holocaust literature (authored by Levi, Frankl, Kertész, Ka-Tzetnik) with Holocaust judging (the Kapo collaboration trials in Israel) in how they come to terms with the agency of the Kapo and the hunger of victims to transcend their suffering at the hands of Kapos.¹³ Ultimately, identifying the logics and aesthetics of criminal law and literature to be in tension on this subject, I urge a *juris silentium* — that is, for criminal law to recede rather than always to regale. I recommend that it is best for certain actors, survivors, and perpetrators to lie beyond criminal law's remit and, hence, to remain non-justiciable. A *juris silentium* is not a world without sound or speech or image. It is a space shorn of the at times domineering fix-it commands of criminal law. This space, however, remains crimped so long as the accoutrements of the criminal law — courtrooms, verdicts, and jailhouses — expand as the iconic way in which to imagine post-conflict justice and solemnly authenticate the past. Law's restraint, then, might encourage other voices to fill the space — lively, animated voices.

¹⁰ The original title of the legislation was 'Act Against Jewish War Criminals'. The legislation was presented by the Justice Minister to the Knesset as applying to 'those who implemented the Nazis' will', some of whom 'unfortunately may be in our midst' and thereby 'contribute to cleansing the air among the survivors who have immigrated to Eretz Israel': Statement of Pinhas Rosen, cited in H Yablonka, 'The Development of Holocaust Consciousness in Israel: The Nuremberg, Kapos, Kastner, and Eichmann Trials' (2003) 8 *Israel Studies* 1, 11.

¹¹ The only German Nazi convicted under the law was Adolf Eichmann. John Demjanjuk, a Ukrainian prisoner of war, also was tried under the law, albeit unsuccessfully.

¹² I Levin, *Kapo on Allenby Street* (Yad Ben Tzvi & Moreshet Publications, 2015).

¹³ Mark A Drumbl, 'Victims Who Victimise' (2016) 4(2) *London Review of International Law* 217; Trials of Kapos were also conducted in displaced persons' camps after the war, as well as in countries other than Israel in mostly informal but also formal proceedings: On this latter note, see Peter Wyden, *Stella* (Simon and Schuster, 1992); Bob Moore, *Victims and Survivors: The Nazi Persecution of the Jews in the Netherlands 1940–1945* (Arnold, 1997).

This current article explores the treatment of the Kapo in film. What kind of stories do films about Kapos tell? How do these stories contrast with criminal law's stories? Instead of "counting cadavers" — and viewing victims as indiscriminate, interchangeable statistics accreting into a faceless monolith — film can humanise victims by recounting their stories, thereby differentiating them *inter se*, unpacking their relationships, and recounting their varied experiences. If law struggles with judgment, can filmic representations soften judgment? Suspend it, even? If not, is the "judgment" delivered in film sufficiently different than the "judgment" delivered in court?

The *Shoah* has been featured in a vast number of films. Kapos, "privileged" Jews, and low-level Nazi collaborators have, however, appeared as characters only in a small number of these productions.¹⁴ Brown, for example, remarks that '[t]he ethical dilemmas faced by "privileged" prisoners in the camps and ghettos are rarely explored in Holocaust documentaries in a substantial manner'.¹⁵ Films that depict Kapos nevertheless are sufficient in number to reflect diverse genres and styles and to have been received in wildly different ways.¹⁶ *Son of Saul*, for example, involves a day-and-a-half in the life of an Auschwitz *Sonderkommando* who fixates on giving a boy a proper Jewish burial.¹⁷ *Son of*

¹⁴ See, eg, *Nuit et Brouillard* (Directed by Alain Resnais, Argos Films, 1955); *Shoah* (Directed by Claude Lanzmann, New Yorker Films, 1985); *The Counterfeiters* (Directed by Stefan Ruzowitzky, Magnolia Filmproduktion, 2007); In *The Pianist* (Directed by Roman Polanski, Canal+, 2002), the protagonist Spielmann survives a selection for the camps only because a Jewish policeman, consistently snubbed by other ghetto inhabitants, suddenly and without any forewarning pushes him — and him alone — out of the line and tells him to run away.

¹⁵ Brown, *Judging "Privileged" Jews*, above n 3, 130.

¹⁶ Some derive from personal memoirs: See, eg, *Out of the Ashes* (Directed by Joseph Sargent, Ardent Productions, 2003) which is a made-for-cable film about Gisella Perl, a prisoner doctor at Auschwitz who performed a large number of secret abortions and also assisted Mengele in his medical 'experiments'. This film was based upon Perl's 1948 memoir called *I Was a Doctor in Auschwitz*. For extensive discussion of this film, see Brown, "'No One Will Ever Know'", above n 8, 96 (noting that in committing the abortions, 'Perl saved the lives of the mothers, who would invariably have been sent to the gas chambers had the Nazis discovered their pregnancies'). In her memoirs, Perl also mentions that she 'fak[ed] blood tests to protect prisoners suffering from typhoid, who, if discovered, would have been killed immediately': Brown, "'No One Will Ever Know'", above n 8, 107. Subject to investigations after the war ended, Perl was eventually admitted to the USA. Perl worked as a gynaecologist in New York, then relocated to Israel; she died in 1988: Brown, "'No One Will Ever Know'", above n 8, 107–108.

¹⁷ Kapos — Biedermann and Mietek — appear in *Son of Saul* (Directed by László Nemes, Hungarian National Film Fund, 2015). They act in both protective and exploitative fashion. While eschewing an uprising, Biedermann develops a plan to photograph atrocities and send the images outside of the camp. The anguished look on his face, however, when informed by the SS that he has to provide a list of seventy men that were no longer needed reflects the revolving nature of victims and victimisers even within the upper echelons of these lower rungs. The fact that a Kapo, moreover, could wield such power to determine who lives, for now, or dies reveals the situational nature of authority. Biedermann is killed by the SS in any event. Mietek as well plays an ambiguous, oscillating role. László Nemes, the film's director,

Saul has achieved popular success and has garnered considerable adulation, winning an Oscar, a Golden Globe, and the jury prize at Cannes. *Schindler's List* (Directed by Steven Spielberg, Amblin Entertainment, 1993), a blockbuster that has been critically chastened,¹⁸ and *The Grey Zone* (Directed by Tim Blake Nelson, Millennium Films, 2001), a more obscure endeavour that has been critically lauded, are two other examples involving Kapos and *Sonderkommando*.

I present two films in this article: *Kapò* (Directed by Gillo Pontecorvo, Cineriz, 1959) and *Kapo* (Directed by Dan Setton, SET Productions, 2000). Neither film has enjoyed much in the way of popular success. Both have in fact been dismissed by critics. That said, each production squarely addresses the “choiceless choices” of the Kapo in a manner that is forthright and forthcoming.¹⁹ I believe the stories these two films tell are worthy of examination and serve as pivots for pedagogy. One film is fictional kitsch involving glamorous actors (*Kapò* (1959)), the other a documentary reportage featuring actual Kapos (*Kapo* (2000)).²⁰ Selecting these artistic works thereby contrasts how documentaries and fictional feature films address tragic perpetrators. Documentaries are generally more preoccupied with asserting claims about the “truth” and exposing the “real” and the “actual,”²¹ though fictional feature films, despite deploying actors, do at times intersperse (and certainly may base themselves upon) history, events, and testimony.

I am interested in interrogating how these two productions portray victim-perpetrator circularity; and didactically how they explain ‘what happened’ or, in other words, the kinds of stories they tell and how they manage to tell them. Protagonists and antagonists are far more complex (and liminal) constructs than accused and accuser or plaintiff and defendant. The complexity of these constructs renders victims much more than statistics

based the film on accounts rendered by *Sonderkommando* members of their own experiences in the camps.

¹⁸ Brown, *Judging “Privileged” Jews*, above n 3, 154, 169: Imre Kertész, a Nobel Laureate who authored the superb autobiographical book, *Fatelessness*, about the experiences of a teenage boy in Auschwitz, lambasted *Schindler's List* as a ‘totally fake interpretation, a lie’.

¹⁹ Holocaust scholar, Lawrence Langer, coined the phrase ‘choiceless choices’ which he defined as ‘crucial decisions ... between one form of abnormal response and another, both imposed by a situation that was in no way of the victim’s own choosing’: Lawrence L Langer, *Versions of Survival: The Holocaust and the Human Spirit* (SUNY Press, 1982) 72.

²⁰ One source dates this documentary to 1999; Brown, *Judging “Privileged” Jews*, above n 3, 110.

²¹ For general discussion of traditional boundaries of fiction and non-fiction in the context of social representation in film, see Bill Nichols, *Blurred Boundaries* (Indiana University Press, 1995).

— whether cadavers or survivors. Trials require a verdict: guilt or innocence; they necessitate the imposition of a sentence in the case of a finding of guilt. Film and literature lack any such mandates.²² Law and film may both condemn, but only law punishes. And punish law must in order for justice to be done. In his opening statement at Nuremberg, after all, Robert Jackson evoked the need for steadfastness in the face of '[t]he wrongs which we seek to condemn and punish'.²³

To foreshadow, *Kapò* (1959) and *Kapo* (2000) each unpack intertwined themes of survival, sacrifice/suicide, and pursuit of the lesser evil. They do so amid the “choiceless choices” that Kapos may have faced, albeit while recognising that other prisoners may have been impacted in overwhelming ways by how a Kapo at any given time chose to exercise his or her discretionary “choicelessness”. These works also give considerable space to women Kapos as key actors and thereby depart from judicial narratives that tend to focus on male perpetrators, masculinities, and the agency of men amid mass atrocity.

These creative works address the primal quest for food and warmth and how becoming a Kapo advanced that quest. Becoming a Kapo, then, was self-evident — it was the thing to do to survive. In the words of Frances, a Kapo featured in Setton’s 2000 documentary, it would simply be “stupid” not to have agreed to become a Kapo — she sees herself as fated to have been selected to be a Kapo and to have survived accordingly. Hence, for her it was not a “choice” to become a Kapo because only a “fool” would eschew the opportunity. Another common theme is that of sacrifice, and the blurry line between sacrifice and suicide in the case of Kapos roiled with trauma and guilt. Not all Kapos could rationalise their conduct as necessary to survive. Sacrificial suicide is vivified by Edith in *Kapò* (1959). Another thread is the nature of Kapo violence, at times justified by Kapos as necessary to maintain order and, thereby, minimise the likelihood that the SS would enter the zones of prisoner or ghetto self-administration and impose much greater violence. Kapos such as Magda in *Kapo* (2000) justify much of their conduct in this fashion.

²² For comparative discussion of how criminal trials and truth commissions approach victim-victimisers in Sierra Leone, see Valerie Oosteveld, ‘Gender and the Sierra Leone TRC’, Forum on Transition and Reconciliation, Laval University (October 1, 2016) (remarks on file with the author).

²³ Robert H Jackson, ‘Opening Statement before the International Military Tribunal’, *The Trial of German Major War Criminals — Proceedings of the International Military Tribunal Sitting at Nuremberg* 49 (1945).

Kitsch may soften the harshness of the experience and thereby help audiences stay put and not shut down. Assuredly, much is lost in this process of “softening”, but kitsch ironically may serve as a vehicle to deliver serious moral quandaries to the public as archival footage (often graphic in nature) or films that harrowingly detail how the sight, smell, and taste of atrocity may simply overwhelm the senses. The Vietnamese shot silent archival footage upon entering the S-21 prison in Phnom Penh, Cambodia, to record the horrific torture there. This footage — entirely accurate and faithful to what “happened” — was so disturbing that, in my case when I watched it, I had difficulty conceiving it as anything but aberrational or, even, contrived. The viewer may simply black out. It may be too much. Kitsch, on the other hand, may depict the victims as much more than the sum of the brutalities inflicted upon them and, in the campy love, implausible romanticism, and naïve attachments of *Kapò* (1959), may engage audiences in longstanding moral debates rather than repel them. To survive, after all, may mean craving more than just food, shelter, and water. In this regard, then, one of the impressionistic outputs of this article is to reclaim the value of kitsch, melodrama, and pulp.

The bulk of this article is concerned with exposition, that is, to share the stories told by each of these two films, beginning with *Kapò* (1959). This exposition serves as a way to “screen” the film for readers, who become viewers. Giving space and place to these films matters, in that ‘[i]n the future, the memory of the Holocaust will be defined less by the recollections of the survivors than by the representations of the filmmakers’.²⁴ This discussion is sprinkled with my reactions, derived by watching the films and in turn the act of expressing them in text for others. Throughout, I include some images. I set out the films in two sequential sections and refrain from comparing them — I prefer any comparison, if effected, to be left to readers. A final section concludes by gesturing towards some wider themes as to the interplay between film and law.

²⁴ Frank Stern, ‘Facing the Past: Representations of the Holocaust in German Cinema Since 1945’, Lecture, United States Holocaust Memorial Museum: Center for Advanced Holocaust Studies (14 June 2000).



Adolf Frankl, 'Verbrennungsofen — Leichenträger', Special Exhibit 'Kunst Gegen Das Vergessen', (depicting *Sonderkommando*), München NS-Dokuzentrum (visited on 28 July 2016).

II MELODRAMA, KITSCH, AND A FEATURE FILM

'I get enough food and sleep, I don't work, and I'm exempted from selections ... What else is there?'²⁵

Gillo Pontecorvo (1919–2006) directed this film, an Italian-French production, which he wrote with Franco Solinas. A Jewish member of the Italian Communist party, Pontecorvo fought in the anti-fascist resistance during World War II. He subsequently made the film,

²⁵ *Kapò* (Directed by Gillo Pontecorvo, Cineriz, 1959).

The Battle of Algiers (Rialto Pictures), in 1966. This film illustrates the brutality of the French occupation of Algeria including extensive suppression efforts.

Kapo was re-released in 2010 on DVD through Criterion's Essential Art House Line. *Kapo*'s protagonist is Edith, a fourteen-year old Parisian Jew. Upon arrival at a camp, Edith is immediately able to impersonate Nicole, a recently deceased asocial prisoner. At an early *Sortierung* ("selection"), where the weak go to the right to face extermination and the remainder to the left to face more work, Nicole arrives with desiccated, bloody hands. At the fateful moment where she is to show her hands to the SS officer, she instead pulls off her prisoner's shirt and bares her breasts. Nicole thereafter comes to navigate camp life through survival sex with the SS. Soon, however, Nicole becomes a Kapo, set in her ways, until she meets a dashing Soviet prisoner of war ('POW') named Sasha. Nicole has him tortured, though the torture may have saved Sasha from an immediate death. Nicole nevertheless regrets how Sasha suffered. The two soon "fall in love" — Hollywood or Bollywood style. Nicole, who morphs back to Edith, ultimately sacrifices herself to save Sasha and all the other prisoners. Perhaps because of its hefty schmaltz, this film offers a campy burlesque of the intersections of atrocity and femininities, romanticism, identity, and heroism. At the same time however, this film also melodramatically navigates the fraught terrain of the Kapo in a way — worthy of recovery — that the Israeli Kapo trials were never able to scale. In this regard, this film reclaims the didactic value of kitsch.



Kapò has been described as a 'concentration-camp drama'.²⁶ It is shot in black and white, *chiaroscuro* fashion. The actors routinely deploy exaggerated facial expressions. They resemble characters in a silent movie. The film has manneristic overtones.

The plot begins with Edith taking piano lessons in Nazi-occupied Paris. Edith plays elegantly, and she is elegantly played by Susan Strasberg, who also originated the title role in Broadway's *The Diary of Anne Frank* (Cort Theatre, 1955). The lesson ends. It is time for Edith to go, so she leaves. Her piano teacher then receives a disturbing phone call. The caller asks if Edith had already left. The teacher says yes, goes to the window, and pulls back the curtain. Edith is no longer to be seen on the street. The teacher returns to the phone only to discover that the line has gone dead — the call is no more.

Edith skips home. She arrives on her street-corner only to discover German soldiers arresting people and pushing them into the back of a military truck. A crowd — quiet, passive, sorrowful — gathers to watch. Edith approaches the edge of the crowd. An elderly woman implores her to stay back. Edith however sees her parents herded onto the truck. She calls out to them, runs to them — against the cries of her mother for her to turn away — and is caught.

The next scene is of trains chugging; the musical score is the sound of rushing trains. The train stops in Poland. All occupants disembark at a concentration camp. The typical procedures begin: selections, separations, reorganisations, the horror-stricken faces, the right-left zigzag.

The family is dismembered. Edith is in a room with other children and teenagers. A baby cries. Edith holds the baby. She speaks to a friend, a boy. She notices a door is left ajar, clearly an oversight. Edith walks out undisturbed. She wanders around aimlessly only to end up in a barrack. The head, an older woman called Sofia, cannot take her in — there is not a square inch of space and, besides, why would she? But Sofia takes Edith to the doctor, another Kapo. The kindly doctor has a reputation for saving people.²⁷ Sofia brings

²⁶ Dennis Lim, 'Kapò': Portraying the Unthinkable in Art', *Los Angeles Times* (online), 11 April 2010 <<http://articles.latimes.com/2010/apr/11/entertainment/la-ca-secondlook11-2010apr11>>.

²⁷ The role of prisoners as doctors is among the more unsettled areas of complicity and resistance in the concentration camps. Miklos Nyiszli, a pathologist in Birkenau and assistant to Mengele, was a Hungarian Jew who, in his memoirs, recounts his dissections of twins and also the health care he provided to the SS: Miklós Nyiszli, *Auschwitz: A Doctor's Eyewitness Account* (Tibere Kremer and Richard Seaver trans, Arcade

him Edith for something in exchange, anything — alcohol even — which the doctor does not provide. Sofia says that she knows a work transport is departing tomorrow that she would be able to get Edith on. It is a good transport: to decent work and apparently solid rations. Better, far better, than remaining in the death camp.

Edith is fortunate amid her misfortune. The doctor tells her that an inmate — an asocial prisoner called Nicole Niepas, a French woman — had died last night. Nicole is a black triangle prisoner; 10099 is her number. Nicole had not yet been registered as dead. The doctor peels Nicole's uniform from her corpse and hands it to Edith. He tells her that from now on she is Nicole and she is no longer a Jew. He tells her Nicole's name and tattoos her arm with Nicole's numbers. He shears her hair. Edith becomes Nicole.

In the morning, Nicole looks out the filthy window. She sees naked bodies running by, including her parents, scurrying to the gas chambers. Nicole shrieks, in garishly dramatic fashion, though the window blocks her cries. Her parents are soon dead.

The doctor pleads with Nicole to please do everything to survive: 'Live and think of nothing else.' 'You're no longer a Jew, understand?' he adds. Nicole ends up on the transport to the labour camp.

Some other characters are introduced. The countess Terese, played by Emmanuelle Riva, is an educated woman who serves as a translator. Terese is poised and principled; she insists on always washing. She refuses to let them turn her into an animal ('they can't take away our dignity') but then ultimately herself steals food from another prisoner, having been on half-rations for far too long, only to be reprimanded ('I told you so') by then Kapo Nicole. Terese ultimately throws herself on the electric wire and, in a fiercely criticised scene, commits suicide.

Sofia fails to survive one of the film's first selections. Left or right — which is the direction to the gas and which is the direction to tomorrow? — the women frantically ask afterwards among themselves. The direction of the infirm, the grey (despite rubbing soot into their hair), the injured — that is the direction of despair for the rest. The goal is to do the opposite of malingering — the goal is to pretend to be healthy. Yet Sofia is sent to

Publishing, 1993). This book is the basis for the film, *The Grey Zone*, and Nyiszli is the doctor in that film; See also Brown, "No One Will Ever Know", above n 8 (discussing Gisella Perl).

the right: the path of death. On the way to the gas, Sofia invokes her final moments to taunt the SS — calling them what they are, namely ‘murderous scum’, and to scorn the surviving women (those sent to the left) for no longer being able to look her in the eye. Sofia is shot by the SS. Nicole and some other women pick up and dump her body. Sofia dies with pride. Nicole callously pilfers her stockings from her limp legs after having received a tacitly approving nod from a Kapo.

Another character is an elderly Russian woman, babbling constantly that the Red Army is going to come. She is ultimately proven right. The Red Army’s arrival destabilises the entire camp.

Nicole is a survivor. The film’s plot is about her ‘savage struggle for survival at any cost’.²⁸ In the pouring rain, and amid terrible penury, she sees the little Kapo wooden shack, in which it is warm, where there are warm things to drink, and where dryness crackles. The Kapos have coats. The Kapos leave; Nicole breaks in. She hugs the heat. The Kapos see her and beat her. Nicole is punished with reduced rations. Days later, Nicole returns to the barracks. The countess Terese had sold some clothes for a potato. Terese roasts the potato — lovingly, tantalisingly. As if in a trance, Nicole enters the barracks; at that very moment, the countess is asked to come forward to translate. Nicole walks to the heater, sees the countess’ potato, and eats it — she steals it. The countess is furious. But the potato is no more.

Time comes for the next selection. Nicole’s feet are fine. Her face is fine. But she has terribly cut hands. They are so gashed she cannot even wash them. Surely this is cause for elimination, for Nicole to be weeded out of the work group. At the fateful moment where she is to show her hands to the SS officer, she instead pulls off her prisoner’s shirt. She bares her breasts. She never reveals her hands. She returns to the barracks, screaming triumphantly: ‘I showed all of you.’

Nicole comes to navigate camp life through survival sex with the SS. ‘If I go will they feed me?’ she asks upon being invited to the SS lodge for the first time. Terese, the translator, is incredulous that Nicole will do this. But Nicole does. She goes, on her own, after having

²⁸ David Bathrick, ‘Teaching Visual Culture and the Holocaust’ in Marianne Hirsch and Irene Kacandes (eds), *Teaching the Representation of the Holocaust* (Modern Language Association of the USA, 2004) 286, 292.

set events in motion at the selection. Nicole loses her virginity to an SS officer. Afterwards, she asks for the food she was promised. The SS officer says tomorrow. Nicole mutters 'tomorrow', her doe-eyed stare hollow and empty, and vanishes like a spectre as the camera pans away.

Time fast-forwards. It is the Christmas season. Nicole now looks well-fed, with long hair, and resonant in her sultry voice. She is "vamped-out", so to speak, but still a teenager, to be sure. She hangs around the SS room as a courtesan. Smoking a cigarette, gazing out a window at the other prisoners, she evokes Marlene Dietrich's Shanghai Lily. Nicole befriends Karl, a maimed officer (he has only one good hand), who is not interested in sex. She and Karl play cards. Karl is committed to his country and to the successful waging of the armed conflict. That is his motivation. He wants to get back to the front. Karl becomes the last person to be with Edith (the person to whom she returns at the film's finale) while she dies. Karl and Edith, in the end, both recognise that they have been used by the Nazis, discarded in the ignominy of a searingly lost war.

The film continues: more work scenes, more brutalities, more transitions. Nicole befriends the women Kapos. Ultimately, she is asked to become one. She agrees, uneventfully. While Nicole is not the cruellest Kapo, she is not a kind Kapo — she is cold and controlling in her ways. The countess Terese, meanwhile, joins the ranks of camp saboteurs. Terese's spirit is broken when she has to translate at a public execution of one of her co-conspirators who dies yoked with a board affirming that she is an 'enemy of the Reich'. The countess cannot bring herself to say 'it is right to execute a saboteur': she stammers, she refuses, she is thrown aside, so the statements are exclaimed by the camp commander in German only. The saboteur is executed. The countess faces punishment — sharply reduced rations amid the other prisoners who get their full rations.

Then the Russian male POW's arrive. The camp transforms. The Russians arrive singing, boisterous and proudly patriotic. They begin by helping rebuild deteriorated barracks.²⁹ The women swarm them, bursting with questions of impending victory by the Allies, of Stalingrad, of D-Day, of English bombers, and of infantry advances from the East. The old

²⁹ The implausibility of Russian POWs ending up at a women's forced labour camp is neither addressed nor explained.

Russian woman hugs them. Nicole is uneasy. The Russians are too open, the women too receptive.

Soon, however, the Russian soldiers become conscripted into heavy and arduous labour. Moving rocks, quarrying — the kind of harsh treatment it is forbidden to impose upon prisoners of war. They struggle. One day, at the quarry, a woman wants to send a letter out of the camp. A horse and cart arrive; she runs to the driver and presses the note to him. Nicole sees. Nicole rages. The attempted communication is foiled. The woman shrieks. Sasha — a handsome Russian POW — dashes to the scene. He grabs Nicole by the arms and devastatingly asks her why she is doing all this treachery. Nicole screams, so the SS come. They beat Sasha, kick him in the dust. Nicole lies, she says it was Sasha who sought to pass a letter. Sasha faces severe punishment: to spend the night standing in a tiny box, assembled of tape affixed to the ground, inches from the electric fence and just under the watchtower. One step out of the box, he will be shot. To fall asleep and tip forward, he will die. The night comes. Nicole, half-heartedly partying with other Kapos, feels remorse. She gazes at Sasha through the window. He is still standing, shirtless, like a breathing sculpture; his breath exhaling in the cold air. Later, she looks again — the same. Sasha endures taunts from the guard. He does not flinch. Later still, an SS officer comes by intending to do what must ordinarily be done, namely to push the tortured into the electric fence. He raises his hand. Mercurially, another SS officer says: stop, this guy might actually make it, let us wait. Sasha makes it. He smiles at the break of dawn. Nicole sees him, relieved. He staggers back to roll call, shoved along by the SS. They do not shoot him, perhaps out of grudging respect.

Although Nicole has Sasha tortured, she also saves his life. She saves his life because she lies to the SS that he tried to send a letter. Had she told them what he actually did, namely attack her physically, he would have been shot to death on the spot. Although she never articulates any of this, the fact remains that Nicole — like other Kapos — triggered some violence to avoid greater violence.

Miraculously, Sasha survives the work day afterwards. In the next scene, he seems recuperated and more handsome than ever, with bright eyes and a lean jaw.

Nicole is smitten. Their passion begins. It is adolescent passion — unsurprising because she is an adolescent (sixteen years old at the time) — never consummated with more than a hug or an arm around the shoulders, but it is passion nonetheless, born within a forced labour camp. The two talk about marriage and about returning home, though Nicole knows she has no home to return to. They plot and plan as only desperate lovers can. The pap is foamy and effervescent.

Then the film slides into the final sequence: escape. Artillery shells are heard in the distance. The front lines are not far away and are in fact inching closer. The war will soon be over, but the most harrowing part of life in the camps is about to begin. The prisoners think they will be released, but the SS and Kapos know better — they all will be slaughtered. Nicole leaks the news.

The Russians develop an escape plan. Part of it will entail shutting off the electric fence; then all the prisoners will swarm to the fence and cut, claw, and dig their way out. But someone has to turn off the electricity.

The women churn with contempt for their overseers. They butcher the SS's black cat, Faust, which Nicole adores, and then they mockingly hand her the limp body. Nicole knows they will all be killed though, unless she stops it. Yet the murder of her cat does not alter her thinking.

So Nicole volunteers. She can walk to the generator, enter it, and shut it off. The plan is hatched. A copy of the key is made.

Hiccups occur. The first time the plan is to be executed, a last-minute change arises. Instead of being taken elsewhere to be killed, the order comes from above to slaughter all the prisoners *in situ* and bury them there. A roll call is announced at the very moment when Nicole was to go to shut off the electricity.

A second hiccup, though, is more troubling. Sasha learns that, as soon as the power is shut off to the fence, a massive siren will wail. This means that whoever is in the unit turning off the electricity will become immediately identified and promptly killed by the SS who will race to restore the power. Sasha knows, then, that Nicole will die. She will not be able to meet him afterwards as planned under the tall tree on the camp to begin her new life as a Russian war bride returning home to meet Sasha's parents — to be welcomed by the

father who says too little and the mother who speaks too much. Sasha is tormented. His co-conspirators get nervous. Sasha's access to Nicole has inveigled her into their sedition, but at the same time his feelings for her could now compromise the entire affair. An older conspirator counsels Sasha that there are times when the needs of the many outweigh the needs of the few or the one; 'all these other women have a right to live, too, don't they?' he exhorts. Sasha wavers, but he agrees to remain silent. He swears to it. The plan continues.

Nicole is to head to the electrical unit. At that very moment, Nicole reminds Sasha about meeting up at the tall tree following the *melée* that is sure to ensue once the power is cut. Sasha can no longer stomach it. He tells her that the siren will go off and that she will be killed, and he tells her that she needs to go do it anyway: it is the right thing to do so she must do it. She must sacrifice herself for the greater good, including implicitly the greater good of his own survival. Nicole is upset, distraught, and incredulous. She also knows, as she had told Karl earlier in morose conversations, that she has no home, no future: as a collaborator and impersonator she has no path forward. She bet it all on the Nazis and lost. Clad now in an actual Nazi uniform (since she and another female Kapo were supposed to get immigration paperwork to return to Germany for a desk job and a good life), she decides to flip the switch anyway.

Digging his own grave, which is what the SS and Kapos had all the other prisoners do collectively, Sasha is spat upon by another Russian POW who calls him a traitor for telling Nicole that this is a suicide mission. It is somewhat curious that the prisoners find sacrificing Nicole to be morally acceptable in the case of their own survival but conceptualise Nicole's decision to tread upon others to become a Kapo as morally reprehensible.

By this time though, Nicole has told Sasha that her real name is Edith and has shared her own story. Sasha has accepted it. He does not judge it or her. He embraces her for who she is.

To his fellow prisoner of war who spits on him, Sasha simply reassures by saying that Nicole will do it anyway, to which Nicole actually does; she not only yanks the power off, but she slashes the cables, so there is no way to restore.

The siren blares. A *levée en masse* occurs. Everyone flees for the fences; en route, they attack the SS with their shovels. The camera pans to the many escapees who are mercilessly machine-gunned by the handful of remaining guards positioned in the turrets. This is shooting of the most utterly pointless kind, gratuitous shooting: so many prisoners die. Eventually the guards in their posts are shot by rifles pilfered from SS members who had been disabled by shovel attacks.

Karl is among those who run to the electric unit. Nicole has been all torn up by bullets. She sacrifices herself. In this way, she follows the path of the courageous warrior — ready to put the interests of the many over the interests of the one. Or, perhaps, she simply commits suicide. Many Kapos, taunted and traumatised, killed themselves in real-time. Edith, for her part, simply helped save many others along the way.

Karl carries her limp body outside. Nicole begs Karl to remove the Nazi insignia from her uniform. He obliges her. The decal comes off easily. ‘They screwed us over, Karl, they screwed us both over,’ she mutters, referencing the Nazis. She dies in his arms, chanting the Shema Yisrael. She rediscovers her dignity (her ‘status as a loving human being’)³⁰ and identity, in particular her Jewish identity, in death. On this note, she is like Terese and Sofia, yet unlike these two other women, her death is impactful, immediately consequential, in improving the survival chances of others.

The camera’s gaze shifts to Sasha. In a wildly stylised scene, his face etches with pain. Her sacrifice, her martyrdom, her suicide — it may be too much for him to bear. Yet Nicole dies with Karl, not Sasha. Her final thoughts and words are with (and to) Karl.

Kapò was nominated for the Academy Award as Best Foreign Language Film in the year it was made. Reviews of *Kapò* have nonetheless been negative to middling. Dennis Lim describes it in the *Los Angeles Times* as ‘neither a great nor a terrible movie’, though acknowledges that ‘it is not without powerful moments’.³¹ Lim also recognises, however, that it ‘has a special place in the history of Holocaust films (and of film criticism). It is a flash point in a long-running debate ... about the responsibilities and the limitations of cinema when it comes to depicting a historical atrocity.’³² Jacques Rivette, writing in 1961

³⁰ Bathrick, above n 28, 292.

³¹ Lim, above n 26.

³² *Ibid.*

in the French journal, *Cahiers du cinéma*, pilloried the film for Terese's death scene, notably the gratuitousness and vulgarity with which her corpse is reframed and attention drawn to her dangling hand. Serge Daney, writing in 1992, revisited this scene and scalded it as well. All told, Lim ably encapsulates the discussion: '[T]he unease the film provokes, beyond its dubious cinematographic flourishes, has to do with the indecency of moulding real-life atrocity to conform to narrative clichés and contrivances.'³³ It is not that the Holocaust should be off limits to art, but rather that this film fails to execute it well, thereby invoking well-worn refrains that distinguish obscenity from erotica. Lim ends his review on a broader note:

There is no exact science to the relationship between ethics and aesthetics. But it is also not that complicated. In figuring out how one feels when confronted with abject spectacles on-screen, it is often a relatively simple matter of questioning — to borrow Daney's memorable phrase — 'the difference between what is just and what is beautiful'.³⁴

Lim notes that '[s]ome have argued that art is fundamentally ill-equipped to capture a horror as unthinkable as the Holocaust'.³⁵ He references Theodor Adorno's "assertion" that 'to write poetry after Auschwitz is barbaric' and notes that '*Kapò* has often been held up as an exhibit' for a 'simplified moral injunction against art about the Holocaust'.³⁶

A rich literature examines tricky questions as to whether cinema, art, and literature ever can represent the Holocaust. Without weighing in on whether this representation ever might be possible, if we concede the possibilities that film might have in this regard, then I find Lim's indictment of *Kapò* to be excessively harsh. Sure, *Kapò* is melodramatic and somewhat H/Bollywoodised; moreover, it can be chided 'for its ideologically motivated folding of the Holocaust survival story into a socialist realist morality play about the beauty of collective death'.³⁷ All that said, I do not find *Kapò* unsalvageable, irretrievable, or irrevocably condemned because of its pap. This campy film relates, assuredly through

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Bathrick, above n 28, 292; For general discussion of kitsch and melodrama as a vehicle for delivering serious moral quandaries, see Thomas Elsaesser, 'Tales of Sound and Fury: Observations on the Family Melodrama' (1972) 4 *Monogram* 2; Peter Brooks, *The Melodramatic Imagination* (Yale University Press, London, 1976).

a highly stylised frame, a tale of the ambiguity of the Kapo, of the limits of collaboration, of the contingency of where one throws one's lot, of the hunger for survival that is all-consuming (devouring even the countess Terese), and of redemption, dually born out of selfishness and self-awareness. For some viewers, perhaps, *Kapò* is nothing more than a pulpy love story. In the end, however, ridiculing it as a love story diminishes what it is. By introducing the prospect of love in the camps — a love with only the slightest of physicality, a love in which sex is stayed — *Kapò* challenges and ruptures. It suggests the possibility of the human spirit to find beauty and passion within the most invidious of circumstances, and the human capacity to plan a conventional future away from these disorientingly unconventional circumstances. The everyday of lovers surreptitiously meeting and dreaming upends the hopelessness of the forced labour camps and the endlessness of death. Suddenly, something normal happens in the most abnormal of places. *Kapò* thereby fills the screen with life, with optimism. From the implausibility of the love story — and the simple suddenness of Edith's redemption — emerges the tangibility of the resilience of the human condition: of the hunger not only for bread and water but also for connection, for touch, for gentleness, and to be held (and to hold) gingerly. All this renders *Kapò* all the more watchable. Viewers feel a little safe and so they keep on watching. They may even laugh and dare to hope. They will not shut down. They mourn but depart the filmic experience with some gleam rather than mired in hopelessness. The implausible fictionalisation comforts the viewer yet, in turn, serves instructional and didactic functions.

Despite wincing gender tropes, this film also features women in prominent roles with multiple identities as both victims, victimisers, and resisters. The fact that women occupy many different roles contrasts with international criminal law's predilection to treat women as static, passive recipients of the pain inflicted by others — the "perfect" victims, so to speak. The polycentric treatment of women as active agents maps onto a broader pattern found in other Kapo films, notably Setton's production from 2000, that in turn also confronts the prevailing texture of international criminal law in which women's agency and roles, other than that of victim, tend to be systematically underdeveloped or wildly tabooified.³⁸ *Kapò* also touches on questions of adolescent social navigation amid

³⁸ *Kapo* (2000) never overtly gestures towards gender as a theme however.

the most invidious of spaces in a way that unsettles dominant humanitarian assumptions about the passivity and fragility of young people in times of armed conflict.

Another thread that weaves through the film is that of futility: the futility of the camps, of the meaningless and relentless deaths, the futility of love, the futility of caring about anyone or anything (Sasha, Karl, or Faust; or Terese's initial affection for Nicole), and the futility of self-sacrifice when so many intended beneficiaries are gratuitously slaughtered regardless.

And yet another thread is the loneliness of being a Kapo. The Kapos get to style their hair, sport stockings, and attend parties with each other. They may be warm and have full bellies, but they are never comfortable. On the one hand, with the exception of Karl, the SS do not respect them. Nicole is treated as a sexual courtesan or, at best, as an acolyte. The SS objectify the Kapos and lead them on with lies. On the other hand, the prisoners loathe the Kapos — they see them as traitorous. The presence of the Kapo as a figure worthy of scorn surfaces in other media as well, for example in the drawings of Dachau survivor, Georg Tauber, discussed at the end of this article. Sasha, however, manages to develop empathy and understanding for Nicole over time, and in this vein, Sasha serves as somewhat of a parallel to Thea, an interviewee in the *Kapo* (2000) documentary. Still, the loneliness — the *anomie* — of the Kapo overwhelms.

III INTERVIEWS, VOICEOVERS, AND A DOCUMENTARY

'Our friendship started with two slaps on the face.'³⁹

Kapo, a documentary (55 minutes), is shot on location in Germany, Israel, Poland, and Australia. It includes archival footage from other films of concentration camps, ghettos, and Israeli Kapo trials. Sometimes, the footage is invoked in slightly misleading fashion, in that it portrays scenes and places that have nothing to do with the actual topic being discussed at that moment in the documentary.⁴⁰ Written, directed, and produced by Dan Setton with Tor Ben Mayor and Daniel Paran (director and researcher), *Kapo* was produced in conjunction with German Spiegel TV and Rai 3 of Italy. Hannah Yablonka, an academic who has written extensively about Kapos, is thanked in the credits. *Kapo* was

³⁹ *Kapo* (Directed by Dan Setton, SET Productions, 2000).

⁴⁰ Brown, *Judging "Privileged" Jews*, above n 3, 133–142.

the first Israeli film to win an International Emmy Award, in its case in the category of Best Documentary. That said, *Kapo* was also controversially received. It remains difficult to locate today. It has been reprimanded in the literature as being too judgmental and too representational and for hewing too closely to the Kapo trials — and hence law’s angularity — in contrast to other Holocaust documentaries such as Claude Lanzmann’s *Shoah* (New Yorker Films, 1985).⁴¹

Kapo proceeds primarily through interviews with former Kapos and survivors affected (and afflicted) by the actions of former Kapos. To be sure, the film is not limited only to Kapos *stricto sensu* in that members of the *Ordnungsdienst*, *Judenräte*, and other camp functionaries also appear as subjects. These interviews and eye-witness accounts are interspersed with images of legal documents and footage from the Israeli Kapo trials. Many of the survivors sit and talk with numbered tattoos visible on their forearms. Cigarettes dangle from their fingers; smoke swirls. Media reports indicate that while Setton and Paran were able to locate interviewees world-wide who were comfortable discussing their erstwhile roles as Kapos, many others refused to participate and often expressed their discomfort at having been asked.⁴² The producers regularly deploy the device of a male narrator, whose authoritative baritone guides the documentary and whose intonation tilts towards condemnation and recrimination. While neither prosecutorial nor adjudicative, this voiceover certainly sets the background and nudges the viewer along in a fashion that constricts the viewer’s autonomy.

Setton reports that, at a screening in Munich before a Jewish audience, older audience members were outraged while younger ones were curious.⁴³ German television aired a version of the film, but it was censored out of fear of negative public reaction.⁴⁴ When the film was screened in France, public reaction was so negative that the show on which the documentary was shown was simply taken off the air.⁴⁵

⁴¹ Ibid 133–142; For a discussion of *Shoah*, see Bathrick, above n 28, 295–298.

⁴² Yoav Birenberg, ‘Our Own Emmy’, *Yediot Ahronot* (Tel Aviv), 22 November 2000.

⁴³ Barry Davis, ‘A Feast for the Eyes and Ears’, *Arts and Entertainment, Jerusalem Post* (Jerusalem), 17 September 1999, 22. Davis’ review of *Kapo* is a positive one, noting that ‘[t]he surprising aspect of all these interviews is the wide range of the interviewees’ reactions, both to the culpability of the collaborators and the acceptability of collaboration with the Nazis in the circumstances of World War II. This is a documentary which will leave the viewer with much food for thought.’

⁴⁴ Birenberg, above n 42.

⁴⁵ Ibid.

Setton and Paran had previously collaborated on a number of Holocaust-themed films, including ones about Eichmann, Mengele, and Bormann. They were inspired to examine the Kapos after having read a newspaper article about the trials that had taken place in Israel in the 1950s. Paran stated that he was shocked to learn about these trials and the fact that they had been initiated by survivors. Reportedly he felt that Kapos had always been victims. Both Paran and Setton disclaimed in media reports any intention to judge the Kapos; for them, responsibility lay with the Germans.⁴⁶ The goal of the film was only to introduce the theme of the Kapo. Yet in media reports both Setton and Paran also note that, after collecting and listening to the stories of the Kapos they had interviewed, they too became shocked with what they learned.

Kapo predictably begins with a kinetic scene of trains undergirded with a solemn musical score and shot through a narrow aperture from another moving train compartment. This is promptly followed by footage from the concentration camps and then stills from the camps. The musical score, which — like the narrator's voiceover — plays an important guiding role throughout the documentary, is ominous.⁴⁷ Also central to the film is the device of introducing archival footage and photographs, at times manipulatively and misleadingly, at select moments for emphasis and direction.⁴⁸

Momentum quickly shifts to the Eichmann trial (held in 1961). A woman testifies. She falters, only to support herself by placing her hand on the wall. She is examined, in-chief it seems. Counsel shows her pictures and drawings of Kapos — surly and muscular, holding clubs and sticks, beating naked prisoners. The Kapos in the drawings are both women and men. Counsel asks the witness for clarification: 'Women too?' 'Yes,' the witness responds, women beat and were beaten. In the questioning, the witness is asked who these people are — she replies, 'Kapos' — and she is further asked whether these things really happened. 'Yes,' she replies, exhausted and dismissive by the end.

The documentary pivots to sunny street scenes of Tel Aviv in the early 1960s. Busy scenes, hectic streets full of life and productivity, and also accompanied with restful and

⁴⁶ Ibid.

⁴⁷ The musical score is orchestral. In contrast, Tim Blake Nelson's *The Grey Zone* (2001) deploys a constant ambient noise — that of roaring crematoria furnaces — that, much like some of the background noise in *Son of Saul* (2015) reminds the viewer of the automaticity of genocide that envelopes all prisoners including Kapos.

⁴⁸ See, eg, Brown, *Judging "Privileged" Jews*, above n 3, 135.

joyous moments on the beach. The narrator intones through voiceover that the Eichmann trial was preceded by other trials that portended a “serious examination” implying ‘serious introspection for the state of Israel’. These trials involved Jewish defendants and charges of collaboration. The narrator continues in solemn voice: ‘This is a film about them.’

Barnblatt is introduced. He was a pianist, a conductor, who had served as a commander of the police force in a Polish ghetto (Benedine or Będzin). The Nazis had simply enlisted the entire ghetto orchestra into the police force. That is how Barnblatt ended up in that position. In this regard, Barnblatt became an accidental perpetrator, whose tragic imperfections arose by happenstance, whose choiceless choices indeed were in no way of their own initial choosing. The documentary references the randomness of Barnblatt’s appointment.

Reuben Vaxelman, a child Holocaust survivor, is interviewed. Vaxelman re-encountered Barnblatt in Tel Aviv well after the war; Vaxelman had endured Barnblatt’s war-time brutalities in Benedine. Upon the re-encounter, Vaxelman complains to the Israeli authorities. Barnblatt is arrested in the opera.

Vaxelman is firm and unyielding in his disdain for Kapos and his hatred of Barnblatt in particular. But for Barnblatt’s immediate arrest, Vaxelman gloats that he would have killed him. Vaxelman remains angry. Vaxelman suffers from what philosopher Jill Stauffer calls ‘ethical loneliness’ — he had been abandoned by humanity as a child and then doubly abandoned as an adult in that he now lacks space to tell his story of suffering after the fact; in other words, he is not being heard — *truly* heard — in talking about what happened (to him).⁴⁹ As a result, he itches to tell his story. It is hard to tell the story and find a sympathetic listener, however, because the pain visited upon him came at the hands of a Jewish police officer and not a German SS. Vaxelman’s eyes are dark — they portend no possibility for forgiveness, no possibility for peace in the afterlife. The camera is his interlocutor. It offers him therapy and release. Vaxelman insists that Kapos who cooperated received excellent conditions, food, and comfort. Vaxelman pounces. He seizes on the opportunity the director provides to expiate his ethical loneliness and tell the story of how Barnblatt killed his brother, Adash. Vaxelman says that Barnblatt

⁴⁹ Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015).

personally stopped Vaxelman's father from trying to save Adash and, instead, compelled his deportation and death. Vaxelmann condemns, and the documentary gives him license to do so.

We learn later on that Barnblatt eventually is acquitted, on the basis of duress, in an Israeli court. He remarries and moves to Germany where he lives a "quiet life". He refused to be interviewed for the film. While the viewer learns this information, the camera pans to a distant shot of an elderly man, sitting and reading the newspaper in the lobby of a building — he has thick, rich grey hair; might it be Barnblatt? We do not learn from the documentary, however, that 'during Barenblat[t]'s 1961 trial, [the] prosecutor conceded that he had saved between 10 and 20 Jews'.⁵⁰

Vaxelman's last chance is the camera. The courts could not process his story; the courts failed to validate his suffering because of Barnblatt's own victimhood, Barnblatt's own suffering, and Barnblatt's own tragedy. Yet the film offers Vaxelman space to (re)testify, which he eagerly does.

The narrator indicates that roughly 40 Kapo trials occurred in Israel although hundreds of complaints had been fielded. Until 1950, complaints led to brief detention followed with release. Why? Because there was no law. Then the 1950 law came, in part in response. Trials ensued. But these trials were relegated to the back-pages of the press. Footage is introduced of those trials. Unlike what I have seen of many war crimes trials, the accused in the Kapo trials — despite the back-page nature of the press coverage — cover up their faces; they enter through the bowels of the courtroom; they button their coats over their heads. They exude shame, and are ashamed, or fearful for what happens if they are released or acquitted. They conduct themselves like accused child molesters. They do not strut.

The narrator tells us that people became Kapos 'either voluntarily or by force'. Initially Kapos were Poles and Germans, but as the war continued Jews were compelled or made themselves available. Germans created two social ranks in the ghettos and in the camps: *Muselmänner* and their overlords, both indentured — to be sure — but to starkly different degrees. *Muselmänner*, a term adapted from the German word for Muslim that is deployed

⁵⁰ Brown, *Judging "Privileged" Jews*, above n 3, 136.

in survival literature (including in Primo Levi's writings), refers to a starved, demolished, barely functioning, spectral and half-dead human being; in the words of Jean Améry, a 'staggering corpse ... in its last convulsions'.⁵¹

After the war, being a Kapo became a "curse". Some Kapos, in the immediate aftermath of the liberation, were attacked, mocked, and sentenced to death by former inmates. Many former Kapos fretted and worried about getting caught, in particular, those who assumed the mantle of being survivors and who moved to Israel.

Vera Alexander — a chain-smoking bespectacled *Blockälteste* in Auschwitz — is interviewed. She was recruited into her position by Madga Hellinger, who had a very high position for a Jew in the concentration camps, that is, commander of a women's sub-camp at Auschwitz (*Blockälteste* and then *Lagerälteste*). Brown reports that Madga 'at one point became responsible for 30,000 women'.⁵²

Magda lives in Australia. She is largely unrepentant for what she did. It becomes obvious that her fear of becoming noticed prompted her to leave Israel with her husband and two young daughters. The filmmakers track her down in Australia. She is introduced to the viewer while polishing her silver.

Vera Alexander presents differently in this documentary than she did as a witness in the Eichmann trial. At the Eichmann trial, the prosecution deployed former Kapos as witnesses to unpack the perfidy of the Nazi extirpation system, expose the depravity of having victims orchestrate the victimisation of others, and voice a nation's moral outrage at Eichmann for having engineered it all. As part of this process, Kapo testimony, including Alexander's, highlighted the structural nature of prisoner self-administration paired with accounts of Kapo exercises of agency, however slight, for good, for better, and towards altruism, mercy, stealing on behalf of the prisoners, and saving them from death. For example:

⁵¹ Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities* (Sidney Rosenfeld and Stella P Rosenfeld trans, Indiana University Press, 1980) 9.

⁵² Brown, *Judging "Privileged" Jews*, above n 3, 137 (noting also that Magda 'survived three and a half years in Auschwitz').

Attorney General: Tell me, Mrs Alexander, how was it possible to be a *Blockälteste* in Auschwitz and to maintain the stance of being created in God's image and maintain the image of a human being?

Witness Alexander: It was not easy. One needed a lot of tact and much maneuvering. On the one hand, one had to obey orders and to fulfill them, and, on the other hand, to harm the prisoners as little as possible and to assist them.

...

Attorney General: We have been told that you saved women from being put to death. How did you do that? Tell us of some cases?

Witness Alexander: There were cases after a selection, where women were selected for death, and I knew which block they were supposed to enter. I tried, not always successfully, to remove them from the ranks. Sometimes I managed to place girls in a commando which was going out from Auschwitz to work. This was not heroism on my part — it was my duty. I don't remember all the instances, and I don't remember how I did it.⁵³

In the documentary, however, Alexander's statements seem much more self-serving and craven, redolent with her agency to inflict harm and further brutalist survivalism. Both the trial and the documentary appear to sculpt their narratives for different didactic motivations. Alexander's linkage of heroism to duty in her trial testimony suggests a structural reclassification of what it means to be a Kapo and a revision of the very job of being a Kapo: the Kapo is presented as a shield and saviour. This linkage is absent in the footage that appears in the 2000 documentary.

Who is a survivor? Is a Kapo a survivor? Kapos who came to Israel after the war see themselves as survivors too. That is why some came. Others, however, perceived Kapos quite differently. Hence the tension, and hence the need for the *Nazi and Nazi Collaborators and Punishment Act* to purge and cleanse. The *Nazi and Nazi Collaborators and Punishment Act*, however, did not distinguish textually between the Nazis, on the one hand, and collaborators (including Jewish Kapos) on the other hand.

⁵³ David Thompson, 'The Auschwitz Testimony of Vera Alexander' on *Axis History Forum* (6 June 2004) (on file with the author) <<https://forum.axishistory.com/viewtopic.php?t=51878>>.

The narrator returns to intone that the demonic nature of the Nazi concentration camp system was such that the ‘victims facilitated their own destruction’. The *Judenräte* are mentioned — Hannah Arendt’s point: namely that the Jews were tricked by the Nazis into “self-rule” when officials and leaders were simply priming a population for extirpation. The film tethers self-rule to the construct of genocide. One Kapo diarist remarks: ‘We have to accept the will of the German God.’ On this note, in addition to the live footage of interviews, some of the diaries of Kapos are introduced into the film and read aloud by the narrator. These diary excerpts reveal a more empathetic voice than those of the live interviewees. The diary entries tend to show the anguish of the Kapo. That said, in one instance involving a ghetto leader, the documentary plays recordings of his radio broadcasts in Yiddish aimed at ghetto inhabitants asking them for the children, requesting the children, so that they could be handed over to the Nazis. The listeners refuse, so the Germans take everyone.

The next tranche of footage involves Michael Gilad — a survivor and war crimes investigator with the Israeli government. Gilad is an authoritative figure, somewhat like the anonymous narrative voiceover. Gilad posits that ‘they could have refused’ if they had been selected to serve as Kapos, although the consequences would have been drastic. Gilad is pensive. He says that the actions of one Kapo saved his life. Gilad relates how one day in the camp he bent down, then straightened up, and ended up coincidentally looking directly into the eyes of an SS man — a terrible offence, punishable by immediate execution. Gilad recounts how Kapo Fritz rushed over and slapped Gilad hard in the face — ‘get back to work now’. Fritz bellowed — such that the tumultuous moment passed, lapsed even, without any shot being fired. Gilad says he believes that Kapo Fritz saved his life then and there. Gilad adds that some Kapos were merciful. Some maintained their dignity and humanity. However, he adds that these Kapos were the exceptions. Gilad emphasises that many Kapos were cruel and sadistic. Gilad underscores the tension between prisoners abiding by moral principles or becoming ‘creatures who do anything they can to survive’ (he mutters the latter with a touch of sarcasm). Other testimonials from other interviewees further describe Kapo sadism and ferocious beatings.

Another investigator who questioned Kapos confides in the camera how he asked them, as part of his examinations, why they felt the need to hit. Why did they have to hit the man who spilled his soup and asked for more? Why?

Noach Flug, another survivor, unwraps the power of hunger. Flug's words are juxtaposed with footage of an old man eating some spilled ugliness off the street with a spoon, his empty eyes drifting and then hauntingly locked onto the camera. Flug references the different planet of the concentration camp: Ka-Tzetnik's planet Auschwitz, so to speak. Hunger is such a powerful engine on planet Auschwitz. Hunger, too, is a key theme in *Kapò* (1959). Nicole is motivated by hunger — she does what she needs to do for her food: trade sex, trade honour. Tellingly though, when she feels remorse for her role in Sasha's torture, she seeks to make it up to him — to atone — by offering him food, on the sly, which he bats out of her hands while denouncing her for thinking that this putative gift would make up for what she had done. But in her mind perhaps it would. Food was so important to her that her offering of food could very well signal genuine remorse rather than a contrived apology.

'Jewish solidarity is broken' — most Kapos 'broke the rules of Jewish solidarity'. Herein is another theme in the 2000 documentary. As the oppression continues, the gap between leaders and the rest grows. Those Jews who join the police, according to the film, have no worry about food, and in any event their pockets are full of bribes.

Another assistant Kapo, bespectacled and not smoking, describes how he was young and strong and therefore muscled away two other prisoners who were trying to take a shower near him. This invariably meant that those other two, already lice-ridden and emaciated, got beaten. This assistant Kapo, too, talks about hunger. If presented with the chance to become a full Kapo (a question asked by the filmmaker in one of the few occasions in the film that his voice arises), this assistant Kapo says that he 'would grab that offer with both hands'.

Madga is authoritarian. She is candid and proud, yet often speaks in euphemisms. She describes how upon arrival she was asked to go for a "job". She leveraged her "job" into the highest-ranking position possible for her, namely to be commander of the women's camp at Auschwitz. 'I was very strict', she affirms, 'I want a camp where nobody would find anything wrong.' She recollects how she "punished". The narrative voice-over chimes in to chide her.

Madga recruits Vera. Vera recalls: 'Our friendship started with two slaps on the face.' Vera had drawn on a wall; in response, Madga berates her for damaging German property. The next day, Vera gets a stubby pencil and some paper from Magda. Now Vera can draw. This pulls her, in turn, into the camp hierarchy. *Kapo* does not reference many details of Magda's life and time in the concentration camps, which — according to Adam Brown's detailed research — reveal her as a much more nuanced and textured individual. Brown reports that Magda '[b]arely surviv[ed] both malaria and paratyphus', that she 'narrowly escaped several "selections" and was even pulled from a line heading for the gas chamber'.⁵⁴ He also contrasts the filmic portrayal of her with video testimony she recorded for the Jewish Holocaust Centre in Melbourne, Australia, where she 'represents herself as consistently generous, self-sacrificing, and protective of others'.⁵⁵ A similar contrast arises as with Vera Alexander, in which the *Kapo* presents herself differently — or is presented differently by others — in different settings.

Frances Kousal comes on.⁵⁶ Frances has an angular face and very sharp pale eyes. Frances was a block commander. She says that one would have to be 'stupid', 'stupid' again and again, one more time over dastardly 'stupid', not to have agreed to be a *Kapo* if offered the chance. Some former *Kapos*, such as Frances and Magda, believe that this was their destiny; it was their fate to be a *Kapo* and their fate to survive in this fashion. 'Why would you refuse?' Frances asks, incredulously. Once again, it would be the 'stupidest thing to do'. 'To refuse would be stupid'. Frances relishes order — 'Can you imagine a world without people in charge?', she rhetorically asks. Frances fancies people in charge. For Frances, then, being a *Kapo*, ironically perhaps, 'made her feel more like a human being'.

The camera pans back to Magda, who prattles on about resistance, sedition, and rebellion. She does not like it now; she fully despised it then. The documentary is not kind to (nor magnanimous with) her. Magda returns to her euphemisms, noting that there were times when the women were 'brewing' and 'brewing' — by this I gather she means that they were plotting in the pleats available to them as inmates, incubating resistance. Magda recalls that she came on the scene, lifted her stick, and told them to stop. And, indeed, they stopped. Magda's eyes light up before the camera — if the 'brewing' continued, she

⁵⁴ Brown, *Judging "Privileged" Jews*, above n 3, 137.

⁵⁵ *Ibid.*

⁵⁶ *Ibid* 140: Brown spells her name Francis.

says, then the SS would come. Madga is so 'strong'; she can dispel the brewing just by taking a step forward, but she adds that, later when back in 'her room', she 'cried and cried and cried'. After the war, in Israel, she recalls how she is out with her little children. She is recognised there as a Kapo by other women. Upon noticing her, Magda recounts how these women, too, begin to 'brew'. The 'brewing' recurs. Magda is anxious in Israel. Who might recognise her? Expose her? Kill her and her children? So she leaves Israel. She flees to Australia. This move, too, she sees as fated. She opines about how she was chosen by fate to survive, somehow.

The documentary includes an interview with Haim Cohen, a judge who presided over Kapo trials. Cohen says: 'We cannot condemn these people'. He adds that it is unnatural to expect solidarity to one's people over solidarity to oneself or to one's children first. 'I had trouble sleeping for over a year', Judge Cohen ruefully adds, signalling the enormous weight of having to adjudicate these cases. Skittishness and erraticism pervade the text and tone of the Kapo judgments.⁵⁷ It is interesting that one of the major moments of vacillation in the documentary in which the frailty of judgment arises involved a judge who presided over the very trials that proved so unsatisfactory. Here, then, is the depth of the perfidy of the Final Solution: the recruitment of the persecuted in the persecution, the shattering of solidarity among victims, the orchestration of the worst among some of the least. This perfidy is not well-served by prosecuting the Kapo; rather, it became aired when Kapos testified against the architect of the entire regime of prisoner self-administration, notably Adolf Eichmann.

The film concludes with a summary of where the interviewees, and some of the diarists whose work was orally excerpted, ended up.

One died fighting for the Israeli army — it is suspected that he was killed purposely through "friendly fire".

Vera is still in Israel, in northern Israel to be precise, where she gardens. She experiences no moral discomfort. She lauds herself for her own 'passion to survive'.

⁵⁷ See Drumbl, above n 13.

Frances is in Australia, as is Magda. Although Magda was questioned in Israel, authorities never initiated any criminal charges.

Thea Kimla, who I have not yet spoken of, is the most compassionate and compelling character. Thea has a melodious voice and earthy mannerisms. She was a prisoner, albeit with no status, in Auschwitz: bottom rung and lorded over by Frances. Now the two — both in Australia — are good friends. Thea is empathetic. She discusses the spark of life. Seated diagonally across from Frances in a living room, Thea says that all Frances wanted to do, understandably, was to survive. That is why Frances, according to Thea, took her position as a Kapo. Thea's face and voice brim with humanity. 'The will to survive was very strong in Auschwitz', she says. Thea sees Frances as a prisoner, like her, who took a position to survive. Thea redeems Frances. Or, at least, she reclaims Frances' humanity.

Michael Gilad reports that the more he researches the topic, the less he understands. He himself is grateful, in his own words, that he was able to preserve his human dignity. He notes that not many did.

Kapo (2000) is a documentary that, while unsettling in certain of its methodologies, unpacks the extreme violence of an architecture in which the victims were indentured, and some responded by victimising each other. The destruction of this group solidarity attests to the heinousness of genocide, the elimination from within. A focus on victims as victimisers could perhaps deepen the culpability of those who create the structures to enable genocidal violence to metastasise. Conscripting of group members in the group's own demise, frankly, may be the greatest of the genocidal iniquities and legacies. That said, the need for victims of Kapo violence to expiate their ethical loneliness may not be achieved when their tormentors serve as witnesses and, hence, become insulated from responsibility other than the responsibility to testify about what they did *because* of the highest leadership. *Quaere* the contrast between Vera Alexander as an Eichmann trial witness and Vera Alexander as an interviewee in the documentary.

On the other hand, this documentary muddles the structural nature of the violence and unsettles the explanatory capacity of structure by emphasising individual decisions and agency. This documentary fields the exhortations of many survivors that blaming the system, blaming the Germans, is just not enough — there must also be some room to finger individuals, to differentiate among victims. The interviewed Kapos themselves do

not seem to believe in their own thoughts and words that they were powerless or lacked any agency. Magda, in fact, routinely emphasises that she used violence to mitigate greater violence. In this regard, *Kapo* is opinionated. Brown flatly concludes that it ‘does not subscribe to Levi’s pronouncement on the need to suspend judgment’.⁵⁸ Although a real-life documentary involving real life people, *Kapo* also includes some sleights-of-hand, omissions, and archival footage juxtapositions that do play with the “facts” and, in this vein, direct the viewer towards intended didactic outcomes. Voice-overs and recourse to baritone authority figures (Gilad and the narrator) channel the viewer to the film’s intended normative destination. That said, whatever judgment pervades *Kapo* and whatever contortions it makes to massage its narrative, the film remains far more subtle and far more empowering of spectator autonomy than the Kapo trials. Brown’s assessment may be too firm. I did not have the impression of *Kapo* as fuelled by an ‘unquestioning mode of expository address [that] result[s] in clear-cut judgments’ with only “brief” references to ‘ethical uncertainty’.⁵⁹ Some of the documentary’s most powerful moments — for example, the interchange between Thea and Frances — are all about the pointlessness of penal (or even moral) condemnation. While *Kapo* may judge, it does not leave the viewer with a lasting impression that legal judgment in a courtroom is appropriate or suitable. Ironically, perhaps, the presence and words of the one judicial figure, Cohen, best encapsulate this documentary’s embedded reluctance to condemn the Kapo through criminal law.

IV CONCLUSION: MOVING FROM COUNTING CADAVERS TO TELLING VICTIM STORIES

Victims are not uniform. Some benefit from a semblance of privilege, which these two films unpack.⁶⁰ This privilege permits (or requires) some victims to victimise others. Film therefore creates space for those others not to be “othered”; this space in turn nudges them to recount their suffering and expiate their ethical loneliness. Film may narrate

⁵⁸ Brown, *Judging “Privileged” Jews*, above n 3, 133 (noting also that ‘the film’s preoccupation with legal judgment hastily transforms into a moral evaluation of its subjects’).

⁵⁹ *Ibid* 141.

⁶⁰ For discussion of the term ‘privilege’ among Jewish concentration camp inmates, see Brown, “No One Will Ever Know”, above n 8, 96 ([w]hen confronted with the traumatic circumstances of ‘privileged’ Jews, the practice of casting judgment becomes highly contentious’).

many other kinds of stories as well, including stories of acquiescent side-standers and benefitting bystanders.⁶¹

Regardless of the kind of story, and its nature, film may help elucidate ‘what happened’. Film is not without many limits in this regard, to be sure; film — like any medium — retains the capacity to distort.⁶² Film (whether documentary or fictional feature in genre) and stage plays nevertheless serve as ways in which art reaches the public, various publics — both proximate and distant from atrocity.⁶³ Olivera Simić, among the very leading voices examining the intersectionality between art and transitional justice, notes that art ‘cannot replace formal judicial mechanisms or material reparation’ but ‘offer[s] a significant and distinctive reparative contribution’, as well as symbolism.⁶⁴ But what about situations — possibly the case with the Kapos — where law cannot speak, or speaks so clumsily, because it lacks the requisite finesse? What about contexts where law suffers from language paralysis? Here, literary and filmic portrayals may serve as the primary mode of representation. For Simić, art advances the right to truth embedded in international law. She posits art, in particular theatre, as among the ‘communicative acts that strive to bring forward survivors’ experiences of war and violence’.⁶⁵ Artistic truth ‘calls for reflecting, rethinking and sharing’.⁶⁶ To varying degrees, each of the creative works discussed in this article contributes to these truths.

Relatedly, much has been written about how film provides ‘critical reenactment’.⁶⁷ According to Esquith, critical reenactments ‘prompt the audience to adopt a more active,

⁶¹ See Stephen L Esquith, ‘Reframing the Responsibilities of Bystanders through Film,’ (2011) (manuscript on file with the author) which discusses the films of Claude Lanzmann, Rithy Panh, and Yael Hersonski on the Holocaust and Cambodian killing fields.

⁶² See, eg, Duygu Alpan Cakmak, ‘The Role of Turkish Cinema in Collective Memory Formation regarding the Cyprus Question’ (Working Paper Series No 11, Historical Dialogues, Justice, and Memory Network, December 2016) (concluding that ‘Cyprus films in the Turkish cinema produced between 1959 and 1975 provide a sizable body of material on how cinema can provide symbols and images of a skewed, one-sided representation of both the past and present, [and] thus contribute to the standardization and reproduction of the Turkish collective memory on the Cyprus dispute’).

⁶³ Cf Shoshana Feldman, ‘Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust’ (2001) 27(2) *Critical Inquiry* 202 (‘Law distances the Holocaust. Art brings it closer’).

⁶⁴ Olivera Simić, ‘“They Say that Justice Takes Time”: Taking Stock of Truth Seeking in Peru, Argentina and Serbia’ (2016) 42(1) *Australian Feminist Law Journal* 137, 137; Olivera Simić and Zala Volcic, ‘In the Land of Wartime Rape: Bosnia, Cinema, and Reparation’ 2014 2(2) *Griffith Journal of Law & Human Dignity* 377, 396 (discussing film as contributing to ‘symbolic reparation’).

⁶⁵ Simić, ‘“They Say That Justice Takes Time”’, above n 64, 145.

⁶⁶ *Ibid.*

⁶⁷ Esquith, above n 61, 12.

participatory role ... [t]hey neither indict nor exonerate'.⁶⁸ The energy is expository, the goal to 'involve ... viewers in critical self-reflection'.⁶⁹ The two films discussed in this article are not reenactments in the sense of Rithy Panh's *S21: The Khmer Rouge Killing Machine*,⁷⁰ Joshua Oppenheimer's *An Act of Killing*,⁷¹ or Fujii Hikaru's *The Educational System of an Empire*.⁷² Nor do they deploy the same devices as Claude Lanzmann's documentary, *Shoah*, in which former *Sonderkommando* Abraham Bomba recreates barber scenes of prisoners getting their hair sheared prior to their deaths, or Yael Hersonski's *A Film Unfinished*,⁷³ in which she reenacts the making of a German film, *Das Ghetto*,⁷⁴ specifically the involvement of the head of the Jewish Council in Warsaw in the original film prior to his anguished suicide in 1942.

The concept of reenactment, however, is capacious, and Setton's and Pontecorvo's works serve illustrative purposes in setting out the life of the Kapo in the camps, the lives of Kapos after the camps and the struggle for rehabilitation, and also the lives of those who toiled under the Kapos and bear that scar afterwards. These works do so in a way that transcends the juridified binaries of "guilty" or "innocent", of "victim" or "perpetrator", or of "passive witness" or "active agent". These works render the viewer unsure of how he or she would have reacted in the same situation. They expose the ill-fitting nature of categorising or classing Kapos and interrogate the kinds of adjectives that could be deployed to describe their conduct or the adverbs best equipped to contextualise how they acted. Themes such as the sacrifice of the privileged prisoner, the deployment of violence putatively for the lesser evil, and the quest for survival suffuse these films.

⁶⁸ Ibid 13.

⁶⁹ Ibid

⁷⁰ *S21: The Khmer Rouge Killing Machine* (Directed by Rithy Panh, Institut National de L'Audiovisuel, 2003).

⁷¹ *An Act of Killing* (Directed by Joshua Oppenheimer, Final Cut for Real, 2012).

⁷² *The Educational System of an Empire: Roppongi Crossing 2016: My Body, Your Voice* (Directed by Fujii Hikaru, Mori Art Museum, Tokyo, 2016) 69: Fujii Hikaru's 2016 film depicts South Korean high school students reenacting torture undertaken by Japanese troops in Korea during World War II. The students viewed reels of archival footage of this violence and then reenacted the scenes amongst themselves under Fujii's supervision in a high school gymnasium. These reenactments are interspersed with excerpts from a US propaganda film from the time about how Japanese children were taught and socialised in school. The film thereby explores overlapping power relations during the war: the US and the Empire of Japan, the Empire and its subjects, Japan and Korea, and Fujii and the students. On this latter note: 'When urged by Fujii to reenact the historical events, [the students] are visibly hesitant, uninterested, as manifested in incoherent physical reactions and uncomfortable expressions.'

⁷³ *A Film Unfinished* (Directed by Yael Hersonski, Oscilloscope Pictures, 2010).

⁷⁴ Archival footage, 1942.

These films also lead to broader debates — historical, representational, and theoretical — related to critical victimology. “Counting cadavers” and counting survivors negates the interstitial realities that how one lived as a victim, and what one did, mattered at the time and continue to matter thereafter. It also matters how a victim was classed, even if the process of classification lay entirely outside the victim’s control.

One of the most poignant special exhibits in Bavaria’s KZ Dachau features the work of Georg Tauber, a Dachau prisoner and survivor. Through his art, Tauber memorialised inmate life, and through his activism he sought to ensure that all prisoners — regardless of classification within the Nazi heuristic — were seen as victims. Yet Tauber was unsuccessful in this regard. The Nazi typology of prisoners into various categories lingered, after the fact, and directly affected who could be categorised as a victim of Nazi persecution and, thereby, preordained the various paths to reintegration and rehabilitation. Tauber references the plight of *die Vergessenen* — the forgotten prisoners — to wit, the asocials (black triangles), homosexuals (pink triangles), and professional criminals (green triangles).⁷⁵ The 1953 *German Federal Law on Compensation for Victims of National Socialist Persecution* (BEG) defined a victim of Nazi persecution as ‘a person who was persecuted for reasons of political opposition to National Socialism or for reasons of race, religious belief or worldview, and subjected to acts of violence perpetrated by National Socialists, from which this person has suffered harm and injury to life, body, health, freedom, property, assets, in professional, or economic advancement’. Following the liberation of Dachau by the Americans, political prisoners and Jews were seen as victims, but the asocials, professional criminals, and homosexuals were not. Political prisoners ‘strictly distanced’ themselves from peers in other categories so as to gain social recognition, such that ‘the different persecuted groups become embroiled in a rivalry as to their respective victim status’.⁷⁶ The estimated 6500 professional criminals (people determined to have repeatedly broken the law) and 10 000 asocials (homeless, unemployed, beggars, addicts, Sinti, and Roma) who were imprisoned at Dachau continued to face social discrimination after the war in that their persecution was not considered to be a generic feature of the Nazi system.⁷⁷ They were

⁷⁵ While Dachau served as a model or prototype for the architecture and structure of other Nazi labour and concentration camps, its demographics are not representative of those of other camps in that the percentage of Jewish inmates in Dachau was far lower than elsewhere.

⁷⁶ Exhibit at Dachau (visited 30 July 2016).

⁷⁷ *Ibid.*

refused assistance by the general support office, so Tauber responsively set up an office for them (and himself, in that he had not been issued an ID pass as a victim because of how the Nazis had classed him).⁷⁸ It was only in the 1980s that these inmate categories acquired any standing to claim compensation.⁷⁹

The Nazi categorisation rendered certain kinds of prisoners ethically lonely after the fact. Ironically, many of the Kapos at Dachau were political prisoners,⁸⁰ meaning that they would be able to be seen as victims after the fact even though they were despised by the other prisoners, on the one hand, and the SS, on the other, as portrayed in Tauber's drawing below:



⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Exhibit at Dachau (visited 30 July 2016): 'In the Dachau concentration camp it is mostly the political prisoners who the SS entrust with the task of heading a work detail. Many of these kapos act humanely and are ready to help their fellow prisoners; others exploit their privileged position and turn into brutal henchmen of the SS'.

Georg Tauber, drawing (1945), Kapo as a dishonorable person (Exhibit at Dachau, visited July 30, 2016)

The exhibits at Dachau's memorial center and museum capture Kapo brutality. Heiden Sepp, a political prisoner from St Pölten, Austria, and 'kapo of the sick bay', is presented as a 'fat man clothed in a white coat' who 'kicked and kicked a prisoner ... again and again and his face was completely contorted by rage'.⁸¹ Sepp is also depicted as having struck prisoners with wet towels, wrapped them in heavy woolen blankets while immobilising them under cold showers for many hours, such that the 'woolen blankets would get soaked and the patient would die with fever and high fever and freezing'.⁸² Another Kapo, Max Schnell, is described in a panel as having 'dragged a half dead Jew' only to 'beat him with the truncheon, and heaped him with such insults ... that Jew died the following day'.⁸³ In one of the two Dachau barracks that still remain standing, the following placard appears in the "eating" area referencing the block leader (a Kapo) and remarking:

Not even the smallest spot is allowed to get on the wood, for if the block leader sees it, he will write up a report for punishment right away ... The tableware also has to be completely clean ... You can get an hour of pole hanging if even a single drop of coffee can be seen on a cup.⁸⁴

Primo Levi, who coined the phrase the 'grey zone' (*la zona grigia*) to describe the ambiguities of connivance in the concentration camps, was not much of a fan of film.⁸⁵ Levi worried that cinematographic representations, in particular those disseminated by fiction film, trivialised and unduly simplified the Holocaust. Levi's concerns indeed are wise.

Yet I am not so sure that film and theatre deserve, as media, to be intrinsically cast as devoid (or wanting) of capacity to elucidate the 'grey zone'. Film conveys the horrific ethical dilemmas faced by the persecuted who themselves persecute. Taking the Kapo as subject, each of the two films discussed in this paper manage, however clumsily at times, to deliver some subtlety, equivocation, and nuance. These films distinguish between the

⁸¹ Prisoner account of Hermann Langbein, 'The Stronger One' (1949) (visited 30 July 2016).

⁸² Evidence given by Heinrich Stöhr in the 1945 Dachau Trial (visited 30 July 2016).

⁸³ Secret diary entry by Karel Kašák (18 March 1941) (visited 30 July 2016).

⁸⁴ Prisoner's report by Edgar Kupfer-Koberwitz, 'The Powerful and the Helpless' (1957) (visited 30 July 2016).

⁸⁵ Levi mentions *Kapò* (1959) *en passant* in 'The Grey Zone' without adding any comment regarding the Kapos in the film.

Kapo and the Nazi in a way that the Israeli *Nazi and Nazi Collaborators Punishment Act* failed to achieve. They represent the Kapo as a liminal figure. Of course, film is a medium, and like any other medium it may trend towards the same foibles that plague legal judgment in unraveling the liminality of victim-victimisers, including selectivity, excessive redirection, and narrative control.⁸⁶ Yet film has the clear potential to transcend law's anxieties in dealing with, and representing, the vacillations of the tragic perpetrator and the oscillations of the imperfect victim.

Film empowers those on the outside of the 'grey zone' — those who have not lived it — to come to their own place in thinking about victims who, while living in it, have the power to have others tortured over a "single drop of coffee". For those tortured over that drop — and those who tortured along with those who refrained from exercising their power to torture when they could — film, too, opens a representational space to curate, narrate, and remember.

⁸⁶ Cf Adam Brown, 'Narratives of Judgement: Representations of "Privileged" Jews in Holocaust Documentaries' (2014) 7(1) *Literature, History of Ideas, Images and Societies of the English-Speaking World* 1 (on file with the author) (noting at paragraph 12: 'The clear narrative trajectory and expository mode of address of many films, which rely on devices such as narrative voiceover, archival footage and the construction of authoritative "witnesses", frequently evoke the kinds of clear-cut opinions that Levi warns against.').

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AG-GAG LAWS IN AUSTRALIA: ACTIVISTS UNDER FIRE MAY NOT BE OUT OF THE WOODS YET

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This paper examines the potential impact of Australia's proposed 'ag-gag' laws in light of the decision of the High Court in ABC v Lenah Game Meats. It also explores the possible consequences of the (suggested) reforms on animal advocates, animal welfare, and our democratic and constitutional right to free political communication. The paper concludes that while the proposed laws may be unable to achieve their intended effect, they still present an inchoate threat to public debate and have the potential to undermine the democracy envisaged by the Australian Constitution.

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I INTRODUCTION

Unless someone like you cares a whole awful lot.

Nothing is going to get better. It's not.¹

— Dr Seuss, *The Lorax*

This paper reviews Australia's proposed 'ag-gag' laws and their significance for Australian consumers, animal advocates, and the animals themselves. Ag-gag laws have been proposed and considered within 25 states of the United States of America and have entered into law in six of those states.² Ag-gag laws are laws which effectively 'gag' or reduce discussion of some of the more controversial aspects of animal agriculture and its practices. By preventing public oversight and criticism of factory farms and their practices, ag-gag laws can allow some of the more egregious forms of animal cruelty to continue. Evidence suggests that ag-gag laws have prevented external scrutiny and may contribute to reduced animal welfare under the guise of animal welfare protection.

Part I of this paper will commence with an introduction to animal law in Australia and considers and offers a concise comparison of the legislative approaches within each jurisdiction. The section concludes with a review of the defences and protections which apply to farm animals or livestock. Part II begins with a brief explanation of the proposed reforms. Part III considers these amendments in light of *ABC v Lenah Game Meats* ('*Lenah*').³ Part IV presents a detailed analysis of the use and impact of visual records of animal cruelty within the context of increased consumer interest in the origins of their food. Part V provides a concise analysis of the use of these laws in other international jurisdictions. The paper concludes with the argument that not only are the proposed laws largely ineffective given the decision in *Lenah* but also that Australia's proposed ag-gag laws provide an unnecessary criminal sanction which disproportionately affects activists and whistle-blowers and has a chilling effect on free political communication regarding animal welfare concerns. Prevention of legitimate public discourse and debate over food production and the treatment of animals during the food production process may also undermine the democratic process.

¹ Dr Seuss, *The Lorax* (Random house, United States, 1971).

² Daniel L Sternberg, 'Why Can't I Know How the Sausage is Made?: How Ag-Gag Statutes Threaten Animal Welfare Groups and the First Amendment' [2015] 13 *Cardozo Public Law, Policy and Ethics Journal* 625.

³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199 ('*Lenah*').

II WELFARE AND UTILITY

More than 90 per cent of Australian farm animals are now raised intensively in facilities commonly known as ‘factory farms’ which are also associated with systemic or institutionalised cruelty.⁴

— Jed Goodfellow

Each of Australia’s states and territories has enacted legislation intended to protect animals from cruelty, abuse, or unnecessary suffering while on Australian soil.⁵ Academics such as White and Cao suggest that the language within the various pieces of legislation highlights the ‘animal welfare approach’ embraced in Australian law. This approach seeks to balance the pain and suffering animals experience with the utility of particular forms of treatment.⁶ Presently, legislation in each jurisdiction remains focused on prevention and protection of mistreatment, abandonment, suffering, neglect, or cruelty. Queensland, Tasmania, and the Northern Territory have gone one step further by including additional provisions which impose a duty of care on those with the custody, control, or responsibility for these animals.⁷

Each Australian jurisdiction and its legislative instruments have one or more criminal offences for the abuse or mistreatment of animals.⁸ The exemption and protection offered to those who engage in apparently cruel acts that comply with the relevant industrial code is another common feature of Australia’s anti-cruelty provisions. While Tasmanian legislation contains no such exemption,⁹ the use of qualifying language, such

⁴ Jed Goodfellow, ‘Regulatory Capture and the Welfare of Farm Animals in Australia’ in Deborah Cao and Steven White (eds), *Animal Law and Welfare — International Perspectives* (Springer, 2016) 197–8.

⁵ *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1986* (Vic); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1999* (NT); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 2002* (WA); *Animal Welfare Act 1993* (Tas); *Animal Care and Protection Act 2001* (Qld).

⁶ Deborah Cao, Katrina Sharman and Steven White, ‘Animal Law in Australia’ (Thomson Reuters Australia, 2nd ed, 2015) 214.

⁷ *Animal Care and Protection Act 2001* (Qld) s 17; *Animal Welfare Act 1993* (Tas) s 6; *Animal Welfare Act* (NT) s 8.

⁸ See, eg, *Criminal Code Act 1899* (Qld) s 242, which states that ‘a person who, with the intention of inflicting sever pain or suffering, unlawfully kills, causes serious injury, or prolonged suffering to, an animal commits a crime’ and sets a maximum penalty of seven years imprisonment.

⁹ Cao, Sharman and White, above n 6, 219.

as 'reasonable', 'unreasonable and unjustifiable', 'appropriate and sufficient',¹⁰ adds a measure of subjectivity into any assessment of animal cruelty.¹¹

The *Pigs: Model Code of Conduct for the Welfare of Animals* applies to the farming of pigs in Australia. It provides that male pigs over the age of 21 days must be castrated under anaesthesia and by a veterinary surgeon.¹² The Code also recommends that farmers castrate piglets while between two to seven days of age.¹³ Castration occurs in the piglets' first week of life without any form of anaesthetic, and those carrying out the procedure (with or without training) are immune from prosecution.¹⁴ Likewise, the *Australian Animal Welfare Standards and Guidelines for Cattle* endorse many apparently harsh protocols.¹⁵ The *Standards* do not specify any minimum age when the calf can be removed from its mother,¹⁶ requiring instead that they receive adequate colostrum within 12 hours of birth,¹⁷ have high protein diets if weaned very early,¹⁸ and have the company of other calves (according to size)¹⁹ from three weeks of age.²⁰ Calves housed in individual pens must at least be able to see nearby calves.²¹ The intention is to balance what is manageable or profitable for Australian farmers against what we can reasonably expect animals to endure. Activist groups seek to reveal the reality of factory farms and allow consumers to "vote with their dollar". Ag-gag laws, irrespective of state or country, reduce public access to the realities of factory farming and prevent consumers making an informed choice when it comes to the purchase of animal products.

¹⁰ *Animal Welfare Act 1993* (Tas) ss 6–7, 8(1), 8(2)(e), (g), 8(3), 11, cited in Cao, Sharman and White, above n 6, 214.

¹¹ *Ibid.*

¹² Primary Industries Standing Committee, *Pigs: Model Code of Conduct for the Welfare of Animals* (PISC Report No 32, 3rd ed, 2008) 5.6.2.

¹³ *Ibid* 5.6.7.

¹⁴ *Animal Welfare Act 1992* (ACT) s 20; *Prevention of Cruelty to Animals Act 1986* (Vic) s 6; *Prevention of Cruelty to Animals Act 1979* (NSW) s 6; *Animal Welfare Act 1999* (NT) s 79; *Animal Welfare Act 1985* (SA) s 43; *Animal Welfare Act 2002* (WA) s 25; *Animal Care and Protection Act 2001* (Qld) ss 38, 40.

¹⁵ Animal Health Australia, *Australian Animal Welfare Standards and Guidelines for Cattle* (Australian Government Department of Agriculture, 1st ed, 2016).

¹⁶ *Ibid* G 8.

¹⁷ *Ibid* G 8.1.

¹⁸ *Ibid* G 8.15.

¹⁹ *Ibid* G 8.5.

²⁰ *Ibid* G 8.7.

²¹ *Ibid* G 8.6.

III THE CRIMINAL CODE AMENDMENT (ANIMAL PROTECTION) BILL 2015

I reject the argument that circumstances may favour a case in which someone may want to accumulate a number of incidences of alleged malicious cruelty before drawing this to the attention of authorities.²²

— Senator Chris Back

In February 2015, (then) Senator Chris Back presented the Criminal Code Amendment (Animal Protection) Bill ('the Bill') to the Australian Senate for its first reading.²³ The Bill proposed that it could improve animal welfare by ensuring that any recordings of malicious cruelty or abuse of animals were reported to authorities immediately. By bringing valuable evidence to the attention of the authorities, this could lead to investigations that may in turn lead to the cessation of the allegedly cruel or inhumane acts. Involving police and regulatory authorities earlier could, therefore, facilitate immediate action.²⁴ In addition, the highly controversial Bill would create new animal cruelty offences that impose a positive duty to report on anyone who filmed or recorded instances of animal cruelty.²⁵ The Bill would also criminalise many of the methods by which activists obtain footage of animal abuse and proposes severe penalties for any activities or conduct which causes a person associated with animal agriculture to fear death or serious injury as a result of the actions of trespassers — regardless of activist's motivation or concern for the animals housed within the facility.²⁶

Division 383 of the Bill — 'Failing to report malicious cruelty to animals after recording it' — would create a criminal offence where a person makes a record of what they believe to be an act of malicious cruelty,²⁷ does not report the acts to an authority within one business day,²⁸ and/or fails to give the record to an authority within five business days.²⁹ In addition, division 383 would reverse the onus of proof for this offence — requiring the defendant to prove they have reported the cruelty as required by the proposed reforms

²² Commonwealth, *Parliamentary Debates*, Senate, 11 February 2015, 482 (Chris Back).

²³ Criminal Code Amendment (Animal Protection) Bill 2015 (Cth).

²⁴ Commonwealth, *Parliamentary Debates*, above n 22, 481 (Chris Back).

²⁵ The Senate Inquiry into the Bill received 1671 written submissions as well as multiple form letters from the public: Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Animal Protection) Bill (2015) 1.4*.

²⁶ Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) div 385.

²⁷ *Ibid* s 383.5(1)(a)-(b).

²⁸ *Ibid* s 383.5(1)(c)(i).

²⁹ *Ibid* s 383.5(1)(c)(ii).

— yet the division fails to define who the relevant authorities are.³⁰ The Rural and Regional Affairs and Transport Legislation Committee Inquiry ('the Inquiry') into the Bill questioned the appropriateness of this aspect of the legislation.³¹ The Inquiry requested an explanation from Senator Back as to why this aspect of the proposed legislation had not been more clearly defined and recommended that the reporting requirement of one day be amended to require that instances of animal cruelty are, instead, reported 'as soon as practicable'.³² According to the *Guide to Framing Offences*, the burden of proof should only be reversed where the justification meets the requirements of section 28 of the *Human Rights Act 2004* (Cth) and amounts to a limitation of human rights.³³ Any limitation on human rights must be reasonable and 'set by laws that can be demonstrably justified in a free and democratic society'.³⁴

The most troubling aspect of the Bill is perhaps the potential for the prosecution of animal activists under animal cruelty provisions. The rapid-reporting requirement potentially runs contrary to public policy by preventing the chronicling of abuse or the collation of sufficient evidence required to prove institutionalised, rather than ad hoc or isolated, cruelty. As a consequence, individual workers are charged with specific instances of animal abuse while companies that rely on, dismiss, or encourage inhumane practices cannot be prosecuted.³⁵ "Trojan horse" legislation, such as the New South Wales *Biosecurity Act*,³⁶ also include similar provisions which provide advanced warning for abusers and their employers before any serious action can be brought.³⁷ Greater transparency within these industries and adequate government oversight would remove the need for covert surveillance and filming operations.³⁸ However, rather than increasing accountability and conditions for farm animals and condemning the institutions responsible for these acts, rapid reporting requirements place the burden of proof on animal activists who seek to expose systematic, cruel, and illegal practices.³⁹ The

³⁰ Ibid s 383.5(3).

³¹ Rural and Regional Affairs and Transport Legislation Committee, above n 25, 2.20.

³² Rural and Regional Affairs and Transport Legislation Committee, above n 25, 3.36.

³³ Department of Justice and Community Safety, *Guide for Framing Offences* (2nd version, April 2010) 1.

³⁴ *Human Rights Act 2004* (Cth).

³⁵ Matthew Shea, 'Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws' [2015] 48(3) *Columbia Journal of Law and Social Problems* 337, 364.

³⁶ *Biosecurity Act 2015 No 24* (NSW) ss 38–40.

³⁷ Ibid 368.

³⁸ Will Potter, 'Ag-Gag Laws: Corporate Attempts to Keep Consumers in the Dark' (2017) 5(1) *Griffith Journal of Law and Human Dignity* 1, 10.

³⁹ Ibid 1.

castration of piglets under a week of age and the removal of calves from their mothers are merely two examples of systematic practices that, if publicised, are likely to draw public censure while remaining legal according to the relevant codes of agricultural practice.⁴⁰ An important way to help reduce these practices is by exposing them to the public. Informed consumers may then choose to abstain from products which they deem to be cruel, enabling them to vote with their dollar for produce or producers that align with their personal beliefs.⁴¹ Cases such as the *ACCC v Pirovic Enterprises Pty Ltd (No 2)*,⁴² *ACCC v C I & Co Pty Ltd & Anors*,⁴³ *ACCC v Rosemary Bruhn*,⁴⁴ and *ACCC v Luv-a-Duck Pty Ltd*,⁴⁵ show that misrepresentation is common and that many animal products are not obtained or produced in ethical and/or free-range conditions despite advertising to the contrary. It is difficult to predict how many cases of misrepresentation would remain unknown without the intervention of animal activists and their subsequent exposure to the public.⁴⁶ It is the public outcry generated by these exposés that precipitate change. The Bill is designed to ‘enhance the protection of domestic animals’ by ensuring investigation occurs as early as possible and considers any delays in reporting to be ‘unacceptable’ but rejects arguments that prosecution may be better served by accumulating evidence of repeated offences.⁴⁷ It therefore remains unclear whether these proposed reforms could be appropriately adapted to meet the objectives as set out by Senator Back. It remains similarly unclear whether the proposed section 383.20 further reduces the value of any such amendment.

Section 383.20 would limit the application of division 383 ‘to the extent (if any) that it would ... infringe any constitutional doctrine of implied freedom of political communication’.⁴⁸ This matter was considered in depth in *ABC v Lenah Game Meats*.⁴⁹ In

⁴⁰ See, eg, *Animal Care and Protection Act 2001* (Qld) s 41, which provides a defence for unnecessarily painful methods of animal processing provided that they comply with the relevant agricultural code.

⁴¹ Zak Franklin, ‘Giving Slaughterhouses Glass walls: A New Direction in Food Labelling and Animal Welfare’ (2015) 21 *Animal Law* 285, 302.

⁴² See *ACCC v Pirovic Enterprises Pty Ltd (No 2)* [2014] FCA 1028 regarding free-range eggs.

⁴³ See *ACCC v C I & Co Pty Ltd & Anors* [2010] FCA 1511 regarding the misleading labelling of eggs as ‘free-range’.

⁴⁴ See also *ACCC v Rosemary Bruhn* [2012] FCA 959 regarding the misrepresentation of cage eggs as free-range eggs.

⁴⁵ See *ACCC v Luv-a-Duck Pty Ltd* [2013] FCA 1136 regarding duck meat sold as free-range.

⁴⁶ See, eg, *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] FCA 570; *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109.

⁴⁷ Commonwealth, *Parliamentary Debates*, above n 22, 481–2 (Chris Back).

⁴⁸ Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) pt 9.7 div 383 s 320.20(1)(a).

⁴⁹ [2001] 208 CLR 199.

this case, the ABC had obtained illegally secured surveillance footage from a Tasmanian possum processing plant that showed the (sometimes failed) stunning and slaughtering practices within the plant. The graphic footage was passed on to members of the animal rights group, Animal Liberation Ltd. The High Court was asked to consider whether the grant of an interlocutory injunction, which would prevent the publication of this material by ABC, was justifiable under legal or equitable causes. The High Court also considered whether illegally obtained footage should be subjected to any greater constraints on publication than that which has been obtained by legal means.⁵⁰ The High Court held, by a 6:1 majority, that the power to grant an interlocutory injunction would not be properly exercised if it operated in a way which prevented free and open debate in areas of legitimate public concern.⁵¹ Other key aspects of this decision will be examined in more detail in Part III of this paper.

In addition, the Bill also creates division 385 — the offence of ‘interfering with the carrying on of animal enterprises’.⁵² This relates to any conduct which destroys or damages property,⁵³ which is used in the carrying on of an animal enterprise,⁵⁴ belongs to a person who carries on an animal enterprise,⁵⁵ or belongs to a person ‘otherwise connected with, or related to, an animal enterprise’,⁵⁶ where that person ‘intends for their conduct to interfere with the carrying on of that enterprise’.⁵⁷ Penalties range from one year’s imprisonment to 20 years, or even life imprisonment.⁵⁸ This punishment is extremely disproportionate when one considers the broad array of actions that may qualify for prosecution under this section. Within Queensland, minor infractions such as the slashing of tyres on a delivery vehicle used to transport high-grade meat from farms to wholesalers could be held to be in contravention of this division, with penalties of up to 5 years where economic damages exceed \$10 000.⁵⁹ The unlawful killing of an animal

⁵⁰ *Ibid.*

⁵¹ *Ibid* [217].

⁵² Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) div 385.

⁵³ *Ibid* s 385.5(1)(a).

⁵⁴ *Ibid* s 385.5(1)(a)(i).

⁵⁵ *Ibid* s 385.5(1)(a)(ii).

⁵⁶ *Ibid* s 385.5(1)(a)(iii).

⁵⁷ *Ibid* s 385.5(1)(b).

⁵⁸ *Ibid.*

⁵⁹ *Ibid* ss 385.5, 385.20(1).

(in the absence of a defence under the relevant agricultural codes)⁶⁰ has a maximum penalty of seven years.⁶¹

The proposed offences are set out in divisions 383 and 385 of the Bill and would be incorporated into the Commonwealth *Criminal Code Act* should both Houses of Parliament pass the Bill. At this stage, the Bill has been restored to the status of 'Notice Paper' for reconsideration at an, as yet, undetermined date by the 44th Parliament.⁶² Senator Chris Back resigned from his position in the Senate on 31 July 2017.⁶³ As a result, the Bill's future remains unclear. Its impact also remains uncertain given the ruling of the High Court in *Lenah*.⁶⁴ In the meantime, the *Biosecurity Act 2015 No 24* (NSW) ('the Act') entered into force on 14 October 2017. The Act is designed to minimise biosecurity risks and thereby protect animals and humans against biological disease. However, much like the Criminal Code Amendment (Animal Protection) Bill, the Act contains provisions that could be used to target traditional methods of animal activism — particularly those related to covert surveillance of animal processing facilities — and, once again, creates unnecessarily broad offences such as a 'biosecurity duty'.⁶⁵ The Act requires '[a]ny person who deals with biosecurity matter or a carrier' to ensure that any risk, whether real or potential, is 'prevented, eliminated or minimised'.⁶⁶ A person who intentionally fails to meet this duty — such as animal activists installing potential 'carriers' such as surveillance equipment or the activists themselves — are guilty of an offence which continues 'for each day that the failure continues' or remains unreported.⁶⁷ The Act also creates an offence related to the inciting of others to create an offence and may leave those indirectly involved in animal activism liable for the same criminal penalties as those involved in the commission of a biosecurity offence.⁶⁸ Perhaps more troubling are the powers of search and seizure granted by section 98 of the Act which allows for the entry of 'commercial premises' — by force, if necessary, and without a warrant — during which time any materials believed to be connected to the commission of an offence may be

⁶⁰ See *Animal Care and Protection Act 2001* (Qld) s 41.

⁶¹ *Criminal Code Act 1899* (Qld) s 468(2).

⁶² Commonwealth, *Parliamentary Debates*, Senate, 31 August 2016, 254 (Chris Back).

⁶³ Parliament of Australia, *Former Senator Chris Back*

<http://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=J7Q>.

⁶⁴ [2001] 208 CLR 199.

⁶⁵ *Biosecurity Act 2015 No 24* (NSW) s 22.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* s 2.

⁶⁸ *Ibid* ss 279–280, 307(b).

seized.⁶⁹ Interestingly, and perhaps somewhat ironically, these powers also extend to the installation of surveillance materials necessary to ‘captur[e] any biosecurity matter or thing’.⁷⁰ This is an interesting contradiction given the agricultural industry’s continued opposition to any form of covert surveillance within its premises as highlighted in *ABC v Lenah Game Meats*.⁷¹

IV *LENAH GAME MEATS* AND THE PROPOSED ‘AG-GAG’ REFORMS

No such rules or practice may burden freedom of communication of the specified kind unless the burden or practice is proportionate to, and compatible with, the Constitution.⁷²

— Kirby J, *ABC v Lenah Game Meats*

There are several key aspects of the *Lenah* decision that are relevant to the implementation of the proposed ag-gag reforms. The decision offered clarity as to whether any real “right” to privacy existed within Australia as well as offering guidance on the limits of our implied constitutional right to free speech. The decision also confirmed that animal welfare was a federal concern and a legitimate area of public interest.⁷³

In holding that no enforceable right to privacy existed within Australia,⁷⁴ the court also held that any such right would not extend to corporations and confirmed that the mere fact that an Act took place on private property, did not make the activity private in nature.⁷⁵ Furthermore, the court held that illegally obtained material should not be prevented from publication by a law-abiding possessor of that information and that statutory sanctions against the trespasser are a more appropriate means of deterrence (than the prohibition of publication by the lawful possessor of that footage).⁷⁶ Chief Justice Gleeson also acknowledged that the expansion of these sanctions might be

⁶⁹ *Ibid* s 102.

⁷⁰ sub-ss 102 (j)-(k).

⁷¹ [2001] 208 CLR 199.

⁷² *Ibid* [194].

⁷³ *Ibid* [217], [220].

⁷⁴ *Ibid* [187].

⁷⁵ *Ibid* [43], [116], [190], [279].

⁷⁶ *Ibid* [48] (Gleeson CJ).

necessary where actions such as unlawful trespass were not adequately deterred by the current statutory framework.⁷⁷

On face value, Gleeson CJ's position may appear compatible with the new criminal sanctions proposed by the Bill. However, this may not be the case. The High Court made several comments that suggest they would not support any laws which would have a chilling effect on political and democratic debate. Such laws would have a restrictive or inhibitory effect on 'the operation of the representative democracy ... envisaged by the constitution'.⁷⁸ While such measures may be justified against matters of general public concern to prevent serious personal denigration or humiliation,⁷⁹ many advances in animal welfare would not have occurred without public debate and political pressure from special interest groups that have caused a public outcry.⁸⁰ The fact that the proposed reforms target recorded footage of animal cruelty may also be particularly problematic. The High Court has also acknowledged the importance of television (and presumably other visual media) for raising public awareness.⁸¹ Without visual footage, these stories may go unreported, and without this media attention, the level of political debate may be compromised and opportunities for nationwide discussion reduced.⁸² Section 383.20 of the Bill would also require the 'failure to report' offence to apply only where it does not 'infringe any constitutional doctrine of implied freedom of political communication',⁸³ thereby raising a legitimate question as to the actual utility of these laws. Perhaps the greatest impact of the Bill would be on 'open rescues' where activists choose not to conceal their identities when 'rescuing' animals from private property.⁸⁴

It is important to note that Lenah Game Meats argued that the footage would have caused economic harm and a public backlash against otherwise legitimate slaughtering practices which were 'no different from any other animal slaughtering operation in Australia'.⁸⁵ While a reasonable argument, Gummow and Hayne JJ noted the tendency of many

⁷⁷ *Ibid.*

⁷⁸ *Ibid* [217].

⁷⁹ *Ibid* [219].

⁸⁰ *Ibid* [217].

⁸¹ *Ibid* [195].

⁸² *Ibid* [197].

⁸³ Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) s 383.20(1)(a).

⁸⁴ Potter, above n 38, 17.

⁸⁵ [2001] 208 CLR 199, [79].

commercial enterprises to sustain economic harm as a result of lawful competition.⁸⁶ To argue that, on these grounds, Lenah Game Meats qualified for injunctive relief required an ‘indulgence of idiosyncratic notions of what is fair in the market place’.⁸⁷ These arguments weighed the individual’s legitimate expectation of privacy against the public interest in free political communication.⁸⁸ Nonetheless, it appears that the proposed legislation (at least indirectly) contradicts the principles espoused by the High Court in *Lenah*. Interestingly, experiences in other jurisdictions where similar laws have been implemented suggest that public pressure may also have impacted the efficacy of these laws. This will be discussed further in Part V; however, before we examine the effect of these laws in the United States, we will first examine the importance of visual imagery as a means to promote and create change.

V THE IMPORTANCE OF IMAGERY

What we witness inside animal agriculture is beyond comprehension ... The public would not believe us, if we were not able to bring out the video and photographs of the extreme torture, humiliation, deprivation, terror, and pain the animals suffer endlessly in their incarceration.⁸⁹

— Patty Mark, Animal Liberation Victoria

The importance of imagery in exposing the cruelty endemic in some of the world’s animal processing plants cannot be understated. Viewers consider it more persuasive than partisan or ‘preachy’ footage.⁹⁰ Exposure to these images can influence the viewer’s behaviour and help promote social change.⁹¹ The effect is especially profound where consumers are faced with the disconnect between the idealised imagery of farming and the realities of agriculture. When this occurs, the public outcry can be loud, and the demand for change can have lasting results.⁹²

⁸⁶ Ibid [80].

⁸⁷ Ibid.

⁸⁸ Which, of course, does not extend to corporations: *Lenah* [2001] 208 CLR 199, [279].

⁸⁹ Potter, above n 38, 20, citing YouTube, *Patty Mark — President of Animal Liberation Victoria* (21 June 2010) <<https://www.youtube.com/watch?v=49G4luRsOmo>>.

⁹⁰ Lara Newman, ‘The Effects of The Cove and Bold Native on Audience Attitudes towards Animals’ (2015) 4(1) *Animal Studies Journal* 77, 85.

⁹¹ Ibid 81.

⁹² Potter, above n 38, 6.

In February 2015, the news program 'Four Corners' aired an exposé on the practice of 'live baiting' within in the greyhound racing industry.⁹³ The response from the public, authorities, and regulators was swift. Police and RSPCA officers raided greyhound facilities, trainers were banned for life and charged with cruelty, and inquiries were launched in New South Wales, Victoria, South Australia, and Western Australia while sponsors withdrew their support from the support.⁹⁴

At the time of this piece's publication, Animals Australia and Change.org have mounted campaigns to ban the live export of sheep from Australia. Footage shows sheep drowning in a 'deadly soup' of 'untreated waste' and being 'cooked alive'.⁹⁵

Traditional and social media exposure raises public awareness and places important pressure on government and regulatory bodies to address these issues. Where this approach fails, public petitions can force public votes or legislative review of problematic practices that are, otherwise, legally conducted,⁹⁶ albeit at the animal's expense.⁹⁷ The involvement of select celebrities or their endorsement also has an important 'halo effect' which gives additional media coverage to less popular animal welfare concerns and helps to keep the issue within the media spotlight.⁹⁸

'Moralisation' is a crucial component of social and ideological change. Moralisation normally involves two strategies: one which is related to the provision of information and evidence about abusive practices, while the other provides visual or emotional appeals to the conscience of society.⁹⁹ 'Moral shocks' are another catalyst for change and occur when 'information raises such a sense of public outrage in a person that she becomes inclined toward political action ... and may also come from new information about something [which exists already but] has already done unseen damage'.¹⁰⁰ The response

⁹³ Four Corners, *Making a Killing* (16 February 2015) ABC News <<http://www.abc.net.au/4corners/making-a-killing/6127124>>.

⁹⁴ Animals Australia, *11 Ways You Helped Achieve Justice for Greyhound Racing Victims* (4 July 2017) Animals Australia <<http://www.animalsaustralia.org/features/live-baiting-investigation-outcomes.php>>.

⁹⁵ Animals Australia, *Animals Don't Belong Here*, Animals Australia <https://secure.animalsaustralia.org/take_action/live-export-shipboard-cruelty/?ua_s=HPH>.

⁹⁶ *Ibid* 7.

⁹⁷ Franklin, above n 41, 325.

⁹⁸ Brian M Lowe, 'Spectacular Animal Law: Imagery, Morality, and Narratives Impacting Legal Outcomes for Nonhuman Animals' (2016) 9 *Albany Government Law Review* 48, 101.

⁹⁹ *Ibid* 72.

¹⁰⁰ James M Jasper, 'The Emotions of Protest: Affective and Reactive Emotions In and Around Social Movements' (1998) 13(3) *Sociological Forum* 397, 409.

to confronting footage of animal suffering is often visceral and relies heavily on arresting imagery.¹⁰¹ Animal rights protestors often cite their own exposure to these types of images as a significant contributor in their move towards animal activism.¹⁰²

A key part of the public response to reports of animal cruelty is the creation of moral shocks or outrage. Activists then help direct public action toward the authorities and institutions that permit or ignore cruel practices and use this public support to lobby decision-makers for change.¹⁰³ The injustice inherent in the mistreatment of animals is a particularly powerful means by which activists promote public anger and translate that anger into a demand for government to find a solution to the problem.¹⁰⁴ Factory farming conditions create abnormal behaviours within species of animals that require human intervention and often inhumane practices to mitigate the suffering of the animals. Pig cannibalism is one example of an aberrant behaviour exhibited by animals in factory farming scenarios. In pigs, cannibalism is a manifestation of the animal's frustration at not being able to engage in its 'natural foraging and exploratory instincts'.¹⁰⁵ To prevent pig cannibalism, the pigs' tails are docked. The result is a tail 'stump' so sensitive and painful that the pig will quickly escape if another pig bites its tail.¹⁰⁶ The procedure is therefore considered 'protective' or 'preventative' and therefore in compliance with *Pigs: Model Code of Conduct for the Welfare of Animals*.¹⁰⁷ Otherwise, tail-docking is likely to be held to be an act of animal cruelty within the relevant jurisdiction.¹⁰⁸ If the Bill were to pass through the Australian Senate, the reality of factory farming and their impact on species such as pigs would remain unknown by members of the general public.

Major world-wide conglomerates such as McDonalds and Walmart also recognised the increasing public interest in the origin of their food and have committed to making their food practices more transparent to consumers.¹⁰⁹ Transparency can be of particular

¹⁰¹ Ibid.

¹⁰² James M Jasper and Jane D Poulsen, 'Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests' (1995) 42(4) *Social Problems* 493, 506.

¹⁰³ Jasper, above n 107, 409.

¹⁰⁴ Ibid 412-3.

¹⁰⁵ Franklin, above n 41, 326.

¹⁰⁶ Ibid 326.

¹⁰⁷ Primary Industries Standing Committee, above n 12, 5.6.8-5.6.10.

¹⁰⁸ Ibid 5.6.8-5.6.9 states that the practice of docking should 'be avoided wherever possible' and that 'all aspects of the environment, feeding and management should be investigated ... so that remedial action can be taken'.

¹⁰⁹ Nicole E Negowetti, 'Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws' [2015] 38 *Seattle University Law Review* 1345, 1390.

importance for religious, political, family, co-operative, economic, environmental, and health-related reasons.¹¹⁰ Concerns for animal welfare have begun to have a significant impact on consumer spending, but consumers are often lulled into a false sense of security and the belief that animals live acceptable lives up until the point of slaughter.¹¹¹ Laws that inhibit the activities of animal activists and thereby prevent the raising of public awareness as to the plight of these animals indirectly allow producers to continue their misrepresentation of the animals' living conditions.¹¹² Greater transparency would allow consumers to 'harmonise their purchases and moral preferences'.¹¹³ Some suspect that the lack of transparency is a means for the deliberate concealment of inhumane or unjustifiable cruelty. The backlash against animal producers is not limited to those engaging in cruel or inhumane practices, with informal polls suggesting that up to 63 per cent of American farmers claim these laws have a detrimental effect on public relations by implying that these producers 'have something to hide'.¹¹⁴

Virilio believes we are in the presence of a 'tangible appearances business' that may well be [a] form of pernicious *industrialisation of vision*'.¹¹⁵ According to Virilio, even war does not exist without representation.¹¹⁶ In the mind of the public, unseen atrocities do not exist. Herman and Chomsky have referred to this as a 'filtering of news by mass media' and have noted that this filtering favours the interests of media owners and their affiliates and therefore serves to conceal information that would otherwise be harmful to these actors.¹¹⁷ Ag-gag laws that limit the exposure of animal cruelty and reduce the opportunity for public debate have a similar 'filtering' effect.

¹¹⁰ Ronald K L Collins, 'Free Speech, Food Libel, and the First Amendment ... in Ohio' (2000) 26(1) *Ohio Northern University Law Review* 1, 7, cited in Negowetti, above n 109, 1384.

¹¹¹ Franklin, above n 41, 294.

¹¹² Ibid 327.

¹¹³ Ibid 328.

¹¹⁴ Negowetti, above n 109, 1389.

¹¹⁵ Lowe, above n 98, 64 (emphasis in original).

¹¹⁶ Ibid 63.

¹¹⁷ Ibid 78, citing Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, 2nd ed, 2002) xix, xlii.

VI CONSIDERATION OF AG-GAG LAWS AND THEIR IMPLEMENTATION IN THE UNITED STATES

Rather than condemn these abuses, change their policies, and respond to consumer demand, the agriculture industry has responded by attempting to shoot the messenger.¹¹⁸

— Will Potter

Some refer to the American ag-gag laws as having occurred in three waves.¹¹⁹ The first wave expanded trespass protections and prevented unauthorised recording in states such as Minnesota, Kansas, and North Dakota.¹²⁰ The second wave expanded these laws again to include ‘agricultural production facility fraud’ and specifically targets activists obtaining footage of animal welfare violations by masquerading as an employee of the facility.¹²¹ These laws have been implemented in both Iowa and Utah, with Iowa also allowing for third party, and therefore journalistic, liability for illegally obtained footage.¹²² The third wave of ag-gag laws added rapid reporting requirements such as those proposed by Australia’s own Criminal Code Amendment (Animal Protection) Bill 2015.¹²³ Many states proposed these laws, but the majority failed to pass — only Missouri succeeded.¹²⁴

Despite the more troubling aspects of these laws, they may have a more limited effect than intended. The rapid reporting requirements led to charges against Americans, Amy Meyer and Taylor Radig, who filmed footage of animal cruelty and released it to the public.¹²⁵ The women were both prosecuted for animal cruelty offences, and in both instances, public outcry led to the charges being dropped. In addition, these laws duplicate existing protections already in place and offer remedies (in the form of damages) to those who suffer economic loss due to the actions of animal advocates. Many

¹¹⁸ Potter, above n 38, 1.

¹¹⁹ See, eg, Sternberg, above n 2; Franklin, above n 41; Shea, above n 35.

¹²⁰ Sternberg, above n 2, 628.

¹²¹ Ibid 632; An important aspect of these laws is that the perpetrator has claimed to be a legitimate job applicant and employee, while their motivation is based solely on their interest in obtaining incriminating footage.

¹²² Ibid 634.

¹²³ Jacob Coleman, ‘ALDF v Otter: What Does It Mean for Other State’s “Ag-gag” Laws?’ (2017) 13 *Journal of Food Law and Policy* 198, 1388; Potter, above n 38, 15.

¹²⁴ Coleman, above n 123, 1388.

¹²⁵ Potter, above n 38, 20–21.

commentators question the need for further criminal sanctions.¹²⁶ 'By prohibiting the recording of ... agricultural operations' these laws also inhibit constitutional free speech and as a consequence have been ruled as unconstitutional by a Utah court.¹²⁷ According to Negowetti, 'these laws have only one purpose: to hide factory farming conditions from a public that is beginning to think seriously about animal rights and the way food is produced.'¹²⁸

VII CONCLUSION

What at first sight might appear to be exclusively an animal abuse issue is, on closer inspection, clearly also a freedom of expression issue, a worker's rights issue, an environmental issue and a public health issue.¹²⁹

— Amnesty International

While Queensland may have dodged ag-gag laws at present, Trojan horse legislation, such as the *NSW Biosecurity Act* and the *Surveillance Devices Act 2016 (SA)*,¹³⁰ and the continuing push for an Australian right to privacy have the potential to deter and reduce the activities of animal activists. The consequent inhibition of free speech or political communication raises significant questions about the ever-increasing commodification of animals and their entitlement to live free from fear, distress, pain, injury, disease, discomfort, thirst, and hunger and to enjoy the natural behaviours of their species.¹³¹ While international consumers have increasingly begun to exhibit a real interest in improving the lives of the animals involved in the production of our food, ag-gag laws in Australia and overseas pose a significant threat to the transparency relied on by consumers who seek to make informed purchases based on their own moral beliefs. These laws offer no additional benefit to legitimate and humane agricultural producers beyond those protections already in place. The only additional benefit comes from the

¹²⁶ Voiceless, Submission No 56 to the Senate Rural and Regional Affairs and Transport Legislation Committee, *Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015*, 10 March 2015, 5 [3].

¹²⁷ Complaint at 19, *Animal Legal Defense Fund v Herbert*, No 2:13-CV-00679 (D Utah, 22 July 2013), ECF No 2, 36.

¹²⁸ Negowetti, above n 109, 1347.

¹²⁹ Vienna Colucci, 'Amnesty Makes It 60' on *Amnesty International USA* (24 May 2013) <<http://blog.amnestyusa.org/us/amnesty-makes-it-60/>>, cited in Potter, above n 38, 21.

¹³⁰ *Biosecurity Act 2015 No 24* (NSW); *Surveillance Devices Act 2016* (SA) (came into force on 18 December 2017).

¹³¹ *Animal Care and Protection Act 2001* (Qld) s 17.

laws' potential to silence animal activists and chill political communication and debate regarding animal welfare. Experience within the United States suggests that these laws can and will be used to stifle the actions of those who seek to open the barnyard door and promote public awareness about the realities of animal agriculture and leave individual workers to face criminal penalties while the corporations that allow or encourage them to escape unscathed.¹³² Such fetters on political free speech strike at the very core of democracy envisioned by the Australian Constitution and are contrary to interests of the Australian public and Australian livestock. It appears the animals and their activists may not be out of the woods yet.

¹³² See, eg, Vandhana Bala, *Yet Another Butterball Turkey Employee Convicted of Cruelty to Animals* (4 April 2013) Mercy for Animals <<http://www.mercyforanimals.org/breaking-news-yet-another-butterball-turkey-employee-convicted-of-cruelty-to-animals>>: The Butterball turkey controversy in the United States where multiple employees have been charged with animal cruelty and yet no charges have been laid against the company itself.

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