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BEYOND MARRIAGE EQUALITY & SKIN CURLING*

THE HON MICHAEL KIRBY AC CMG**

December 2017 marked the culmination of a tedious process which led to the enactment by the Australian federal Parliament of long overdue amendments to the Marriage Act 1961 (Cth). However, the anomalous approach in the form of a public postal vote that was employed in deciding whether a minority of citizens should be afforded equal civil rights to other citizens highlighted and exacerbated the vulnerability experienced by the very subjects it sought to redress. Nonetheless, in reminiscing about the significant changes that I have witnessed in my lifetime regarding alleviation of the uniquely hostile discrimination against LGBTIQ citizens is doubtless a step in the right direction and can make us optimistic about times to come, but also impatient to complete these changes in the hope that similar discrimination and injustices circumvented in times to come — and for generations to come.

* Editor's note: The following article is a written publication of an address delivered by the Hon Michael Kirby AC CMG for the Third Curtin Annual Human Rights Lecture at Curtin University, Perth, on 28 September 2018, and parts of this lecture were derived from the Hon Michael Kirby AC CMG's address for the Australian Research Centre in Sex, Health and Society at La Trobe University, Melbourne, on 2 May 2018. The author acknowledges the suggestions of the anonymous reviewers which have been accepted and reflected in the text.

** The Hon Michael Kirby was a Justice of the High Court of Australia (1996–2009) and is currently Co-Chair of the Human Rights Institute of the International Bar Association (2018–), Patron of the Curtin Centre for Human Rights Education, Hon DLitt at Curtin University, and Ambassador of the Australian Research Centre in Sex, Health and Society at La Trobe University.

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I THE IDEA OF MARRIAGE EQUALITY

The enactment in December 2017 by the Australian federal Parliament of amendments to the *Marriage Act 1961* (Cth) was a belated move, at least by comparison with other countries having similar social, cultural, religious, and legal features.¹ By the time the federal politicians in Australia got around to adopting the amendments redefining marriage, for the purpose of Australian law, as a relationship between two ‘persons’ rather than between one man and one woman, changes of that kind had been introduced in more than 25 of the democratic, economically advanced countries with which Australia normally compares itself.

In many such countries, the change had been brought about by the combined actions of the legislatures and courts: the latter usually giving effect to constitutional provisions upholding human rights and the principles of civic equality.² In the United States of America, there had been several legislative moves. However, the primary impetus for change followed important judicial rulings, notably the decision of the Supreme Judicial Court of Massachusetts and,³ ultimately, of the Supreme Court of the United States.⁴

Against the unlikely risk, in the meagre constitutional and statutory setting of Australia, that an adventurous court might have felt tempted to uphold a legal right to marriage by same-sex couples within the then condition of the law, that pathway was effectively

¹ MD Kirby, ‘Marriage Equality Law and the Tale of Three Cities: How the Unimaginable Became Inevitable and Even Desirable’ (2016) 22 *Auckland Uni Law Review* 11.

² See, eg, *Fourie and Anor v Minister of Home Affairs and Anor* [2005] ZACC 19; (2006) (1) SA 524 (South African Constitutional Court). In Canada, the Federal Government referred the question to the Supreme Court of Canada and the court affirmed the power: *Re Same-Sex Marriage* [2004] 3 SCR 698. This resulted in the introduction and passage of Bill C38 from 20 July 2005.

³ *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass, 2003).

⁴ *Obergefell v Hodges*, 576 US (2015); 135 S Ct 2584, 2628 (2015).

blocked in 2004 by a pre-emptive strike introduced into the Federal Parliament by the Howard Government. An amendment to the *Marriage Act 1961* was enacted with near unanimity. This not only forbade any Australian court upholding the legal status of same-sex marriage — that is, the extension of civil marriage to same-sex couples — but it also obliged Australian courts to give no legal recognition in Australia to any such marriage, lawfully adopted elsewhere in the world.⁵

To rub salt into this particular wound, the Australian Parliament, again with near unanimity, inspired by a United States legislative precedent,⁶ obliged religious and non-religious marriage celebrants, officiating at all Australian marriage ceremonies, to read out to the participants in the marriages where they officiated, a specified text affirming that marriage was, under Australian law, a union between one man and one woman to the exclusion of all others for life. That assertion was not only an exercise in wishful thinking for a large proportion of marriages, which statistics and common knowledge showed would break down during the lives of those involved, but it was a hurtful reminder to any LGBTIQ persons who happened to be present,⁷ and their families and friends, that they were not included in this aspect of civic equality. They were not part of the Australian community for the legal recognition of long-term relationships.⁸ On the contrary, they were excluded. And that was so by the vote of most members of their national Parliament.

These legislative impediments were not the only disappointments for LGBTIQ citizens in Australia on their journey to the acceptance of same-sex marriage. The defeat of the Howard Government in 2007 and the election of the first Rudd Government, raised hopes, in some quarters, that same-sex marriage might at last be achieved. The first Rudd administration had proposed amendments to a large number of federal statutes that contained discriminatory provisions adversely affecting LGBTIQ citizens.⁹ This was

⁵ *Marriage Amendment Act 2004* (Cth) s 5 (definition of ‘marriage’); See also s 88EA inserted in the 1961 Act.

⁶ *Defense of Marriage Act 1996*, Pub L No 104-199, 110 Stat 2419 § 3; See *United States v Windsor*, 570 US 744 (2013).

⁷ ‘LGBTIQ’ means Lesbian, Gay, Bisexual, Transgender, Intersex, and otherwise “Queer” people.

⁸ Although, de facto relationships have been legally recognised to some degree since the 2009 reforms to the *Family Law Act 1975* (Cth). State legislation in Australia had also given recognition to de facto heterosexual married relationships: See, eg, *De Facto Relationships Act 1984* (NSW) later renamed as *Property (Relationships) Act 1984* (NSW).

⁹ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth).

enacted. However, when the same Parliament came to consider a revised law from the Australian Capital Territory ('ACT') providing for the legal recognition of same-sex civil "partnerships" (not marriage and not civil "unions") the new federal government, complying with an electoral promise, took the most unusual step (almost unique) of disallowing the Territory enactment. It did so notwithstanding the grant of self-government that had otherwise normally resulted in federal deference towards locally enacted legislation.¹⁰

In this way, in 2008, the opponents of same-sex relationship recognition in Australia, by way of civil union or civil partnership short of marriage, surrendered the prospects of safeguarding the word 'marriage' for heterosexual couples alone whilst permitting LGBTIQ couples recognition of a lesser, and different, relationship in law. This was to prove a goal for the opponents of relationship recognition. Thereafter, advocates of the legal recognition of same-sex relationships concentrated exclusively on the achievement of marriage equality.

The pesky legislature of the ACT did not abandon its efforts on this subject. For the third time, a Bill was introduced in 2013 by the Legislative Assembly of the ACT to permit a form of "Territory marriage" which, it hoped, might be sufficiently distinguished in law from the strictures of the federal *Marriage Act* to permit constitutional validity: *Marriage Equality (Same Sex) Act 2013* (ACT). Although Prime Minister Rudd had returned to office as Prime Minister, a belated convert to marriage equality, his second government was defeated in a federal election held in September 2013. The Coalition parties returned to office with an ongoing party and political commitment to oppose marriage equality. It was led by a committed opponent of marriage equality, Prime Minister Tony Abbott.

The third ACT enactment was immediately challenged in the High Court of Australia on constitutional grounds brought by the new Federal Attorney-General, Senator Brandis. Any hopes that the courts would come to the rescue of the ACT measure were soon laid to rest by the speedy decision of the High Court rejecting the supposed "Territory marriage" and holding that any such relationship under Australian law had to be enacted,

¹⁰ *Civil Partnership Act 2008* (ACT); The Howard Government earlier secured the disallowance of the *Civil Unions Act 2006* (ACT).

if at all, nationwide and by the federal Parliament. It could not be validly enacted by a sub-national law, at least in the form of the ACT's third attempt.¹¹

Those who, in Australia, dreamed that the courts would support a vulnerable minority on human rights grounds have generally been disappointed. The constitutional text and federal legislation give few foundations for judicial protection of a legal principle of civic equality. Nevertheless, the High Court's prompt decision in 2013 offered a silver lining. The court unanimously made it clear that any hopes that opponents of same-sex marriage in Australia might hold, that the federal constitutional head of legislative power with respect to 'marriage' would be read so as to confine its availability to heterosexual marriage,¹² on the basis that such had been the "original intent" of the constitutional power when it was adopted in 1901,¹³ were to be disappointed. The court held that the word was broad enough, in its context, purpose, and meaning, to include application to same-sex relationships. Accordingly, any such change had to be made by the federal Parliament. This clarification by the High Court neatly returned the issue to the federal politicians. Some, including people of differing political persuasions, were still strongly opposed to same-sex marriage. However, the removal of Mr Abbott as Prime Minister and his replacement by Malcolm Turnbull — a long-time personal supporter of marriage equality — raised hopes once again amongst LGBTIQ citizens and their supporters.

However, it soon became clear that Prime Minister Turnbull (as a condition for securing the leadership change) would resist a free parliamentary vote on the issue: a procedure that had been used in the past to resolve equally sensitive controversies, such as the enactment of the *Family Law Act 1975* (Cth). The Coalition parties would continue to oppose the enactment of same-sex marriage in the absence of the conduct of a national plebiscite indicating approval in the marriage law by a majority of electors voting for a change on that issue and, inferentially, supporting the introduction of a parliamentary measure to enact such a change.

The appeal to an extra parliamentary procedure, as a necessary precondition to the availability of a vote in the federal Parliament, was opposed by many citizens, not only

¹¹ *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.

¹² Understanding of 'marriage' in 1901 as a legal concept so recognised by the common law as declared at that time.

¹³ See *Hyde v Hyde* (1866) LR 1 P & D 130.

LGBTIQ electors. They regarded it as alien to the system of representative, parliamentary democracy established by the Australian Constitution. Such a procedure was virtually without precedent in Australia — at least since the failed plebiscites on overseas military service during the First World War. Some opponents saw the procedure as specially undesirable in this matter as it was likely to promote open hostility and stigmatisation in the community of the already vulnerable LGBTIQ minority.¹⁴

II FROM PLEBISCITE TO SURVEY TO SAME-SEX MARRIAGE

In order to secure parliamentary approval for a plebiscite, the Turnbull government introduced proposed legislation both to provide for a vote and to appropriate funds for its conduct by the Australian Electoral Commission ('AEC'). However, although that measure was twice approved by the House of Representatives, it twice failed to pass the Senate. In that chamber, a majority of senators criticised the departure from Australia's ordinary constitutional lawmaking practice; the substantial costs that were necessarily involved; and the precedent thereby established to delay, and possibly impede, parliamentary law-making. In the result, the proposed law was not approved by the Parliament. Opponents to the plebiscite also relied heavily on the harm that would be done by such a procedure, especially to young LGBTIQ people forced to witness a hostile public campaign in the general Australian community.

Once again, hopes were raised in some sections of the Australian community that the courts might come to the rescue of the observance of ordinary constitutional norms. Reference was made to the constitutional provision that required approval from both chambers of the Australian Parliament for the expenditure of taxpayers' monies upon projects enacted within a federal head of power, proposed by the Executive Government, and supported by an appropriation approved by the Parliament.¹⁵ Despite precedents that might have suggested that the High Court would, once again, return the matter to the Executive Parliament to be dealt with in the normal way envisaged by the Australian Constitution, the Court effectively waived the constitutional significance of the repeated defeat of the plebiscite measure in the Senate. It held that the government could go ahead

¹⁴ See generally MD Kirby (n 1).

¹⁵ *Combet v The Commonwealth* (2005) 224 CLR 494; [2005] HCA 61; *Williams v The Commonwealth* (2012) 248 CLR 156; [2012] HCA 23.

with its postal survey. It could rely on “emergency” entitlements to cover the appropriation of the estimated \$122 million for the conduct of the survey. And this was so despite the fact that the polling would not be conducted by the AEC but by a different federal agency altogether, the Australian Bureau of Statistics.¹⁶ In this way, a completely unprecedented arrangement was adopted as a supposed precondition to the consideration by the Parliament of the enactment of a law within its undoubted constitutional power. This (unanimous) ruling of the High Court was criticised on several grounds by respected observers.¹⁷

There was no constitutional or legal need for a referendum, plebiscite, or postal survey prior to the decision by the federal Parliament on a law on same-sex marriage. The only need was a decision within the Coalition parties to permit a ‘free vote’ in the Parliament. A minority of their members were reportedly opposed to same-sex marriage and would not agree to a free parliamentary vote.¹⁸ Instead of that matter being resolved by a normal vote in the Parliament, a *deus ex machina* was provided to the government in the form of a postal survey conducted by a federal agency entrusted with the gathering of statistics.

Before these matters pass from memory, it is important that the uniquely hostile discrimination against LGBTIQ citizens (their families, colleagues, and friends) should be recorded, in the hope that similar discrimination and injustices are avoided in the future. I will leave it to others (some have already done so) to recount the injustices that they see as having happened. It is important to remember, however, that one of the purposes of representative government — by which contested and divisive questions are committed to debate and recorded discussion, and decisions are duly voted upon in the legislature — is the avoidance of the transfer of such decisions to the streets, to media in all its forms, and to hostile environments.¹⁹

¹⁶ *Wilkie v The Commonwealth* (2017) 91 ALJR 1035.

¹⁷ See, eg, Professor Anne Twomey contrasting *Wilkie* with the strict interpretation of s 44 of the *Constitution* elaborated: Anne Twomey (ed), ‘A Tale of Two Cases: *Wilkie v Commonwealth* and *Re Canavan*’ (2018) 92 *Australian Law Journal* 17.

¹⁸ As, for example, in the enactment of federal laws on marriage and divorce on the grounds of irretrievable breakdown of marriage, following the report of the Commonwealth Royal Commission on Human Relationships: Royal Commission on Human Relationships, *Final Report* (Report, 1974–78).

¹⁹ See, eg, Barbara S Gamble, ‘Putting Civil Rights to a Popular Vote’ (1997) 41(1) *American Journal of Political Science* 245, 246–251.

Many accounts have been written about the vulnerability that was felt by those who were subjected to the exceptional public vote concerning the entitlement of a minority to have their Parliament decide whether they should enjoy equal civil rights to other citizens and to have those rights determined (if need be) by the normal constitutional processes. Many of the commentators on the Australian postal survey were not lawyers at all. One of them was Professor Christy Newman (UNSW).²⁰ A professor with both personal and professional social science experience in considering the “survey”, Professor Newman described its impact upon her, her family, and many others:²¹

[F]or me, as for many others across Australia, the experience of living through the marriage equality ‘debate’ made it very clear that, while much has been achieved in changing attitudes to sexuality, we are not yet done. For every family like mine, who were mostly all Yes voters, and able to celebrate the outcome together, there was another family ripped into pieces as a direct result of having been asked to pick a side. For every individual and couple and family who were thrilled to have the opportunity to post their survey response in, there was another who was completely humiliated by the process, or aghast at having to support the right to marry when they did not support the concept of marriage in any form ... [T]here were myths perpetuated about same-sex families being an unsafe and unnatural environment for children to be raised in. This made it clear to me and to many others that we are still split as a community between those who can see that sexuality is simply one aspect of a person’s life ... and those who can’t or won’t make room in their hearts for an appreciation of sexual and gender diversity.

For those who are interested to hear the lived experience of a law student who observed the postal survey process, they can read a description written before the survey result by Odette Mazel:²²

For me personally, the process of the postal survey feels invasive and a little dangerous. I am concerned about the impact the debate will have on my family and the queer community, and the risk that is being taken for the sake of marriage ... I vacillate between feeling overwhelmed by the public support, and distraught by the deceptive attempts by antipathetic campaigners to undermine my way of life and the happiness of my children.

²⁰ Christy Newman, ‘Queer Families: Documenting Stories of Adversity, Diversity and Belonging’ (Sex(uality) Lecture, University of New South Wales, 22 February 2018).

²¹ *Ibid.*

²² Odette Mazel, ‘The Policies of Difference: Posting My ‘Vote’ on Marriage Equality’ [2018] 48 *Alternative Law Journal* 4; See also Josie McSkimming, *Leaving Christian Fundamentalism and the Reconstruction of Identity* (Routledge, 2017) 79.

Gay mental health services are working overtime and, as I witness my own vulnerabilities coming to the surface, I can understand why ... Who is the law for? It should be for all of us.

In my own case, as a citizen in a same-sex relationship of almost 50-years' duration, I began to notice the large banner posters on the many churches that I passed in the course of ordinary days. "It's okay to vote No", they proclaimed. Such signs were hurtful for many who had been brought up in an understanding of Christian beliefs. Was it truly "okay to vote No"? When the outcome of the postal survey was announced, the extent of the hostility to LGBTIQ people (especially youngsters required to suffer in silence) became plain. This was particularly so in some outer suburbs of major cities or provincial centres of conservative opinion. Whilst many rejoiced in the 61.6% (Yes) vote against the 38.4% (No) vote,²³ a lingering question remained: can one be satisfied that nearly 40% of fellow citizens voted to deny an equal secular legal right to others simply because it was new? Because of their religious beliefs? Because the others were in some way different and for that reason disentitled?

Given that the overwhelming majority of marriages in Australia are now not conducted in churches but in vineyards, local parks, golf clubs, and family homes, what business was it of the religious citizens to struggle so mightily against a change that has already happened in virtually every similar country? Was it really acceptable, or necessary, to submit the equal legal rights of some Australian citizens to a survey dependent on the voluntary votes of those who chose to vote? What does such a survey say about the protection that Australia's legal institutions give to a minority whom a significant number of their fellow citizens obviously still regard with differentiation, some even with hostility?

In the cold light of morning after the conduct of the survey, and the amendments to the Australian *Marriage Act* that followed,²⁴ it is increasingly realised that 'there are other issues':²⁵

²³ Australian Bureau of Statistics, *Report on the Conduct of the Australian Marriage Law Postal Survey* (Catalogue No 1800.0, 30 January 2018).

²⁴ *Marriage Act 1961* (Cth).

²⁵ Odette Mazel (n 22) 9; See also Gregg Strauss, 'What's Wrong with *Obergefell*' (2018) 40(2) *Cardozo Law Review* 631.

Queer people are still at greater risk of self-harm, suicide, depression and drug use, and continue to be marginalised and discriminated against in other areas of social, legal and political life. This current achievement might attest to a shift in some of these things over time, but it will also privilege those queers whose lives are deemed more conventional, whose stories more closely fit the 'right' narrative.

A significant proportion, nearly 40% of the population of Australians who voted "No" in the survey, presumably remain fearful and unfriendly over the recognition and acceptance of difference in sexual orientation and gender identity — although there may be a myriad of nuanced reasons for such a stance, such as simple social conservatism or intuitive resistance to changes to the preconditions for the status of marriage. This was why there was a certain irony in the struggle to delay the availability of marriage for non-heterosexual people in Australia. The institution is a conservative one. So, it is ironic that the chief battlelines of 2017 were drawn between highly religious and ordinary conservative people who claimed to love marriage and LGBTIQ citizens who wanted to enjoy the possibility of participating in this ancient civic and personal arrangement.

III MARRIAGE AND RELIGIOUS FREEDOMS

The title of the statute that enacted the availability of marriage for same-sex couples in Australia was somewhat ominous for LGBTIQ citizens. It rejected an aspirational title such as 'marriage equality', used for the third ACT law which had been invalidated by the High Court in December 2013.²⁶ For many of the opponents, there was no 'equality' with the married relationships effected between same-sex parties. Those relationships were seen as different and inferior. That was the reason of opponents for insisting that the old English word 'marriage' did not fit LGBTIQ couples. To demand 'equality' was a bridge too far. For the opponents, deployment of the traditional word might now be constitutional and ultimately legal. But it was not acceptable. For them, the battle was not over. It had simply moved to a different battleground.

The reforming Act, enacted after the postal survey result, was titled the *Marriage (Definition and Religious Freedoms) Act 2017* (Cth). For opponents, the use of the word 'marriage' was no more than a sleight of hand: the use of a definitional legal trick. It could not change the substance. Doubtless that was why the title chosen was propounded, to

²⁶ *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.

make the statute tolerable for the Members of Parliament who still basically objected to the whole idea of same-sex marriage. Even the relatively neutral and legally accurate language of the first law that had permitted same-sex marriage was not used. It was not titled descriptively, as in the Netherlands, with its reference to ‘opening up’ marriage for same-sex couples. By the same token, the addition of the reference in the title of the Act to ‘Religious Freedoms’ was further hurt for many LGBTIQ citizens and their supporters. What should have been a moment of equality for everyone, was to be dressed up as a [partial] victory for opponents who advocated the traditional religious or sacramental quality of marriage. That, presumably, was to be a continuing, available ceremony under Australian law, even if only for the “true believers”.

Religious opponents of marriage equality did not win all the battles in 2017. The *Marriage Act 1961*, as amended by the 2017 Act, would redefine marriage as ‘a union of two people’, expressed in non-gendered language. It would provide for the recognition of same-sex marriages solemnised under the law of a foreign country. It would remove the prescribed statutory homily that marriage was confined to heterosexual couples. Still, there were some implied concessions to the suggested ‘religious freedoms’ that rejected same-sex marriage. Thus, a new category of ‘religious marriage celebrants’ was added so that they, together with ministers of religion, chaplains, and bodies established for religious purposes, could refuse to solemnise or provide facilities, goods, or services for marriages on religious grounds, in defined circumstances. Amendments to the *Marriage Act 1961* were to be contingent on the commencement of a further amending law,²⁷ to provide that refusal by a minister of religion, religious marriage celebrant, or chaplain to solemnise marriage in circumstances involving same-sex couples would not constitute unlawful discrimination under federal law as otherwise it would have been. The anti-discrimination laws were to be cut back in their operation.

As in so many legislative and other moves to advance equal civil rights to LGBTIQ citizens in the United States, the steps to that end were accompanied, and sometimes modified, in Australia by new laws for the protection of the beliefs and practices of ‘Faith’ communities. In 1993, the United States Congress had enacted the *Religious Freedom Restoration Act*.²⁸ It was adopted by unanimous vote of the US House of Representatives.

²⁷ Concurrent changes to the *Sex Discrimination Act 1984* (Cth).

²⁸ Pub L No 103-141, 107 Stat 1488.

Only three US senators voted against its passage. It was signed into law by President Clinton. However, in 1997, the Supreme Court of the United States held that the law was unconstitutional in so far as it purported to apply to the states.²⁹ It has continued to apply in federal jurisdiction. Just as earlier the *Defense of Marriage Act* had been copied from the United States, now the defence of 'Faith' communities became an agenda item for citizens in Australia antagonistic to same-sex marriage.

Powerful opponents of same-sex marriage in the Australian federal Parliament called for the enactment of new federal laws (and the amendment of present laws) to counter what was called 'the creeping encroachment from the State on religious beliefs' and 'the use of political correctness to marginalise and silence the religious perspective' and to respond to a supposed 'modern problem' arising 'where religious freedom rubs against laws written to protect other rights'.³⁰

To respond to these views, the Turnbull government set up an advisory panel to provide a report on reforms that might be needed to better protect religious freedom in Australia in the federal sphere. That committee was chaired by the Hon Philip Ruddock, a former senior minister in the government of John Howard. Although the report was provided to the Turnbull government on 18 May 2018, to the present time, the contents of the report have not been made public. Reportedly, the report received "thousands" of submissions from the public.

None of the members of the panel, charged with reporting on the subject, identified publicly as LGBTIQ.³¹ Most, if not all of them, had known associations with Christian or Jewish religious traditions or beliefs. No committed rationalist, secularist, or non-believer was appointed. The lengthy delay in the publication of the panel's report is of concern. Indeed, the issue has become more sensitive to the LGBTIQ population of Australia and others following the removal of Malcolm Turnbull as Prime Minister and the appointment of Scott Morrison. After his appointment, Mr Morrison promised immediately to change

²⁹ *City of Boerne v Flores* (1997) 521 US 507.

³⁰ Dan Tehan, 'Lessons from St Thomas More and the Freedom of Religion in Australia Today' (St Thomas More Lecture, Australian Capital Territory, 22 June 2018) quoted in Michelle Grattan, 'Little Upside for Malcolm Turnbull in Debate over Religious Freedom', *ABC News* (online, 13 July 2018) <<https://www.abc.net.au/news/2018-07-13/religious-freedom-debate-does-little-to-help-malcolm-turnbull/9989314>>.

³¹ The panel was constituted by the Hon Philip Ruddock (chair), Professor Nicholas Aroney, the Hon Annabelle Bennett AO SC, Professor Rosalind Croucher AM, and Father Frank Brennan SJ AO.

Australian laws to further protect 'religious freedom'. He suggested that new laws were needed 'to safeguard personal liberty'.³² However, in particularising this need, he indicated that he would act on calls from church groups and others to enshrine religious freedom in the law, adding that public schools in Australia should not curb Christian traditions. He said, 'That's our culture. There's nothing wrong with that ... The narks can leave those things alone.'³³ The new Prime Minister, himself an active adherent to a pentecostal denomination of Christianity, suggested that "religious freedom" was in need of new legal defences.³⁴

This call has been accompanied by very substantial increases in promised federal subventions to private and religious schools which go far beyond those earlier endorsed by the Turnbull government. The additions go on top of earlier large subventions by the federal Parliament to support the facility of 'chaplaincy programs', providing religious chaplains for public schools, although those schools had been established throughout Australia in the 19th century on the basis of the general principle of secularism.

Mr Morrison's insistence in his first major address as Prime Minister of his love for 'all Australians' is no doubt to be welcomed.³⁵ Necessarily 'all Australians' includes LGBTIQ Australians. However, many of them probably feel anxiety about the ambit of the expressed political 'love'. They do so because of the fact that all major Christian denominations (except Quakers and some sections of the Uniting Church) took a strong institutional stand in the postal survey, hostile to the extension of marriage to LGBTIQ citizens. The anxiety will not have been diminished by the reported statements, attributed to Mr Morrison in an early radio interview as Prime Minister, that a Victorian schools program about teen sexuality made his 'skin curl'; that instruction on building 'respectful relationships' was simply 'a fancy word for Safe Schools'; that public schools

³² David Crowe, 'Scott Morrison Vows to Change Laws on Religious Freedom but Won't Be a 'Culture Warrior' PM', *Sydney Morning Herald* (online, 7 September 2018) <<https://www.smh.com.au/politics/federal/scott-morrison-vows-to-change-laws-on-religious-freedom-but-won-t-be-a-culture-warrior-pm-20180907-p502da.html>>.

³³ *Ibid.*

³⁴ Michael Kirby, 'Jury Still Out: Does Scott Morrison Love Gays', *The Sydney Morning Herald* (online, 30 September 2018) <<https://www.smh.com.au/national/jury-still-out-does-scott-morrison-love-gays-20180930-p506x8.html>>.

³⁵ Michael McGowan, 'Scott Morrison Sends His Children to Private School to Avoid 'Skin Curling' Sexuality Discussions', *The Guardian* (online, 3 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/03/scott-morrison-sends-his-children-to-private-school-to-avoid-skin-curling-sexuality-discussions>>.

should be 'focused on things like learning maths and science'; and, inferentially, that they should not teach values of respecting diversity in sexual orientation and gender identity.³⁶

Prime Minister Morrison is himself an alumnus of the famous public school in Sydney, Sydney Boys' High School. Inferentially, that school taught him values that he reflects in his life, as did the values I received 10 kilometres away at another public school: Fort Street High School in Sydney. Whilst not supporting the discredited procedure of 'gay conversion therapy', the Prime Minister, in answer to media questions, refused to condemn the procedure, stating that he had 'never really thought about it'.³⁷ He said that he 'respected people of all sexualities'.³⁸

The Prime Minister's choice of a Baptist religious private school for his daughters is, of course, a matter for him and his wife in discussion with his daughters. However, there appear to be resonances in his reported statement of the old approach to sexual orientation and gender identity in Australia. Under that approach, at least during the time I was growing up, it was scientifically known that there were LGBTIQ people, including children, in our world and in our country and in its schools. It knew that they were subject to harsh criminal laws. However, such people basically were left alone so long as they were completely silent about their reality, basically ashamed of it, and willing always to pretend that their reality was different — that they were straight, heterosexual. This was the world of silence in school about anything that could make a gay child's reality open and understood by teachers and fellow students — and by themselves. That silence was the coinage in which was paid a fee for being left alone, for avoiding causing "skin curling" to those who were heterosexual and did not like to be reminded that a minority were not.

It has to be said quite bluntly to Prime Minister Morrison, that from national leaders, leadership is expected. Such leadership must be based, eventually, on scientific truth and rational understanding. To be unaware of 'gay conversion therapy' and the victims it has

³⁶ Ibid; Other political motivations have been propounded: See, eg, Jared Owens, 'Evangelical Vote May Tip the Federal Election', *The Australian* (online, 11 September 2018) 3 <<https://www.theaustralian.com.au/national-affairs/evangelical-vote-may-tip-federal-election/news-story/1baca5a0bf6b29d5c655cb7ff15d7a60>>.

³⁷ McGowan (n 35).

³⁸ Ibid ("I respect people of all sexualities. I respect people of all religions, all faiths. I love all Australians", he said').

created throughout the world, is not good enough.³⁹ Certainly, it cannot last as an excuse for not thinking about the issue for very long.

To forbid any reference in school to respecting sexual and other minorities may be acceptable in Baptist schools, although I doubt it. I was raised in the Protestant tradition of Christianity as a Sydney Anglican. I adhere to that tradition, although not to the Biblical literalism that it sometimes teaches. The essential message of most religions is (meant, in principle, to be) love for one another. That is why I welcomed Prime Minister Morrison's identification with that message of love as a badge of his political program. However, as some religious denominations distinguish between love for the individual as opposed to their conduct, the jury is still out on whether he really does "love" LGBTIQ citizens — or simply knows that they exist and tolerates them so long as they remain silent because he feels he has no choice.

If the Prime Minister's daughters' school ignores the reality that some of their students, over time, are and inevitably will be LGBTIQ, they are failing in their pastoral duty to all the students in their care. That should not happen in schools in Australia. It should certainly not happen in schools that receive federal funding, with that funding from taxpayers of all religions, and every religion should bear an irreducible commitment to every child in the care of such schools, whether public, private, or religious. That means care for every child and education in the "values" that the existence of indigenous, racial, sexual, and religious elements in those students' lives demands.

To demonise all education programs in Australia's schools that teach Australian school children the realities of human diversity is not only bad science, it is also bad for our community. It is isolating and destructive to children in the minorities concerned. And (I presume to say) it also happens to be contrary to spiritual and religious values, at least as I understand them. There will be no going back into the dark closet of self-denial, silence, and shame for LGBTIQ school children in Australia. The liberation is achieved by the light of education about diversity and basic kindness to one another as human beings and as citizens. That includes young human beings and young citizens. No laws on "religious freedom" should be accepted in Australia which allow people, on the basis of

³⁹ Ibid ("Never really thought about it", the Prime Minister said people should "make their own decisions about their lives").

their religions, to isolate, denigrate, and humiliate minorities. Whether those minorities are indigenous, racial, gender-based, religious, disabled, or gay Australians. If that means a bit of “skin curling” for certain religious Australians who have not given enough thought to these issues, so be it.⁴⁰ The thinking, although belated, will be good for them. It will be especially expected of them if they hold positions of leadership in trust for the people — because that means all of the people and certainly all of the children.

There are many other issues caught up in this debate that lie far beyond the school room. These include the extent to which religious citizens, on the basis of their ‘faith’, should be exempted from anti-discrimination laws that, in defined circumstances, forbid words and conduct that discriminate against people on the basis of indigenous status, race, gender, disability, sexual orientation, or gender identity.

In the United States, this subject too has been submitted to legal analysis. One such case involved a Colorado baker who refused to make a wedding cake for a same-sex couple.⁴¹ The couple objected and alleged that they had suffered discrimination, contrary to State law. In a divided decision of the US Supreme Court in June 2018, Justice Kennedy, for the majority, came down on the side of the baker. However, this was not the decision of far reaching principle that the proponents of ‘religious freedoms’ had hoped for. The case went off on the footing that the decision makers in Colorado had not given the baker, accused of discrimination, a fair hearing of his asserted reasons for objecting to bake the cake. Just as customers were entitled to dignified treatment and not to be humiliated by a baker refusing their cake order, religious bakers were entitled to due process and an opportunity to explain themselves. That is what free expression was held to require. This sounds a sensible, or at least arguable, viewpoint. But it leaves the general principle to be resolved in the future.

The UK Supreme Court considered this issue in some detail in the *Ashers Bakery case*,⁴² where religious owners of a bakery refused to provide a cake to a gay customer as they deeply disagreed with the iced message requested to be inscribed on top of the cake. In considering the rights to freedom of thought, conscience, religion, and expression

⁴⁰ Cf McGowan (n 35).

⁴¹ *Masterpiece Cake Shop v Colorado Civil Rights Commission*, 584 US (2018); 138 S Ct 1719 (2018).

⁴² *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 (*Ashers Bakery case*).

aroused by this case,⁴³ the Court found that although the bakers could not withhold services on the basis of a customer's sexual orientation or stance on gay marriage, this was distinguished from obliging them to manifest views and opinions contrary to their own.⁴⁴

The right to hold and practice, or not to hold and practice, religious beliefs is common to all statements of fundamental human rights.⁴⁵ However, nowhere in civil law or principle is it made absolute. In any statement of universal rights, religious freedoms must be balanced against the enjoyment of other competing rights, many of which ultimately coalesce in the right declared in the first article of the *Universal Declaration of Human Rights*,⁴⁶ namely that 'all persons are born free and equal in dignity and rights'. 'All persons' includes LGBTIQ persons. It certainly includes LGBTIQ school children. Where the exercise by one person of their religious beliefs diminishes or interferes with the dignity and human rights of another person, the competing rights must be reconciled and adjusted in a principled way. As one sage put it, 'the right to swing my arm finishes when my fist comes into contact with your chin'.⁴⁷

There are many exceptions already in place for religious bodies in Australia under current anti-discrimination law. Those exceptions apply in Australia by the federal *Sex Discrimination Act 1984* (Cth). They allow religious bodies to discriminate on the basis of sexual orientation when it is 'necessary to avoid injury to religious susceptibilities of adherents of the religion'.⁴⁸ In the matter of the performance of marriage ceremonies for same-sex couples, it has not been a feature of exceptions generally to permit publicly authorised marriage celebrants to refuse to conduct such ceremonies. Generally speaking, those who serve the Crown, the State, or the public at large have to perform their duties without discrimination or resign the public office. An exception for priests, ministers of religion, and other religious office-holders is common and has long applied

⁴³ *Human Rights Act 1998* (UK) art 9–10.

⁴⁴ *Ashers Bakery case* (n 42) [49]–[55].

⁴⁵ Cf *Australian Constitution* s 116; See also *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 18; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

⁴⁶ *Universal Declaration of Human Rights* (n 45) art 1.

⁴⁷ Cameron Myles, 'Religious Freedom Laws Must Not Discriminate, Former High Court Justice Warns', *WAtoday* (online, 30 September 2018) <<https://www.watoday.com.au/national/western-australia/religious-freedom-laws-must-not-discriminate-former-high-court-justice-warns-20180929-p506uc.html>>.

⁴⁸ *Sex Discrimination Act 1984* (Cth) s 37(d).

in Australia under the *Marriage Act*.⁴⁹ I did not hear anyone in the recent debate arguing that this exemption should be abolished. Australia did add another exception in 2017 for private “civil celebrants” who “opt in” to a new register of “religious celebrants”. They might then refuse to conduct same-sex marriage ceremonies. However, that was to be a closed category. Civil marriage celebrants appointed after 2017 were not to be entitled to refuse to conduct same-sex marriages. Most such civil celebrants were only too glad to gain the extra business. These have been hard times for the marriage occupations. Many heterosexual couples have not been bothered getting married. The influx of new enthusiastic gay couples has been an unexpected boost that most civil celebrants have been glad to welcome.⁵⁰ Good for business. Good for society.

The working out of the applicable legislation has varied amongst the 29 countries that have so far enacted same-sex marriage. In England, Wales, and Scotland, for example, a limited right is afforded to refuse participation in a ‘religious marriage service’. This has permitted church organists and flower arrangers to opt out, if their services can be regarded as part of a religious institution. However, it would not exempt commercial photographers from unlawfully discriminating if they refused their services to a same-sex couple.⁵¹ Laws in several states of the United States have undergone multiple changes on this score since the Supreme Court upheld the constitutional validity of same-sex marriage.⁵² Time and growing community acceptance of such relationships appear to be on the side of limiting the exceptions. More and more non-LGBTIQ citizens are becoming comfortable with the new ideas. This should not cause us any surprise in Australia. It is what happened earlier when we began dismantling the apparatus of White Australia and after the law began recognising land rights for Aboriginals after the *Mabo* and *Wik* litigation.

⁴⁹ *Marriage Act 1961* (Cth) s 47.

⁵⁰ Brendan Gogarty, Anja Hilkemeijer and Daniel Westbury, ‘Religious Based Exceptions from Anti-Discrimination Law: Comparing Jurisdictions that Permit Same-Sex Marriage’ (2018) 48 *Alternative Law Journal* 1.

⁵¹ *Obergefell v Hodges*, 576 US [9] (2015); 135 S Ct 2584 (2015).

⁵² Aksoy et al, ‘Do Laws Shape Attitudes? Evidence from Same-Sex Relationships Policies in Europe’ (Working Paper No 219, European Bank for Reconstruction and Development, July 2018) 25.

IV OTHER AREAS OF DISCRIMINATION

There are many other particular issues, affecting LGBTIQ people, that have consequences for legal regulation. A number of them are referred to, directly and indirectly, in the annual report of the Australian Research Centre in Sex, Health and Society of La Trobe University.⁵³ I am a “distinguished ambassador” of that Centre.

It is enough here to mention some of the topics that have been raised in the work programs of scholars in that Centre. Several of them are general to the issues presented by sexual conduct and expression, whether heterosexual or LGBTIQ. These include the revision of the language and definition of criminal offences, as well as the expungement of past criminal offences and of convictions entered years ago against LGBTIQ citizens for adult, private, consensual conduct. Laws relating to the amendment of Birth Certificates, Marriage Certificates, and other public registries require attention. Provisions governing access to family members (widely defined) in times of illness and disability may require revision, so may revision of taxation legislation allowing exceptions for religious bodies engaged in substantially commercial activities.⁵⁴ Family rejection, multicultural isolation, and access to sporting facilities and other institutions with special challenges now need attention. Amongst the most serious problems are those that still arise in the field of transgender citizens, and in particular transgender children, seeking to transition into an identity other than that which they were assigned at birth. Theirs is a most challenging journey. In my experience, many “L” and “G”, even “B”, and possibly “I” persons rarely meet or mix with transgender “T” people. They may never have met and may feel no kindred sympathy for them. There is work for education here for all of us.

Looking back on the great changes that have occurred in my lifetime on gay rights, they can make us optimistic, but also impatient to complete the changes. And those changes are not only required in Australia. The need extends far beyond Australia’s shores.

Certainly, they include the treatment of sexual minorities who flee cruelty and oppression in other countries but then end up in cruelty that we have specially devised ourselves in

⁵³ La Trobe University, Australian Research Centre in Sex, Health and Society, *Annual Report 2017* (Report, April 2018).

⁵⁴ *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 252 [124]; [2008] HCA 55; *Births, Deaths and Marriages Registration Act 1995* (NSW); *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2013) 250 CLR 490; [2014] HCA 11; MD Kirby, ‘Adult Guardianship Law, Autonomy and Sexuality’ (2013) 20 *Journal of Law & Medicine* 866.

the detention camps. There we practice long-term detention in the outsourced facilities for asylum seekers we have established on Nauru, Manus Island, and elsewhere. Some of them are seeking asylum in Australia on the grounds of a well-founded fear of persecution on the basis of their sexual orientation and gender identity.⁵⁵ We are legally and morally obliged, as a nation, to process and determine such claims for ourselves — not to send them somewhere else because it is sufficiently horrible to serve as a deterrent.

Every now and again, there are moments of proper celebration — above all, the recent decision of the Supreme Court of India.⁵⁶ It struck down the British originating criminal laws against gays. The judges declared, in the words of one of the Justices, that such people, and their families, had been compelled to live lives ‘full of fear of reprisal and persecution and they deserve an apology’.⁵⁷ What a powerful repost for the ignominy and ostracism that has, until now, been heaped on the LGBTIQ community in India, especially under the s 377 of the *Indian Penal Code*,⁵⁸ adopted in the time of British rule. The same hostility was also heaped upon us here in Australia. It must not return and must not be preserved under different guises.

Whether institutionalised disgust and contempt will be lifted or whether “skin curling” will delay that process, that is the question. The answer to that question depends on all of us. And it is not only, or even mainly, a struggle for us in Australia. The journey continues. Scholars, politicians, Allies, and LGBTIQ citizens are all involved. Eventually, our skin will “curl” when we look back on these present times and times earlier and think of how we have treated LGBTIQ citizens and LGBTIQ human beings — and especially the children and the weak and the vulnerable — and of how long it took us to realise that our skin was “curling” for all the wrong reasons.

⁵⁵ Cf *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (1998) 216 CLR 473; See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 297, 361 [388]–[418] (Gordon J).

⁵⁶ *Navtej Singh Johar and Ors v Union of India* (2018) SCOI.

⁵⁷ *Ibid* 50 [20] (Malhotra J).

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A REPRODUCTIVE RIGHTS FRAMEWORK SUPPORTING LAW REFORM ON TERMINATION OF PREGNANCY IN THE NORTHERN TERRITORY OF AUSTRALIA

SUZANNE BELTON,* FELICITY GERRY QC** & VIRGINIA STULZ***

This article describes the reproductive rights framework underpinning the campaign to reform the law on termination of pregnancy in the period 2013 to 2017 in the Northern Territory of Australia. We begin by outlining the pre-reformed legislation governing abortion in the NT. We then evaluate the reformed 2017 law using the typology established by Cook and Ngwena,¹ namely: (1) whether the law provides evidence-based access to health care; (2) whether it provides transparent access to health care; and (3) whether it provides fair access to health care. We finish by remarking on the continuing problems with the legislation and conclude that only complete decriminalisation will fulfil Australia's commitments under the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') and other human rights instruments.

* Associate Professor Suzanne Belton is an Adjunct Fellow at the Menzies School of Health Research, President of Family Planning NT, and a Member of the Public Health Association NT.

** Professor Felicity Gerry QC is Queen's Counsel in Carmelite Chambers, London, and Crockett Chambers, Melbourne, Professor of Legal Practice (.4) at Deakin University, as well as PhD candidate at Charles Darwin University.

*** Associate Professor Virginia Stulz is currently working in a conjoint position between Nepean Hospital and Western Sydney University (WSU) in the School of Nursing and Midwifery. She is Chief Investigator on four research projects in the Nepean Blue Mountains Local Health District ('NBMLHD'), Chair of the Midwifery Education Advisory Committee for the Australian College of Midwives, an Associate Editor for Women & Birth, and a member on the Editorial Committee for the Australian Midwifery News.

¹ Rebecca J Cook and Charles G Ngwena, 'Women's Access to Health Care: The Legal Framework' (2006) 94(3) *International Journal of Gynecology & Obstetrics* 216.

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I INTRODUCTION

In March 2017, the Northern Territory ('NT') government modified the law on termination of pregnancy ('TOP') by amending the *Medical Services Act* ('MSA') with the effect of partial decriminalisation.² Previously, the law required attendance at hospital, consent of both parents for minors under 16, and agreement of more than one practitioner to the termination. It also criminalised the use of any abortifacient for early medical abortion ('EMA'). The NT was the last jurisdiction in Australia not to have legal access to EMA.³ The *Termination of Pregnancy Reform Act 2017* ('the 2017 Act') decriminalises termination of pregnancy in certain circumstances. It also provides protection for women if medical practitioners have a conscientious objection, implements safe access zones around clinics to protect staff and patients, and ensures that bio-data will be provided to the Chief Medical Officer. However, it leaves scope for appropriate future reform and continues to criminalise abortion in some circumstances.

² *Medical Services Act 2017* (NT).

³ Barbara Baird, 'Medical Abortion in Australia: A Short History' (2015) 23(46) *Reproductive Health Matters* 169, 172.

Our view is that the law in the NT has been improved, but it still does not comply with Australia's international obligations to ensure women in the NT have unfettered access to suitable reproductive healthcare.

Against a background of advocacy and action by academics, health and legal professionals, and members of the public, in 2014 to 2015 we undertook a collaborative project funded by Menzies School of Health Research and Charles Darwin University on women's health and law in the NT. We gained research ethics permission (HREC# 12-1816) to analyse over 5,000 cases of surgical termination of pregnancy, and some of that data is presented here. We undertook a literature review, examined the compliance of the NT legislation with international human rights obligations, and held a forum to discuss local issues viewed through the lens of women's reproductive health rights. This included consideration of the availability of early termination by the medications, mifepristone and misoprostol. Following the project, we continued to engage in local advocacy which came to fruition with legislative reform in July 2017.

Our work followed the 58th session of the Commission on the Status of Women which resolved progress towards achieving Millennium Development Goal 5 on improving maternal health, namely to: (1) reduce maternal death and (2) achieve universal access to reproductive health.⁴ The Commission noted that progress on women's reproductive rights was slow and uneven, as well as that globally there remained an urgent need to fully achieve Goal 5 and strengthen legal systems to ensure accessible quality, comprehensive, and integrated sexual and reproductive health care services.⁵ Our project highlighted the injustice and discrimination against women seeking to terminate a pregnancy in the NT prior to reform, and our 2015 discussion paper provided a legal and human rights-based focus for the campaign.⁶ In this paper, we note the continuing problems with the NT legislation and conclude that there remains an ongoing failure to fulfil Australia's commitments.

⁴ *Commission on the Status of Women*, UN ESCOR, 58th sess, Supp No 7, UN Doc E/2014/27-E/CN.6/2014/15 (10 March 2014) [23].

⁵ United Nations Population Fund, 'UNFPA Welcomes Outcome of the 58th Session of the Commission on the Status of Women', *UNFPA* (Web Page) <<http://www.unfpa.org/press/unfpa-welcomes-outcome-58th-session-commission-status-women>>.

⁶ Felicity Gerry, Suzanne Belton and Jeswynn Yogaratnam, 'Reproductive Health and Rights in the Northern Territory: Reforming the Medical Services Act 1974' (Menzies School of Health Research, Charles Darwin University, December 2015).

II HEALTH AND ABORTION

Preventing and managing unwanted and unviable pregnancies is a public health issue requiring quality health services.⁷ A third of Australian women experience elective abortion in their lifetime. Half of all pregnancies are unplanned, and a fifth of all pregnancies are terminated, while up to a third are miscarried spontaneously.⁸ The publicly available data for the NT is limited and old.⁹ The total population of the NT is 239,500, and the estimated total number of terminations is 1,000 annually. By way of comparison, 4,000 babies are born annually. This number does not include the small number of abortions performed in one private hospital, so numbers for the NT are underestimated. Indigenous people make up one-third of the NT population; they are comparatively younger and have higher fertility rates. Figure 1 shows publicly available data for Indigenous and non-Indigenous women.

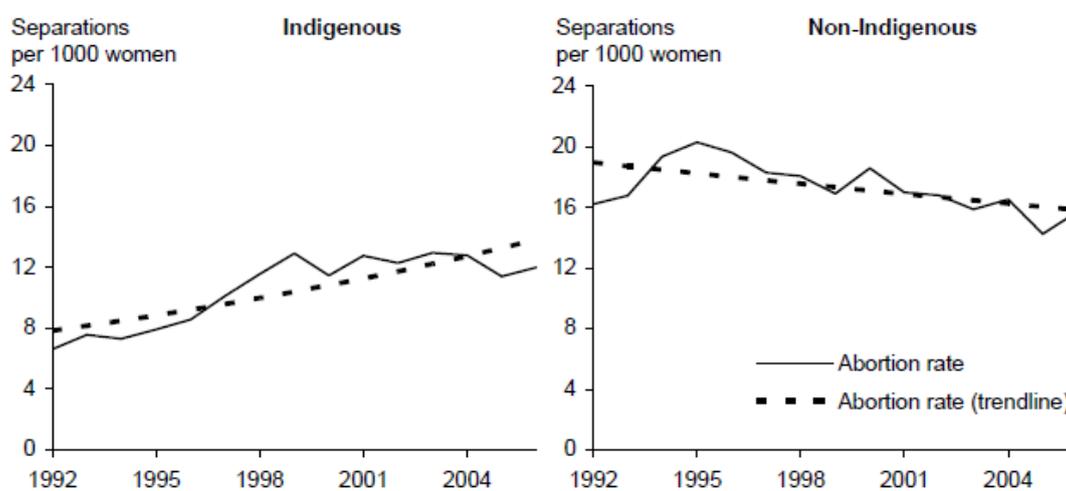


Figure 1: Induced abortions, annual rate by Indigenous status and NT residents admitted to NT public hospitals in 1992–2006.¹⁰

In 2010, the abortion rate was reported to be 12 out of 1,000 women and rising. This contrasts with the non-Indigenous rate of 15.4 out of 1,000 women and falling as of the

⁷ Ibid.

⁸ Family Planning NSW, 'Reproductive and Sexual Health in New South Wales and Australia: Differentials, Trends and Assessment of Data Sources' (Report, 2011).

⁹ Xiaohua Zhang et al, 'Trends in the Health of Mothers and Babies, Northern Territory, 1986–2005' (Department of Health and Families, 2010).

¹⁰ Gerry, Belton and Yogaratnam (n 6) 38.

end of 2006.¹¹ As data from private hospital abortions were not included, non-Indigenous rates are likely to be higher. Johnstone's work has shown that for Indigenous women there are patterns of rising abortion in the urban areas, whereas rural-remote rates have declined.¹² She also found that this was associated with Indigenous fertility rates and access to contraception.¹³ Public health focuses on disparities in access to health care, and legislation should work towards equity in health care provision.¹⁴

EMA has been available in Europe since 1988, in the US since 2000, and in other Australian jurisdictions since 2006.¹⁵ The history of EMA's entry into Australia is convoluted and politicised.¹⁶ Mifepristone and misoprostol for EMA are approved and recommended medicines by the Royal Australian and New Zealand College of Obstetricians and Gynaecologists.¹⁷ The lack of clarity on medical abortion in NT legislation put the Territory several decades behind evidence-based reproductive health care and was a frustration for health practitioners who wished to offer current health care practice to their patients. EMA includes the provision of doses of mifepristone and misoprostol orally before nine weeks' gestation. It is efficacious and well-accepted by women as a method of terminating an accidental, mistimed, unwanted, or unviable pregnancy. Very few medical abortions require follow-up due to complications such as excessive bleeding or continued pregnancy.¹⁸ In South Australia, 22% of terminations are performed as a medical abortion as the preferred method, and 80% of terminations of pregnancy are performed by general practitioners.¹⁹

EMA is possibly as revolutionary as the oral contraceptive pill. This medicine produces an experience like a heavy menstrual period or miscarriage which general practitioners

¹¹ Ibid.

¹² Kim Johnstone, 'Indigenous Fertility in the Northern Territory of Australia: What Do We Know? (And What Can We Know?)' (2010) 27(3) *Journal of Population Research* 169.

¹³ Ibid.

¹⁴ Cook and Ngwena (n 1).

¹⁵ Baird (n 3); Caroline M de Costa et al, 'Introducing Early Medical Abortion in Australia: There Is a Need to Update Abortion Laws' (2007) 4(4) *Sexual Health* 223.

¹⁶ See Baird (n 3) and de Costa (n 15) for excellent accounts.

¹⁷ Royal Australian and New Zealand College of Obstetricians and Gynaecologists, 'The Use of Mifepristone for Medical Termination of Pregnancy' (Report, February 2016).

¹⁸ Ea Mulligan and Hayley Messenger, 'Mifepristone in South Australia' (2011) 40(5) *Australian Family Physician* 342, 343.

¹⁹ Pregnancy Outcome Unit, SA Health, Government of South Australia, 'Pregnancy Outcome in South Australia 2013' (Report, October 2015).

prescribe to women for use at home.²⁰ This generally does not require women and girls to attend hospital, nor the input of expensive senior doctors, nor the use of surgical theatres. The reformed legislation in the NT now enables access to EMA and surgical terminations, largely provided in the public health system.²¹

The mortality rate from any type of abortion is extremely rare; childbirth is riskier.²² There is only one case in Australia of death after a medical abortion due to sepsis. Mulligan's reporting on medical abortion in South Australia found that complications such as haemorrhage, treatment failure, and sepsis were not common, similar to surgical abortion.²³ The risk from perforation from surgical instruments and anaesthetics was limited to the extremely low proportion who developed complications.²⁴ These research findings of safety and efficacy of abortion are echoed from multiple studies globally which include hundreds of thousands of cases.²⁵ Non-availability of abortion services increases maternal morbidity and mortality in population studies,²⁶ and it is unknown if this plays any part in the higher rates of maternal mortality or morbidity for Indigenous women in the NT or perinatal outcomes.²⁷ The reformed legislation in the NT assists in promoting maternal health and works towards decreasing morbidity.²⁸ Nonetheless, it remains a barrier to freedom of choice which can affect overall health.

III RIGHTS OF WOMEN IN THE CONTEXT OF TERMINATION OF PREGNANCY

Academic opinion on human rights versus legal control over women's reproductive self-determination is already well published.²⁹ In 2013, writing in the American context, Diya

²⁰ Caroline de Costa, 'Use of Mifepristone for Medical Abortion in Australia, 2006–2009' (2011) 194(4) *The Medical Journal of Australia* 206, 207.

²¹ Cook and Ngwena (n 1).

²² S Johnson et al, 'Maternal Deaths in Australia 2006–2010' (Research Discussion Paper No 4, Australian Institute of Health and Welfare, 2014).

²³ Mulligan and Messenger (n 18) 343.

²⁴ Ibid.

²⁵ H von Hertzen et al, 'WHO Multinational Study of Three Misoprostol Regimens after Mifepristone for Early Medical Abortion. I: Efficacy' (2003) 110(9) *British Journal of Obstetrics and Gynaecology* 808, 814; See also Royal Australian and New Zealand College of Obstetricians and Gynaecologists (n 17).

²⁶ World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012).

²⁷ Zhang et al (n 9).

²⁸ Cook and Ngwena (n 1).

²⁹ Rosalind P Petchesky, 'Rights and Needs: Rethinking the Connections in Debates over Reproductive and Sexual Rights' (2000) 4(2) *Health and Human Rights* 17.

Uberoi and Maria de Bruyn identified impediments to state duties under international human rights law to protect people's health in the context of abortion:³⁰

- prohibiting or impeding access to contraception or forcing a contraceptive method on women;
- controlling pregnant women's actions through laws and regulations such as those which deny decision-making capacity or provide for punitive measures regarding pregnant women's actions, including a presumption of neglect;
- criminalising or impeding access to safe, legal abortion; and
- criminalising and violating international human rights law including rights to life, health, information on scientific progress, freedom from inhuman or degrading treatment or punishment, rights to dignity and autonomy in decision making, the right to privacy and presumption of innocence, and rights to non-discrimination and equality.

They noted that the *International Covenant on Economic, Social and Cultural Rights* ('CESCR') guarantees all persons the right to equal protection under the law without discrimination based on sex, and the *Convention on the Elimination of Discrimination Against Women* ('CEDAW') stipulates that governments must take all appropriate measures to eliminate discrimination against women in health care. The UN Committees for CESCR, CEDAW, the *International Covenant on Civil and Political Rights* ('CCPR'),³¹ the *Convention on the Rights of the Child*,³² and the *Convention against Torture*,³³ have all made recommendations to governments to consider revising laws that criminalise and penalise abortion.³⁴ By ratifying the CCPR, Australia committed itself to recognise the right of everyone to education and the enjoyment of the highest attainable standard of

³⁰ Diya Uberoi and Maria de Bruyn, 'Human Rights Versus Legal Control over Women's Reproductive Self-Determination' (2013) 15(1) *Health and Human Rights* 161, 163.

³¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990).

³³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').

³⁴ Ipas, 'Maternal Mortality, Unwanted Pregnancy and Abortion as Addressed by International Human Rights Bodies' (Chapel Hill, NC, 2013).

physical and mental health.³⁵ Taking steps to achieve the full realisation of this right shall include those necessary for the reduction of the stillbirth rate and infant mortality, as well as for the healthy development of the child.³⁶

It follows that Australia has recognised that women and girls have rights to make their own informed sexual choices, bear the consequences of their choices, and survive through the provision of appropriate health services in pregnancy and for their children to have an enhanced survival rate through appropriate spacing. In addition, by ratifying the CEDAW,³⁷ Australia has also committed itself to *eliminate* discrimination against women. Article 12 of CEDAW prohibits all forms of discrimination against women in the delivery of health care. States are required to ensure equality of access to health care services, including those related to family planning, and ensure women receive appropriate services in connection with pregnancy, confinement, and the post-natal period. A restrictive abortion law exacerbates the inequality that results from the biological fact that women carry the exclusive health burden of contraceptive failure and the consequent moral, social, and legal responsibilities of gestation and parenthood.³⁸ Failing to provide appropriate and confidential healthcare in the context of reproductive health unambiguously constitutes a form of discrimination against young women and girls. The Convention obliges State parties to submit to the CEDAW reporting mechanism. The goal in this context is for maternal mortality and morbidity to be reduced, the dignity of women to be enhanced, and their reproductive self-determination to include access to health care and the benefits of scientific progress.³⁹

Further, by virtue of the UN *Convention on the Rights of the Child*,⁴⁰ Australia has *positive* obligations in international law to *ensure* that children are not subjected to cruel, inhuman, or degrading treatment.⁴¹ Failing to provide adequate and confidential medical services, in the context of reproductive health to children who are at risk of harm via the

³⁵ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13.

³⁶ *Ibid* 12.

³⁷ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

³⁸ Rebecca J Cook, 'International Human Rights and Women's Reproductive Health' (1993) 24(2) *Studies in Family Planning* 73, 74.

³⁹ *Ibid*.

⁴⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁴¹ *Ibid* 37.

consequences of failing to properly treat unwanted and/or unviable pregnancies, constitutes an irreparable violation of the child's physical and psychological health. Therefore, we suggest (as Uberoi and de Bruyn did in the US) that it is beyond argument that international law requires that Australia create an effective and proactive mechanism that operates to protect women and girls from unnecessary health risks. Australia has a legal duty to ensure that quality, comprehensive, and integrated sexual and reproductive health care services, commodities, information, and education mechanisms are adequately resourced.

Intrinsic to these legal obligations is the requirement that states must not only respond to the need for reproductive health care but respond in an effective way.⁴² Australia regularly submits national reports to the CEDAW committee on how it meets treaty obligations. The Federal Government Office for Women coordinates the reports by compiling information from government sources. In addition, a Shadow Report is submitted to the UN by non-government sources to balance governments' claims.

A 2010 UN communique diplomatically stated:

The Committee remains concerned about the lack of harmonization or consistency in the way that the Convention is incorporated and implemented across the country, particularly when the primary competence to address a particular issue lies with the individual states and territories. It notes for example that inconsistent approaches have arisen with regard to the imposition of criminal sanctions, for example with regard to abortion.⁴³

In the 2016 CEDAW report, the Australian government wrote, 'Laws relating to pregnancy termination are matters for states and territories. The Australian Government has no constitutional powers in this area.'⁴⁴ The Federal Australian government suggests that it has limited power in the harmonisation of the multiple laws that regulate women's access to abortion; this is left to the eight states and territories that comprise the

⁴² Ronli Sifris and Suzanne Belton, 'Australia: Abortion and Human Rights' (2017) 19(1) *Health and Human Rights* 209.

⁴³ UN Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, 46th sess, UN doc CEDAW/C/AUL/Q/7/Add.1 (12 July 2010) 3.

⁴⁴ Australian Government Office for Women, Department of Prime Minister and Cabinet, 'Australia's Eighth Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women August 2010–July 2014' (Report, 15 December 2016).

federation. Australian women who become weary of the diplomatic exchanges directed at the UN may seek their reproductive health rights under the Optional Protocol to CEDAW, which allows individuals to file complaints to the UN CEDAW Committee after domestic remedies have been exhausted. The value of the CEDAW Committee's investigations of claims of serious violations of CEDAW in Australia in this context cannot be underestimated. Of course, the difficulty for individual women is the pressure and publicity that such litigation may create with regard to such a personal issue. Further examination of individual claims is outside the scope of this article, but it is worth bearing in mind if our views, that regulation remains restrictive, are accepted.

IV LAWS IN THE NORTHERN TERRITORY

Prior to the passing of the 2017 Act, the law on termination of pregnancy in the NT was governed by two pieces of legislation: the *Criminal Code* ('NTCC') and the MSA 1974. The MSA 1974 was amended and revised in 2006 and 2011, but the provisions and practical reality in relation to abortion had not changed. It allowed for termination up to 23 weeks but with separate provisions for pregnancies up to 14 weeks' gestation and those up to 23 weeks' gestation. In relation to abortion up to 14 weeks' gestation, subsections 11(1) and (2) of the MSA 1974, before the 2017 reform, made it lawful for a medical practitioner to provide medical treatment with the intention of terminating a woman's pregnancy if, after medically examining her, the practitioner reasonably believed she was pregnant for not more than 14 weeks. These subsections also required the practitioner *and another senior specialist medical practitioner* to be of the opinion, formed in good faith, that the continuance of the pregnancy would involve greater risk to the woman's life or greater risk of harm to her physical or mental health than if the pregnancy were terminated or that there was a substantial risk that, if the pregnancy were not terminated and the child were born, the child would be seriously handicapped because of physical or mental abnormalities. It also provided that treatment was to be given in hospital. This meant there had to be two medical professionals making the decision under restrictive criteria and at least one of the medical practitioners had to be a gynaecologist or obstetrician unless it was not reasonably practicable in the circumstances to find a gynaecologist or obstetrician to examine the woman.

In relation to abortion from 14 to 23 weeks' gestation, subsection 11(3) of the MSA 1974 made it lawful for a medical practitioner to give treatment with the intention of terminating a woman's pregnancy if, after medically examining her, the medical practitioner was of the opinion that termination of the pregnancy was immediately necessary to prevent serious harm to her physical or mental health, and, when giving the treatment, the practitioner reasonably believed she was pregnant for not more than 23 weeks. Finally, subsection 11(4) made it lawful to give medical treatment with the intention of terminating a woman's pregnancy only if the treatment was given or carried out in good faith for the sole purpose of preserving her life, and the appropriate person consented to the giving of the treatment. Otherwise, as provided by section 11, TOP was a criminal offence.

In clinical practice, this required two highly qualified health practitioners working in specific urban locations with very particular circumstances. Women had legal permission for surgical treatment only in limited circumstances. The effect of these limitations, in the case where the woman could not access local health care, was that women travelled elsewhere, ordered medicines online, or continued the pregnancy. These issues were exacerbated by further provisions in the MSA 1974, such as subsection 11(5) in relation to consent for minors:

The appropriate person for giving consent to medical treatment ... is the woman if she is at least 16 years of age; *and* is otherwise capable in law of giving the consent; or *each person* having authority in law apart from this subsection to give the consent if the woman is under 16 years of age; or is otherwise incapable in law of giving the consent.

This meant that in clinical practice both parents had to be consulted. For children where the pregnancy was the result of familial abuse, this created a requirement of consent from a parent who may be the abuser.

Prior to the 2017 reforms, the MSA 1974 raised the following issues of concern which drove a successful agenda for reform:

1. There appeared to be no justification for the differentiation between 14 and 23 weeks' gestations.

2. The restrictive definition of medical practitioner excluded those eminently able to provide appropriate health care beyond a hospital, including midwives, nurses, and pharmacists.
3. Access to approved medical treatment was so restricted that, in the NT, doctors, women, and girls were at risk of criminal prosecution in the context of acceptable modern termination by the administration of medication. Further, the words 'includes surgery' implied that only surgical termination of pregnancy was acceptable.
4. The criteria requiring medical practitioners to make findings about harm to the woman or girl, or abnormalities in the foetus, inhibited autonomy.
5. The requirement for treatment in a hospital inevitably restricted abortion to hospitals in only two urban centres, which reduced access to health services and promoted a lack of confidentiality.
6. The lack of conscientious objection provisions fostered a culture where doctors were able to put their personal beliefs before patient welfare and inhibit services, which impacted women seeking a lawful abortion.⁴⁵ Ethical service provisions needed to allow for informed choice, prevent patient trauma, avoid the risk of service delays leading to fewer or more invasive options, and enable rural women to seek other practitioners.
7. The requirement for a specialist obstetrician or gynaecologist as part of the decision-making process prevented women's access to primary health care providers, which is the wholly appropriate place of treatment in this context.
8. The requirement for each person having the authority of law to make decisions about a child inevitably meant both parents must consent, which inhibited treatment for minors.

Prior to 2017, the requirement under the MSA 1974 for treatment to be provided in hospitals had the practical effect that women potentially had to travel some hundreds of kilometres to Darwin or Alice Springs to access specialist services from an obstetrician

⁴⁵ Suzanne Belton, Caroline de Costa and Andrea Whittaker, 'Termination of Pregnancy: A Long Way to Go in the Northern Territory' (2015) 202(3) *Medical Journal of Australia* 130.

or gynaecologist. They were also required to have surgical abortions as prescribing EMA was legally restricted. Inevitably, there are no figures for women who travelled to other parts of Australia seeking an abortion. With only one or two willing and able health practitioners, the effect on health care at times was catastrophic in the NT.⁴⁶ Delays in health service provision meant that women carried a foetus for longer than they should, increasing potential negative health and legal consequences.

In relation to the abortifacients, mifepristone and misoprostol, Part VI, Division 8 of the NTCC provided criminal sanctions that covered both the woman and the practitioner. Section 208B stated that

a person is guilty of an offence if:

- (a) the person: (i) administers a drug to a woman or causes a drug to be taken by a woman; or (ii) uses an instrument or other thing on a woman; and
- (b) the person intends by that conduct to procure the woman's miscarriage.⁴⁷

Section 208C created a criminal offence where a person

- (a) supplies to, or obtains for, a woman a drug, instrument or other thing; and
- (b) knows the drug, instrument or other thing is intended to be used with the intention of procuring the woman's miscarriage.' In both sections, the maximum penalty was imprisonment for seven years.⁴⁸

Notes for sections 208B and 208C provided that '[u]nder section 11 of the MSA 1974, in certain circumstances it was lawful for a medical practitioner to give medical treatment with the intention of terminating a woman's pregnancy'.⁴⁹ Part 1, Division 1 of the NTCC defined 'medical treatment to include 'dental treatment and all forms of surgery'.⁵⁰ By normal interpretative rules, this did not appear to include treatment that prescribed medicines. A medical practitioner was not defined in the NTCC but, on any ordinary interpretation, did not include health workers nor nurses who provide the majority of primary, reproductive, and sexual health care in the NT. It followed that treatment had to be surgical, and many appropriately qualified and experienced health professionals could

⁴⁶ Ibid.

⁴⁷ *Criminal Code Act 2017* (NT).

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid s 4 (definition of 'medical treatment').

not treat those seeking medical abortion without risking criminal prosecution. Anyone prescribing mifepristone and misoprostol committed a criminal offence, despite those abortifacients being approved and recommended medicines elsewhere.⁵¹

The effect of the unreformed legislation denied women their health rights to patient autonomy in abortion health care and criminalised women, children, and health practitioners. The indirect effect of lack of access to abortion was that some women and female children were forced to carry to term with the consequent effect on health and well-being that an unwanted and unplanned pregnancy may bring. Barriers to appropriate treatment increased as medicine had progressed in an environment where the law remained static.⁵² The consequence was that women's access to termination was prohibited by the very laws which were designed to lawfully create voluntary motherhood; the law simultaneously acted as a barrier to women's access to services and as a tool to ensure that women have effective access to health services.⁵³ In applying Cook and Ngwena's framework, it was neither evidence-based, transparent, nor fair legislation.

The 2017 legislative reform repealed section 11 of the MSA 1974 in its entirety and made consequential amendments to the NTCC, thus removing many of the restrictive criteria and allowing for drug prescriptions and a wider cohort of treating practitioners in a wider range of locations. However, despite the campaign to remove all regulation of TOP, the position for NT women is now governed by the *Termination of Pregnancy Law Reform Act 2017*.⁵⁴ This still provides separate provisions for pregnancies up to 14 weeks and those up to 23 weeks. For those up to 14 weeks, section 8 allows for appropriate advice and the prescription of drugs to be authorised by a single health practitioner. While the definition includes a much wider cohort of treating practitioners, two are required to consult and agree under section 9 for pregnancies up to 23 weeks. In any other circumstances, criminalisation remains unless termination is necessary for the preservation of life. Provision is included for contentious objection and safe access zones for treatment.

Although this represents significant progress, the retaining of any criminal provisions still restricts a woman's freedom in the context of health care and provides an available

⁵¹ Anne O'Rourke, Suzanne Belton and Ea Mulligan, 'Medical Abortion in Australia: What Are the Clinical and Legal Risks? Is Medical Abortion Over-Regulated?' (2016) 24(1) *Journal of Law and Medicine* 221.

⁵² *Ibid* 221.

⁵³ Cook and Ngwena (n 1).

⁵⁴ *Termination of Pregnancy Law Reform Act 2017* (NT).

mechanism for future legislative reform in another direction. This remains risky for NT women as it leaves them at the whim of political manoeuvring.

V ACCESS TO EVIDENCE-BASED HEALTH CARE

Cook and Ngwena suggest that courts are interested in scientific evidence and safety and not religious or political biases. Similarly, health care should be based on scientific evidence — most importantly, as science advances, the provision of clinical health care evolves. However, there are several factors which work against evidence-based health abortion care in Australia. One is the lack of bio-data and clinical evidence, and the other is fossilised laws (even where amended) which impede the provision of quality health care via free choice.

Any lack of health data is surprising in a developed nation. The total numbers of TOP are not known, the types or timing of procedures have not been systematically recorded, and the characteristics of women seeking abortion are not monitored for public health purposes. There are two jurisdictions which mandate the reporting of abortion — South Australia and Western Australia — where records are relatively complete but only contain limited information that could be used to design public health interventions. The lack of nationally consistent data suggests that abortion is not a priority in either health research or policy.

There are other contexts where Australian law is used to inhibit evidence-based reproductive health care.⁵⁵ For example, health care providers cautiously interpret the law to mean that counselling is required prior to abortion.⁵⁶ This is particularly so in unreformed jurisdictions such as Queensland where section 282 of the *Criminal Code Act 1899*,⁵⁷ provides that '[a] person is not criminally responsible for ... providing ... medical treatment ... if ... providing the medical treatment is reasonable, having regard to the patient's state at the time and to all circumstances of the case'. The test of lawfulness has been determined by the courts to mean that abortion can be lawfully performed where it is necessary to prevent serious danger to the woman's life or physical or mental health

⁵⁵ Sifris and Belton (n 42).

⁵⁶ The Tabbott Foundation, 'Australia's Medical Termination Provider' (Web Page)

<<https://www.tabbot.com.au/>>.

⁵⁷ *Criminal Code Act 1899* (Qld).

and further that social and economic considerations cannot be taken into account.⁵⁸ In New South Wales, under section 82 of the *Crimes Act 1900*,⁵⁹ it is an offence 'for any person ... to administer a drug to unlawfully procure a miscarriage'. The term 'unlawfully' has not been defined but precedent suggests that abortion is generally regarded as lawful if it is performed to avoid serious danger to the woman's mental and physical health.

In the NT, Part two, section 7 of the *Termination of Pregnancy Law Reform Act 2017* states that:

A suitably qualified medical practitioner may perform a termination on a woman who is not more than 14 weeks pregnant, if the medical practitioner considers the termination is appropriate in all the circumstances, having regard to:

- (a) all relevant medical circumstances; and
- (b) the woman's current and future physical, psychological and social circumstances; and
- (c) professional standards and guidelines.

It follows that lawfulness still depends on the assessment of a medical practitioner who must examine the woman's whole life circumstances. These types of unreformed legislation can lead to defensive clinical practice and referrals to psychologists to conform with the perceived intent of the law. Mandatory counselling is discriminatory, humiliating, intrusive, and wasteful of health resources. Research evidence and clinical practice concede that few women require counselling, whereas all women have a right to information to assist in making a pregnancy choice.⁶⁰

The lack of legal availability of EMA in the NT was highly significant in propelling the groundswell for legal reform given the restrictions that criminalisation placed on both women and practitioners. The provisions of the reformed 2017 Act which allows for EMA is a significant improvement.

While the 2017 Act is an improvement, continued regulation has no sound health basis and limits the freedom of practitioners to treat a patient in any circumstance. In addition,

⁵⁸ *R v Bayliss and Cullen* (1986) QDC 011.

⁵⁹ *Crimes Act 1990* (NSW).

⁶⁰ Kirsten Black, 'Some Women Feel Grief after an Abortion, but There's No Evidence of Serious Mental Health Issues', *The Conversation* (online, 26 April 2018) <<https://theconversation.com/some-women-feel-grief-after-an-abortion-but-theres-no-evidence-of-serious-mental-health-issues-95519>>.

in cases over 23 weeks, criminalisation remains. Termination of pregnancy over 23 weeks is rare but sometimes necessary and therefore does not require legal regulation where performed by an authorised health practitioner. When termination is requested, it is often in catastrophic situations. The pregnancy is often wanted, and women are advised by doctors that their child has a serious foetal abnormality, or there is poor maternal health, or the woman is dealing with social/mental dysfunction such as substance abuse.

The routine tests during antenatal care are not yet advanced enough to detect problems early in pregnancy. Ultrasound scans during pregnancy occur at 16 to 18 weeks' gestation; genetic testing is not complete until 20 weeks which means that health practitioners must deal with these issues at later gestation. These practitioners should not be criminalised for providing a termination in such circumstances. One case study provided by a NT health care professional is compelling:

The limiting of access to abortion to 23 weeks has significant implications when diagnosis of genetic anomalies takes up to 2 weeks (and occasionally longer). We had a case in 2015 where despite early genetic screening and an initially normal diagnosis, a small but significant chromosomal abnormality was not identified until 28 weeks. Despite every effort to obtain a late termination interstate, it was not possible to do this due to the fact that the woman involved was an NT resident.

Publicly funded late termination services in Victoria were not available as she was not a Victorian resident. A private service provider was prepared to perform a procedure for her, but unfortunately medical indemnity was not obtainable as again she was not resident in the state where the procedure would be performed.

This has resulted in the woman and her family having a child with a significant burden of disability and had a devastating effect on the mental health of the parents involved. These cases are rare, but I feel that it is important that, as doctors involved in the care of pregnant women, we have the discretion to offer late termination of pregnancy in such circumstances.⁶¹

According to the most recent figures from the Australian Institute of Health and Welfare, 0.7% of abortions in Australia were carried out at or after 20 weeks;⁶² most (94.6%) were

⁶¹ Interview with NT health professional (identity concealed).

⁶² Narelle Grayson, Jenny Hargreaves and Elizabeth A Sullivan, AIHW National Perinatal Statistics Unit, 'Use of Routinely Collected National Data Sets for Reporting on Induced Abortion in Australia' (Report, December 2005).

performed before 13 weeks of gestation. Data from the NT shows a very similar pattern of a very small number of women requiring this type of health care.

Gestational age	Number	%
0–13 weeks	5233	95.5
14–19 weeks	73	1.3
>20 weeks	11	0.1
Unstated	156	2.9
Total	5473	100.0

Table 1: Surgical termination of pregnancy, numbers and percentages of gestation in weeks 2006–2011, Northern Territory.

Most women who have a termination are treated within 10 weeks of having a positive pregnancy test, although we note that records are not kept of women who requested termination but were turned away or went interstate for care. In addition, the provisions remain out of step with other Australian jurisdictions. For example, Victoria, the Australian Capital Territory, and Tasmania have legislation that enables doctors to assist women confronting serious foetal abnormality or maternal health problems after 23 weeks.

VI TRANSPARENT ACCESS TO HEALTH CARE

Abortion laws should articulate clearly how they facilitate access to health care. Cook and Ngwena state that legal uncertainty is ‘where fear of criminal prosecution and liability to prolonged imprisonment cause a reluctance to provide and/or seek services’, and this exists in Australia.⁶³ The continued criminalisation of abortion in Western Australia, South Australia, New South Wales, and Queensland is contrary to international obligations under CEDAW and maintains social stigma ultimately perpetuating the chilling effect on health services and women’s wellbeing. Notably, Queensland Clinical

⁶³ Cook and Ngwena (n 1) 219.

Guidelines are a positive development in providing clear clinical instruction for health practitioners but may not be enough if the law remains unreformed.⁶⁴ The International Confederation of Midwives has a policy statement supporting safe abortion and articulating midwives' roles in supporting women in their fertility choices.⁶⁵ Unfortunately, there are no similar national statements from Australian nurses nor midwives supporting women's reproductive health rights, even in spite of the policy statements of both the Australian Medical Association and the Public Health Association of Australia that support access to health services and health practitioners' obligations in providing terminations.

Conscientious objections to providing abortion information, counselling, assessment, or treatments puts personal morals ahead of professional obligations. Only Victorian and Tasmanian laws explicitly deal with the duties of health providers who find themselves unable or unwilling to perform an abortion. The reformed NT law also has a clause for guiding conscientious objectors: they are legally obliged to expeditiously refer the patient to a colleague who can engage the patient's request. In the other five jurisdictions, this is left to the health provider's discretion. This type of legal fuzziness can mean that women need to 'jump through hoops' as described in research exploring the barriers to access to abortion.⁶⁶

Travel to abortion services in urban areas or other parts of Australia are not well understood.⁶⁷ However, it is common for women to seek access interstate when it is not available in their area through either lack of skilled workforce, legal barriers, or health system weaknesses.⁶⁸ Not only is this a personal burden, but it discriminates against women as a group. This is notwithstanding the little information sharing or continuity of health care for women who travel to another region or state for abortion and then return

⁶⁴ Queensland Health, 'Queensland Maternity and Neonatal Guidelines, Supplement: Therapeutic Termination of Pregnancy' (Queensland Clinical Guidelines, State of Queensland, 2018).

⁶⁵ International Confederation of Midwives, 'Midwives' Provision of Abortion-Related Services' (Position Statement, The Hague, 2015).

⁶⁶ Frances Doran and Julie Hornibrook, 'Barriers around Access to Abortion Experienced by Rural Women in New South Wales, Australia' (2016) 16(1) *Rural and Remote Health* 3,538: 1–12, 4 .

⁶⁷ Carolyn Nickson, Anthony Smith and Julia M Shelley, 'Travel Undertaken by Women Accessing Private Victorian Pregnancy Termination Services' (2006) 30(4) *Australian and New Zealand Journal of Public Health* 329, 333.

⁶⁸ Frances Doran and Susan Nancarrow, 'Barriers and Facilitators of Access to First-Trimester Abortion Services for Women in the Developed World: A Systematic Review' (2015) 41(3) *Journal of Family Planning and Reproductive Health Care* 170, 176.

home. Nickson, Shelly, and Smith inform us that Tasmanians travel to the mainland, Queenslanders travel to New South Wales, and Northern Territorians travel to Queensland and South Australia.⁶⁹ There are international cases where this type of breach in health care resulted in governments being found liable for violations of local laws and international human rights duties.⁷⁰

VII FAIR ACCESS TO HEALTH CARE

Fair and reasonable access to health care is a well-accepted notion in Australia with the introduction of a universal health welfare system in the 1970s, initially titled *Medibank* and later *Medicare*. The Australian taxation system funds the public health system at the federal level of government. Women pay the same percentage as men through compulsory taxation of wages; however, access to appropriate reproductive health care is not fair nor transparent for Australian women. The state bears legal responsibilities of non-discrimination in the provision of health services. We argue that sex-based discrimination occurs due to the failure of the state which it is obliged to remedy.

Women seeking to terminate their pregnancies experience difficulties accessing public health services and, in most states and territories, use private health services at personal financial cost sometimes in combination with personal private health insurance if they are wealthy enough to have it.⁷¹ Notably, South Australia and the NT have considerable abortion health services in the public health system. The shift of abortion public health work to private providers is real and can cause delays and discontinuities in health care as women try to find suitable providers, in addition to meeting the upfront out-of-pocket costs. As a group, women are castigated if they are perceived to be having terminations 'too late'. It seems axiomatic that women whose terminations are delayed due to health system dysfunction could claim damages from the state. However, a full examination of individual legal rights is outside the scope of this article.

Our research, the project forum and community debate, focused attention on these issues. We found that there was support for the use of approved abortifacients in the NT, but

⁶⁹ Carolyn Nickson, Julia Shelley and Anthony Smith, 'Use of Interstate Services for the Termination of Pregnancy in Australia' (2002) 26(5) *Australian and New Zealand Journal of Public Health* 421, 423.

⁷⁰ Cook and Ngwena (n 1).

⁷¹ Nickson, Smith and Shelley (n 67) 45.

public debate often returned to the 1960s and 1970s agenda without recognising women's right to abortion which was already legalised.⁷² It was recognised that the need to be in or near a hospital inhibited the use of approved abortifacients for women and girls in remoter communities. It was understood generally that approved abortifacients are low risk, but there was concern around supervision in remote conditions. Other practitioners took the view that as spontaneous miscarriage is dealt with in remote communities, there is no reason why managed miscarriages could not be. The forum thought that well-equipped clinics in remoter areas could and should be able to use approved abortifacients for women. It was unreasonable for women, girls, and health professionals in the NT not to have access to approved abortifacients, and furthermore it would be safer to manage terminations medically than risk women importing unknown abortifacients by post as had happened in Queensland.⁷³

Another concern during the 2014 forum was the consent processes for minors seeking abortion in the NT. Public sentiment found this was unreasonable and discriminated against young people. Processes and laws for gaining medical consent from minors exist in Australia, which rely on the principle of *Gillick* competency, where health practitioners assess the maturity of the minor in the provision of health care.⁷⁴ The authorisation of medical care — in this case, abortion — by parents or guardians was not necessarily in the best interests of the child nor required. It can breach patients' rights to confidentiality, and, as Cook and Ngwena point out, chronological age is less important than the capacity to understand.⁷⁵

⁷² Barbara Baird and Suzanne Belton, 'Feminism on the Frontier: The History of Abortion Law Reform in 1973 in the Northern Territory, Australia' (2019) 28(1) *Women's History Review* 139, 139.

⁷³ *R v Brennan & Leach* [2010] QDC 329 (Everson DCJ).

⁷⁴ The Australian High Court gave specific and strong approval for the *Gillick* decision in *Department of Health and Community Services v JWB and SMB* [1992] HCA 15; (1992) 175 CLR 218 ('*Marion's case*'). The *Gillick* competence doctrine is part of Australian law (see, eg, *DoCS v Y* [1999] NSWSC 644). There is no express authority in Australia on *Re R* and *Re W*, so whether a parent's right terminates is unclear. This lack of authority reflects that the reported cases have all involved minors who have been found to be incompetent and that Australian courts will make decisions in the *parens patriae* jurisdiction regardless of *Gillick* competence. In South Australia and New South Wales, legislation clarifies the common law, establishing a *Gillick*-esque standard of competence but preserving concurrent consent between parent and child for the ages 14–16.

⁷⁵ Cook and Ngwena (n 1).

Politicians split almost equally over the issue of reforming the MSA 1974 and not necessarily along political party sides. One female member of Parliament from the conservative Country Liberal Party stated:

I have confidence in the [medical] profession, the AMA and the Royal Australian and New Zealand College of Obstetricians and Gynaecologists to determine the appropriate administration of RU486 and the guidelines associated with it. The medical board and the Australian health practitioner regulation agencies are our professional watchdogs over the medical profession.

It is true that all jurisdictions except the Northern Territory allow the use of RU486 outside a hospital environment for medical terminations of pregnancy up to nine weeks under the supervision and assessment of a medical practitioner. This debate is not about the introduction of the drug RU486 in Australia but introduction into the Northern Territory. We are the exception, and the question is whether or not we want to become the rule.

I am a proud Territorian. The Territory does many things differently and we are proud of it. Unfortunately, there are examples of where Northern Territory differences are not something to be proud of. I am thinking specifically of issues affecting women, such as our higher rates of domestic violence and our inability to access RU486.⁷⁶

This member of Parliament retained her seat in the last election and is only one of two Country Liberal Party members remaining in the Legislative House of Assembly. She voted for reform in 2017. This perhaps gives an indication of the need for political will to achieve women's health rights in the NT and thus mitigate the risks we have suggested that continuing regulation can create for the future.

VIII SOLUTIONS AND CONCLUSIONS

Taking a rights-based approach and using Cook and Ngwenya's framework, in the context of reproductive autonomy for women seeking to end a pregnancy, was useful.⁷⁷ The NT found some solutions in the 2017 reforms. Namely, the 2017 Act broadened the named health providers to include nurses, midwives, Aboriginal health practitioners, and

⁷⁶ Northern Territory, *Parliamentary Debate*, Legislative Assembly, 20 April 2016 (addressing the *Medical Services Amendment Bill*) 8,173.

⁷⁷ Heather Douglas and Katherine Kerr, 'Abortion, Law Reform and the Context of Decision-Making' (2016) 25(1) *Griffith Law Review* 129.

pharmacists. Importantly, the definition of ‘medical treatment’ now includes termination by prescription and removes the requirement for hospitalisation and senior specialists. Furthermore, taking the example from Victorian and Tasmanian legislation, the NT now has protection zones to prevent harassment and intimidation of health staff and women. It also contains a conscientious objection clause, and the requirement to seek out consent from parents of minors has been removed. Anonymous bio-data is collected and could be analysed and interpreted for health policy and system planning. However, this legislation is not perfect — it appears to be a political compromise that fails to leave the issue of women’s health to the woman and her health practitioner. The reformed 2017 Act attempts to increase access and fairness to abortion health services. While it is an improvement on the MSA 1974, it is not a comprehensive instrument on reproductive health rights and thus may not age well as medicine continues to advance.

In reviewing Australia’s international obligations, the legislative frameworks against a background of campaigning brings us to the conclusion that there should be national uniform legislation to completely decriminalise abortion in Australia. Given the considerable effort it took to change the legislation in the NT, such reform may be a while away. In the meantime, women’s health rights are not comprehensively observed,⁷⁸ which leaves Australia bound to report these issues to the CEDAW Committee. Of course, women also have the opportunity to make individual complaints, but the process is long. Unfortunately, the lack of access to rights-based lawyering in the NT is outside the scope of this paper.

Despite the remaining limitations of the 2017 Act, the concerns about its implementation, and the lingering human rights issues, it is our view that the 2017 Act enables some improvement in evidence-based access to health care, more transparent access to health care, and fairer access to health care.

⁷⁸ Sifris and Belton (n 42) 14.

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WHY DIGNITY IS A POOR REASON TO LEGALISE ASSISTED SUICIDE

PETER KURTI*

A growing movement in support of assisted dying is bringing pressure to bear on Australian politicians to enact legislation making it legal for doctors to help people to die. Victoria has already legalised assisted suicide, and now the Western Australian parliament may introduce a similar law. Proponents of assisted suicide argue that the burden of great physical or mental suffering diminishes human dignity and that — in the name of compassion — people should be able to receive assistance to end their lives when they wish to do so.

The word “dignity” is used in equivocal ways, however, and can refer both to an intrinsic dimension of human identity, and to an extrinsic, or social, dimension. Opponents of euthanasia and physician-assisted suicide tend to use dignity in its intrinsic sense whereas proponents use it in its extrinsic sense. There is, however, a response to those who argue that the demands of social dignity require the possibility for assisted suicide. This is the therapeutic option known as ‘dignity therapy’, increasingly used in palliative care to restore the social dignity of the terminally ill patient.

In jurisdictions where assisted suicide is legal, the categories of those eligible for assistance in dying are already expanding to include not only those with physical or mental ailments, but also those who are simply weary of life. Avoidance of suffering is only one factor to be weighed in the debate about legalising assisted suicide. It is also vital to consider the harmful impact on Australian culture and society if laws are enacted that permit doctors to kill their patient when prevailed upon to do so. Is the risk of cultural harm, perpetrated in the name of dignity, really one that we should be willing to run?

* Peter Kurti is a Senior Research Fellow in the Culture, Prosperity & Civil Society program at the Centre for Independent Studies. He is also an Adjunct Associate Professor in the School of Law (Sydney) at the University of Notre Dame, Australia.

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I THE LEGISLATIVE JOURNEY OF ASSISTED SUICIDE IN AUSTRALIA

Until recently, it was an offence everywhere in Australia — punishable by up to five years in prison — to incite, counsel, or assist another to commit suicide or to attempt to commit suicide.¹ The criminal law reflected the social taboo about suicide which held the act to be an offence against humankind; suicide deprived the individual’s family and community of a member prematurely and denied them the opportunity to care for the troubled individual. It was also regarded as ‘self-murder’.²

Criminal codes also reflected Judeo-Christian teaching about the sanctity of human life. According to this teaching, a human being is neither the absolute owner of her life nor its author. Created in the image of God, the life of each human being is ‘entrusted to us by God that it may begin to find its fulfilment in the loving service of God and our fellow human beings. It is not for us to decide for how long it shall be so used.’³ As such, the criminal law imposed sanctions for suicide and attempted suicide both because of key ethical and religious conceptions of humanity and because of the wider impact of each act of suicide on society.

In many places, the law has now changed, and the act of suicide is no longer illegal. An eloquent account of the reasons for this legal development was given by Lord Bingham in a House of Lords judgment:

¹ See, eg, Sir John Vincent Barry, ‘Suicide and the Law’ (1965) 5 Melbourne University Law Review 1, 8–15.

² See, eg, Andreas Bähr, ‘Between “Self-Murder” and “Suicide”: The Modern Etymology of Self-Killing’ (2013) 46(3) *Journal of Social History* 620.

³ John Macquarie and James Childress, *A New Dictionary of Christian Ethics* (Westminster Press, 1st ed, 1967) 609.

Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were prosecuted, in effect, for their lack of success.⁴

Suicide ceased to be a felony in England in 1961. Reform occurred earlier in all Australian jurisdictions — much earlier in New South Wales ('NSW') where the *Crimes Act 1900* (NSW), passed at the beginning of the 20th century, abolished the offence of suicide. Assisting suicide, however, was another matter. The *Crimes Act 1900* (NSW) indicates clearly that one of the factors according to which an action causing the death of another person can amount to murder is where it has been done with the intent to kill that person.⁵ Accordingly, not only would a person counselling another to commit suicide commit a crime, the provision in any circumstances of the means to commit suicide, such as acceding to an individual's voluntary request for the administration of a drug to bring about death, could also well be construed as an act of murder.

In 2005, the Commonwealth Parliament passed legislation making it illegal to produce, supply, or possess materials intended to promote the committing of suicide.⁶ There have been few prosecutions for assisting another to commit suicide, and when a conviction has been issued, the decision of the court has often been based on the absence of capacity of the deceased to give full consent.⁷

However, the movement to decriminalise the offering of assistance to another to commit suicide continues to gain momentum. In November 2017, the Parliament of Victoria passed the *Voluntary Assisted Dying Act 2017* (Vic). The statute, which will not come into effect until mid-2019, will allow an individual with a terminal illness to obtain a lethal drug within ten days of asking to die, after having complete a three-stage process involving two independent medical assessments. In order to qualify, the individual must be over the age of 18, have been a resident in the state of Victoria for at least twelve months, and be suffering in a way that 'cannot be relieved in a manner the person deems

⁴ *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61; [2002] 1 AC 800 [35].

⁵ *Crimes Act 1900* (NSW) s 18.

⁶ *Criminal Code Amendment (Suicide Related Material Offences) Act 2005* (Cth).

⁷ See, eg, *Justins v The Queen* [2010] NSWCCA 242.

tolerable'.⁸ The new law was based on the recommendations of an expert panel chaired by a former president of the Australian Medical Association.⁹

A few weeks before the Victorian legislation received Royal Assent, an attempt was made in the NSW Parliament to pass the *Voluntary Assisted Dying Bill 2017*. The Bill, which had been drafted by a cross-party working group and contained provisions similar to those in the Victorian Bill, failed to pass in the State's Upper House by one vote.¹⁰ Attempts to pass similar legislation failed in Tasmania in November 2013 and in South Australia in November 2016. The issues are not likely to come before the Western Australian Parliament in 2019.

Assisted suicide was legal between 1995 and 1997 in the Northern Territory after its Parliament passed the *Rights of the Terminally Ill Act 1995* (NT), which had been prepared by the Country Liberal government led by Marshall Perron. The Commonwealth Parliament responded by passing a private member's Bill promoted by Kevin Andrews MP which became the *Euthanasia Laws Act 1997* (Cth). The Act removed the power of any Australian territory to legalise euthanasia. The 1997 Act specifically repealed the Northern Territory Act — but not before four people had received assistance in committing suicide from Philip Nitschke.¹¹

In mid-2018, however, Senator David Leyonhjelm proposed his own private member's Bill — *Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015* (Cth) — to restore the territories' rights to legislate on assisted suicide which had been set aside in 1997. Although the Bill was subsequently defeated in the Senate in August 2018, it is worth noting the arguments with which it was presented to the Senate. The Bill proposed by Leyonhjelm recognised the territories' rights to legislate without specifying the scope of any legislation that might be passed in the Northern Territory or the ACT. In his second reading speech delivered in the Senate on 3 March 2016, however, Leyonhjelm's principal

⁸ *Voluntary Assisted Dying Act 2017* (Vic); See also Jean Edwards, 'Euthanasia: Victoria Becomes the First Australian State to Legalise Voluntary Assisted Dying', *ABC News* (online, 29 November 2017) <<http://www.abc.net.au/news/2017-11-29/euthanasia-passes-parliament-in-victoria/9205472>>.

⁹ *Ministerial Advisory Panel on Voluntary Assisted Dying* (Final Report, July 2017).

¹⁰ 'Euthanasia Debate: NSW Parliament Rejects Bill on Voluntary Assisted Dying', *ABC News* (online, 17 November 2017) <<https://www.abc.net.au/news/2017-11-16/nsw-parliament-votes-on-euthanasia-bill/9158384>>.

¹¹ Michael Cook, 'Euthanasia Activist Nitschke Loses Legal Battle to Practice as a Doctor', *National Right to Life News* (online, 14 January 2015) <<https://www.nationalrighttolifenews.org/news/2015/01/euthanasia-activist-nitschke-loses-legal-battle-to-practice-as-a-doctor/>>.

concern was clearly to assert the ‘fundamental and legal right to choose whether we wish to continue living’.¹² Leyonhjelm continued:

The law says we are only permitted to die by our own hand, without assistance. And if we are too weak or incapacitated to end our lives ourselves, we are condemned to suffer until nature takes its course. It is a serious offence for anyone to either help us die, at our instruction, or even to tell us how to do it ourselves.¹³

The argument was cast as relief from a supposed experience of unendurable suffering, but the force of Leyonhjelm’s reasoning means that once permission to grant assistance is afforded to someone in pain, that permission must be extended *a fortiori* to anyone wishing to exercise their freedom to commit suicide. As Leyonhjelm remarked in his speech: ‘An individual may have good reasons to take his or her own life. But even if they do not, it is still their decision to make.’¹⁴

Additionally, if the principle of individual freedom entitles a sick person in pain to assistance in committing suicide, on what basis can that principle be denied to someone who is not sick and in pain but who wishes to die? One example of a person who falls into this category is David Goodall, a 104-year-old academic from Perth who flew to a clinic in Basel in Switzerland in May 2018 where he committed suicide with the assistance of medical staff.¹⁵ The case was unusual because, while enthusiastic about accepting assistance to end his life, Goodall met none of the qualifications normally associated with assisted suicide. Indeed, much of the public support for assisted suicide comes from those who think that no one should have to endure a long and painful death. However, Goodall was not suffering from any terminal illness and enjoyed good general health; he was just old and frail, no longer enjoying life and longing to die.¹⁶

Although the terminally ill are usually listed as the first and most obvious candidates for assisted suicide, the categories of eligibility are seemingly elastic and can potentially be

¹² Commonwealth, *Parliamentary Debates*, Senate, 2 December 2015, 9,673 (David Leyonhjelm, Senator).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Charlotte Hamlyn and Briana Shepherd, ‘David Goodall Ends His Life at 104 with a Final Powerful Statement on Euthanasia’, *ABC News* (online, 11 May 2018) <<https://www.abc.net.au/news/2018-05-10/david-goodall-ends-life-in-a-powerful-statement-on-euthanasia/9742528>>.

¹⁶ *Ibid.*

extended to further categories of people. This is something admitted readily by Amanda Vanstone writing in support of Leyonhjelm's Bill:

There is no reason that we should refuse to end the suffering of two groups of people. First, those who have a terminal illness and are more worried about the quality of their remaining life than the quantity. Second, those for whom just age has taken its toll and whose consequent frailty leaves them incapable of doing much and who do not want to spend their last months being cared for as one does a baby.¹⁷

Successful passage of legislation in Victoria — the only state in Australia where assisted suicide is currently legal — has encouraged euthanasia advocacy groups such as Exit International and YourLastRight.com (a national alliance of dying with dignity and voluntary euthanasia societies in Australia) to increase the pressure brought to bear on politicians for legal reform.

Whilst all opponents of assisted suicide are, at some time or another, bound to be negatively categorised into specific groups notorious for opposing these kinds of radical ideals (such as religious groups), it should be noted that not all calls for reform come from secular advocates. For example, there are religious groups that favour assisted suicide. *Christians Supporting Choice for Euthanasia*, for example, claims that 'the overwhelming majority of people of faith support choice for voluntary euthanasia', appealing to a 2007 survey conducted by Newspoll.¹⁸ Meanwhile, opposition to the legalisation of assisted suicide in Australia comes from a broad cross-section of the community, some of whom are religious and some not. With the enactment of a law to permit assisted suicide in Victoria, their efforts will be directed to arguing clearly against the pursuit of similar changes in the law in the rest of the country.

¹⁷ Amanda Vanstone, 'Can't We Just be Decent to People at the End of Their Lives?', *The Sydney Morning Herald* (online, 1 July 2018) <<https://www.smh.com.au/politics/federal/can-t-we-just-be-decent-to-people-at-the-end-of-their-lives-20180629-p4zok5.html>>.

¹⁸ 'Public Opinion — Christian Opposition a Tiny Minority', *Christians Supporting Choice for Voluntary Assisted Dying* (Web page, 2018) <<http://christiansforve.org.au/public-opinion/>>; See, eg, Andrew Dutney, 'Christian Support for Voluntary Euthanasia' (1997) 16(2) *Monash Bioethics Review* 15.

II THE “DIGNITY” DEBATE

Language is used in very elliptical ways in the debate about euthanasia and assisted dying.¹⁹ One of the phrases that feature prominently is “dying with dignity”. It is a coded phrase, of course, referring to the idea that each of us should be entitled to decide exactly how and when we die — as if an unexpected death, or one that comes as a result of illness rather than our own volition, is by that very fact lacking in dignity. Additionally, as in the case of David Goodall, one does not even need to be terminally ill to decide that it is time to die.

“Dying with dignity” is almost being promoted as little more than a lifestyle choice. Mourning what it saw as an opportunity to reform the law on assisted suicide missed by the UK Parliament back in September 2015, *The Economist* argued that ‘the state should no more intrude on personal decisions at the close of life than at any point during it’, continuing that ‘governments everywhere should recognise that, just as life belongs to the individual, so should its end’.²⁰ Yet, the demand that the dignity of the person be respected is at the heart of many arguments propounded by both advocates and opponents of euthanasia and assisted suicide.

The *Oxford English Dictionary* (‘OED’) gives eight definitions for *dignity*, the first two of which are the most relevant here: ‘the quality of being worthy or honourable; worthiness, worth, nobleness, excellence’ and ‘honourable or high estate, position or estimation; honour, degree of estimation, rank’.²¹ Worthiness, excellence, and estimation, therefore, are the central notions of dignity which is a term of distinction and therefore not necessarily something to be found or expected in every human being. “Dignity” is clearly not synonymous with “life” because a person can live without dignity; but human life is obviously a necessary condition of there being human dignity, for without life there can be no possibility of dignity.

¹⁹ Although frequently closely associated with each other, the terms assisted suicide and euthanasia must not be used interchangeably. In assisted suicide, the individual kills himself or herself with assistance; in euthanasia, the individual is killed by another person. The distinction is important: it does not turn on whether or not the individual who dies or wishes to die has given their full, informed consent; it turns on who does the killing.

²⁰ ‘One Door Closes, Another Opens’, *The Economist* (online, 19 September 2015) <<https://www.economist.com/leaders/2015/09/17/one-door-closes-another-opens>>.

²¹ *Oxford English Dictionary* (online at 20 January 2019) ‘dignity’ (def 1–2).

But what can it possibly mean to “die with dignity”? In their appeals to dignity, those on either side of the debate about assisted suicide claim that their position is the ethically correct one. This seems paradoxical; but, as bioethicist Margaret Somerville has noted, the paradox is resolved once we understand that each side uses the term human “dignity” differently.

According to Somerville, opponents of assisted suicide regard dignity as an *intrinsic* characteristic that human beings have simply by virtue of being human. It is a dignity that cannot be lost or diminished. A full conception of intrinsic human dignity is grounded in the inherent moral worth of human beings — a worth that is not diminished by disease or infirmity. It should be noted, incidentally, that Somerville’s interpretation does not completely accord with the OED definitions of dignity, which indicate that dignity refers to worthiness and an honourable standing rather than to an intrinsic characteristic. It is quite possible to live without dignity. Somerville’s interpretation is helpful, however, for capturing a conception of the inherent value of human life.

Turning to pro-euthanasia advocates, Somerville says that they ‘see dignity as an extrinsic characteristic that can be lost with an individual’s loss of autonomy, independence, and control’.²² Providing assistance in suicide, pro-euthanasia advocates argue, is a means of restoring control and, thereby, safeguarding the dignity of the individual.²³ Clearly, this conception of what may be considered *social* dignity aligns more closely with the OED definition of dignity because it is a status that can be both gained and lost. Yet this extrinsic or social conception of human dignity is surely impoverished because it means that dignity, understood in this way, is always compromised by any form of disability or dependence. However, this cannot be correct: an individual can surely enjoy the quality of being ‘worthy’ or ‘honourable’ whilst living with disability or infirmity. It is clear that the word “dignity” is used in very different ways in the debate about assisted suicide and that some uses somewhat stretch the principal accepted meanings.

Some have argued, in response to this, that a subjective approach to dignity always needs to be adopted when discussing ways of dying; if a person *thinks* dying in a certain way lacks dignity then it would be undignified for that person to die in this way. ‘It is easy to

²² Margaret Somerville, *Death Talk: The Case against Euthanasia and Physician-Assisted Suicide* (McGill-Queen’s University Press, 2nd ed, 2014) xxviii.

²³ *Ibid.*

see why this is popular,' notes Christopher Coope, a moral philosopher, 'for it seems to by-pass our problems with definitions, and it has an attractive air of autonomy about it'.²⁴

III THE COMPASSION ARGUMENT

There can be little doubt that fears about a loss of extrinsic, or social dignity, have been fuelled, in part, by advances in medical technology that can allow people to live for far longer than in earlier times. In their arguments for people to be afforded relief from the ravages of technology, advocates of assisted suicide frequently appeal to compassion which often forms a very strong component of their case. There are two elements to the argument from the perspective of compassion.

The first element is that people who are terminally ill should not be forced to be kept alive against their wishes and should be permitted to die when they choose. This, however, fails to acknowledge the extremely important point that if faced with medical intervention — such as the use of a respirator or a therapy such as kidney dialysis which is intended only to sustain life and alleviate pain rather than cure an illness — any person has the right to refuse treatment, even though to do so may lead to an increased risk of death.

At first glance, the assertion of a right to refuse treatment looks very much like the assertion of a "right to die". This is especially so since proponents of assisted suicide frequently demand not only the discontinuance of treatment, but also positive assistance in dying by, say, a lethal dose of a drug administered either by a physician or the individual patient. As Somerville has argued, however, '[a] right to refuse treatment is based in a right to inviolability — a right not to be touched, including by treatment, without one's informed consent. It is not a right to die or a right to be killed.'²⁵ Although the call for the discontinuance of treatment looks very much like the assertion of a "right to die", it might also be described as the assertion of a "right to commit suicide" or a "right to become dead". According to Somerville, '[a]t most, people have a negative content right

²⁴ Christopher M Coope, 'Death with Dignity' (1997) 27(5) *Hastings Center Report* 37, 37.

²⁵ Donald Boudreau and Margaret Somerville, 'Euthanasia is Not Medical Treatment' (2013) 106 *British Medical Bulletin* 45, 60.

to be allowed to die, not any right to positive assistance to achieve that outcome'.²⁶ Perhaps it is more accurate to say a person is *free* to become dead.

Proponents of assisted suicide often insist there is no significant difference between deliberately withdrawing essential medical life support and deliberate intervention to bring about death because the outcome is the same.²⁷ However, there is a most significant difference. Letting a patient die at some point is a practical condition of the successful operation of modern medicine, as Yale Kamisar has observed. The same cannot be said of physician-assisted suicide:

To allow a patient to reject unwanted bodily intrusions by a physician is hardly the same thing as granting her a right to determine the time and manner of her death. The distinction between a right to resist invasive medical procedures and the right to [physician-assisted suicide] is a comprehensible one and a line maintained by almost all major Anglo-American medical associations.²⁸

The second element is that advocates for assisted suicide also profess to want to spare vulnerable patients who are experiencing what is usually described 'unbearable pain'. Yet available data suggests the experience of unbearable pain does not appear to be a principal reason why people seek assisted suicide.

The Oregon *Death with Dignity Act* ('DWDA') Data Summaries record in great detail those who have taken advantage of Oregon law's permission to end their lives by means of a voluntary self-administered lethal dose of medications.²⁹ As such, they are a reasonably reliable guide to what motivates people to seek a lethal dose. According to the 2017 DWDA Data Summary, 218 people in Oregon received prescriptions for lethal medications. As of January 2018, 143 people were reported to have died from ingesting the medication.³⁰ Of these, 21% gave inadequate pain control as their reason for seeking assisted suicide; for 37%, it was loss of control of bodily functions; for 55%, it was concern about becoming a burden on others; for 67%, the reason was loss of dignity; and

²⁶ *Ibid.*

²⁷ See, eg, James Rachels, 'Active and Passive Euthanasia' (1975) 292 *New England Journal of Medicine* 78.

²⁸ Yale Kamisar, 'The Reasons So Many People Support Physician-Assisted Suicide — And Why These Reasons Are Not Convincing' (1996) 12(2) *Issues in Law and Medicine* 113.

²⁹ *Death with Dignity Act*, Or Rev Stat § 127.800–127.897 (2017).

³⁰ Oregon Health Authority, 'Death with Dignity Act Annual Reports', *Oregon.gov* (Web Page, 9 February 2018) <<https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Pages/ar-index.aspx>>.

for 87%, it was a loss of the ability to engage in activities that make life enjoyable.³¹ If the DWDA report figures are representative of other places where assisted suicide is available, it would appear that relief from intolerable pain is the reason for seeking assistance in only a minority of cases. Anxiety about the loss of ability to participate in society and loss of autonomy are by far the more prevalent reasons.

The fact that few people appear to seek a lethal dose because of intolerable pain surely undermines the arguments based on compassion that are advanced by proponents. Critics such as Kevin Yuill are quite sceptical about the compassion argument, arguing that '[m]uch of what passes for compassion is simply reflected fear on the part of those with little prospect of death in the immediate future. [It] is really self-centred fear for one's own prospects.'³² It seems then, that flaws in the argument from the perspective of compassion arise, in part, because of its close association with the problematic concept of "dignity" to which proponents of assisted suicide appeal. Notwithstanding the problems identified earlier with the analysis of dignity, Somerville's account is nonetheless helpful because it lays bare the subjective element of the responses of individuals to the prospect of death.

Thus, when people advocating for the legalisation of assisted suicide appeal to "dignity", the dignity to which they most frequently seem to refer, and which it is held to be important to retain, does appear to be the *social* dignity of independence and capacity rather than the intrinsic *human* dignity that comes simply from the fact of human *being*. This conclusion is supported by successive DWDA Data Summaries.

IV A DIGNIFIED DEATH?

If the meaning of "death with dignity" is to be entirely subjective, dying without dignity will simply be a felt experience. It will commit us to hold that merely for a dying person to *think* they were dying without dignity would mean they actually *were* dying in such a manner. Concern for addressing the "felt" experience of lost social dignity by the patient lies behind the emergence of a form of psychotherapeutic intervention known as 'dignity

³¹ *Ibid.*

³² Kevin Yuill, *Assisted Suicide: The Liberal, Humanist Case against Legalization* (Palgrave Macmillan, Kindle edition, 2013) 43.

therapy' pioneered by psychiatrist Harvey Max Chochinov.³³ Dignity therapy seeks to mitigate against a loss of social dignity and helps patients to see that ingesting a lethal dose of medication is not the best way to restore that dignity. For opponents of legalised euthanasia and physician-assisted suicide, such as Somerville, dignity therapy offers their case significant weight:

[Dignity therapy] identifies the reasons people want euthanasia, explains why many of them change their minds, and describes in personal detail what they and others would have lost if [physician-assisted suicide and euthanasia] were available. Dignity therapy can assist health-care professionals to help patients at the end of their lives who see their circumstances as unbearable and have lost a "why" to re-find one.³⁴

The notion of "dying with dignity", which is advocated by proponents of euthanasia and physician-assisted suicide, really appears to reflect a state of *pre-mortem* anxiety and loneliness that can beset the terminally ill; a lethal injection which cuts life short is hardly an appropriate way to address this experience of distress or despair. Dignity therapy, increasingly available as a component of palliative care in Australia, enables the terminally ill to reclaim their identity and sense of social dignity.

Death happens to everyone. While it is certainly true that one can die in undignified circumstances — by execution or torture, for example — such a death can, at the same time, surely be a dignified one if the person confronting death does so with a certain spirit of worthiness, nobleness, and honour. External circumstances do not determine the dignity with which death is met. Indeed, it is difficult to understand how the sort of death that occurs naturally can be either dignified or undignified, as Leon Kass has observed:

A death with dignity — which may turn out to be something rare or uncommon even under the best circumstances — entails more than the absence of external indignities. Dignity in the face of death cannot be given or conferred from the outside but requires a dignity of soul in the human being who faces it.³⁵

³³ See, eg, Harvey Max Chochinov, *Dignity Therapy* (Oxford, 2012).

³⁴ I am grateful to an anonymous referee for drawing Dignity Therapy to my attention, and for referring me to Margaret Somerville's remarks about Dignity Therapy: Margaret Somerville, 'Dr Harvey's Must-Read Book Unpacks What Dignity Means', *Catholic Weekly*, (online, 8 June 2017) <<https://www.catholicweekly.com.au/margaret-somerville-dr-harveys-must-read-book-unpacks-what-dignity-means>>.

³⁵ Leon R Kass, 'Averting One's Eyes, or Facing the Music?: On Dignity in Death' (1974) 2(2) *Hastings Center Studies* 67, 70.

Dignity in the face of death is a possibility for everyone as they die; it is something that depends on the character and bearing of the individual who is dying. The phrase “dying with dignity”, as it is deployed by proponents of legalising assisted suicide, is thereby exposed as meaning preciously little. It is used to describe the state that precedes death rather than the death itself.

Once the categories of eligibility for assisted suicide and voluntary euthanasia extend beyond terminal illness and the experience of ‘unbearable suffering’ — as they already have done in the case of David Goodall — the dignity ascribed to the *pre-mortem* state will, soon enough, turn upon the human conditions of vulnerability, weakness, and infirmity.

In the twentieth century, we have witnessed the consequences of the profound contempt shown, at times, for the weak and the infirm. Now it is important to affirm that those very human conditions do not become the pretext for arguing that a point can be reached when a life is no longer worth living.

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WEST PAPUA EXPOSED: AN ABANDONED NON-SELF-GOVERNING OR TRUST TERRITORY*

JULIAN MCKINLAY KING** WITH ANDREW JOHNSON***

This paper examines the shift in legal status that should have occurred, under the United Nations ('UN') Charter, with the transfer of West Papua from the Netherlands to the United Nations in 1962 via the 'Indonesia and Netherlands Agreement (with annex) concerning West New Guinea (West Irian)'. It advances that this agreement must be a Trusteeship Agreement shifting West Papua's legal status from a Non-Self-Governing Territory of the Netherlands to a Trust Territory of the United Nations. As such, the United Nations via the Trusteeship Council was, and remains, responsible to ensure the West Papuan people attain self-government or independence as required under Article 76(b) of the Charter. The argument is based upon Chapters XI, XII, and XIII of the UN Charter governing decolonisation and is further supported by admissions contained in now-declassified secret American, Australian, and United Nations documents from the period. A legal path to assist the people of West Papua to attain their rightful independence is also advanced utilising the Rules of Procedure of the Trusteeship Council where any UN Member can add an agenda item, and inhabitants from the Territory or other parties can present petitions, to draw the Council's attention to a breach of the International Trusteeship System. This will allow the Trusteeship Council to seek an advisory opinion

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** Julian McKinlay King is a member of the West Papua Project Steering Committee at the Department of Peace and Conflict Studies, University of Sydney; advisor to the United Liberation Movement for West Papua and Groups Revolutionnaires Koutumiers Kanaks; and former assistant to the late Dr Otto Ondawame. He holds a master's degree in Social Anthropology and completed doctoral research on the United Nations Transitional Administration in East Timor where an alleged attempt was made on his life by the United Nations Security Forces before being framed as a terrorist by the Horta-Alkateri-Lobato government and subsequently exonerated. Julian is recommencing doctoral research at the University of Sydney.

*** Andrew Johnson is also an advisor to the United Liberation Movement for West Papua, has conducted research on behalf of the late Dr John Otto Ondawame, and is Founder of the online websites West Papua Information Kit and Colony of West Papua.

from the International Court of Justice as available under Article 96 of the UN Charter and authorised by General Assembly Resolution 171(III) Part B. This legal opinion should also empower the World community to come to the assistance of the West Papuan people as encouraged under General Assembly Resolution 2621(XXV).

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I INTRODUCTION AND BACKGROUND

This paper argues that the *Agreement (with annex) concerning West New Guinea (West Irian)* between Indonesia and the Netherlands ('*Agreement*'), including an accompanying agreement titled *United Nations and Indonesia and Netherlands: Understandings relating to the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*,¹ with respect to international law governed by the *Charter of the United Nations* ('*Charter*'), constitutes a United Nations Trusteeship and advances that West Papua remains a Non-Self-Governing or Trust Territory,² under Indonesian occupation.³ While the *Agreement* is recorded in Volume 437 of the *United Nations Treaty Series* ('UNTS'),⁴ a disclaimer by the Secretariat states that '[t]he terms "treaty" and "international agreement" have not been defined either in the Charter or in the regulations, and the Secretariat follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration'.⁵ The legal status of the *Agreement*, according to the United Nations ('UN') Secretariat, is therefore undefined.

Prior to European colonisation, the island archipelagos of south-east Asia and the Pacific were a vast array of autonomous indigenous tribal groups, chiefdoms, and kingdoms. The Netherlands' colonies extended from the Dayak tribes of Borneo and Batak tribes of Sumatra almost 7,000 kilometres east to the Melanesian tribes of Papua. The borders separating these colonial territories were often arbitrary (straight) lines that dissected

¹ *Agreement (with annex) concerning West New Guinea (West Irian)*, Indonesia–Netherlands, signed 15 August 1962, 437 UNTS 6311 (entered into force 21 September 1962); *United Nations and Indonesia and Netherlands: Understandings relating to the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, 437 UNTS 6312 (registered ex officio 21 September 1962) ('*Understandings relating to the Agreement*').

² West Papua is located on the western side of the island of New Guinea (also known as Papua) and was formally known as West New Guinea, then listed as Netherlands New Guinea in the 1951 revised list of Dutch territories prior to Territory's transfer to the United Nations in 1962.

³ The notion that the *Agreement* is a Trusteeship Agreement was first raised by Andrew Johnson in discussions with Julian McKinlay King in 2012. While Andrew has provided valuable material and critique, the text is entirely the responsibility of the author. The author also acknowledges his supervisors, Dr Wendy Lambourne and Emeritus Professor Stephen Hill for their review and critique of this text.

⁴ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1).

⁵ 'Note by the Secretariat', *Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations* (Web Page, 1962) <<https://treaties.un.org/doc/Publication/UNTS/Volume%20437/v437.pdf>>.

local indigenous tribal groups and their territories. In the case of the Dutch East Indies, such occurred on the islands of Borneo, Timor, and Papua.

Following the creation of the *Charter* in 1945, colonial territories were designated Non-Self-Governing Territories with the sovereign colonial power accepting a 'sacred trust' to deliver a 'full measure of self-government' to the inhabitants.⁶

At the completion of the Pacific War, the Netherlands was unsuccessful in re-establishing authority over the Dutch East Indies where predominantly Javanese militants, with the support of deserting Japanese soldiers and military hardware,⁷ were forcefully taking control across the island archipelago.⁸ These amalgamated Territories gained United Nations recognition in 1949 as the United States of Indonesia,⁹ but within one year they succumbed to be incorporated into the Republic of Indonesia,¹⁰ under a quasi-military dictatorship led by Sukarno.¹¹

West Papua and East Timor, however, remained Non-Self-Governing Territories under the sovereignty of the Netherlands and Portugal respectively. The Netherlands was liaising with Australia (who held the eastern side of Papua) with a view to reunite the Papuan people. In 1957, the *Joint Netherlands/Australian Statement* recognised that the people in the Papuan territories are 'geographically and ethnologically related' with the Netherlands and Australia agreeing to strengthen cooperation between these territories 'until such time as their inhabitants ... will be in a position to determine their own future',¹² including the possibility of being re-united as one nation.¹³

⁶ *Charter of the United Nations* ch XI art 73.

⁷ Christine T Tjandraningsih, 'Japanese Recounts Role Fighting to Free Indonesia', *The Japanese Times* (online, 9 September 2009) <<https://www.japantimes.co.jp/news/2009/09/09/national/japanese-recounts-role-fighting-to-free-indonesia/#.WecmCExL1Jk>>.

⁸ John S Bowers, 'Japanese Nationalists Prepare to Make Guerrilla War on Dutchmen, Former Masters', *The Berkshire Eagle* (Pittsfield, Massachusetts, 15 September 1945) 1.

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¹⁰ 'Indonesia Drops Federation; It's a Unitary State — Soekarno Proclaims Centralized Rule', *Chicago Daily Tribune* (Chicago, 15 August 1950) 13.

¹¹ While Sukarno was never a military soldier and the Indonesian Parliament consisted of multi-party civilian cabinets, he nonetheless maintained a quasi-military-dictatorship until his replacement in 1967 by General Suharto.

¹² Note, 'Joint Netherlands/Australian Statement' (1957) 28(11) *Current Notes on International Affairs* 888.

¹³ 'Special Study on New Guinea', *National Archives of Australia* (Web Page, 1958) pt 3, 201 <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/ViewImage.aspx?B=558075>>.

By 1961, the Netherlands had created the New Guinea Council — the first national Papuan people’s representative body — to assist with the planning towards independence. On 19 October 1961, the New Guinea Council proclaimed to the world the people’s desire to become a new nation called West Papua.¹⁴ This was followed by the inaugural raising of the West Papuan flag alongside that of the Netherlands on 1 December 1961 as the people of West Papua strode confidently along the path to independence which, in agreement with the Netherlands, was set to be declared on 1 December 1970.¹⁵

Sukarno, however, claimed the Territory of West Papua was part of Indonesia simply on the basis that it was a Dutch colony and, while the vast majority of Indonesians at the time ‘do not know where [West Papua] is and are not interested in it’,¹⁶ the issue was an ‘obsession’ for Sukarno.¹⁷ The Netherlands offered to have the dispute resolved by the International Court of Justice (‘ICJ’) ¹⁸ as ‘the principle judicial organ of the United Nations’.¹⁹ However, Indonesia rejected this legally binding solution arguing that the dispute was ‘political rather than juridical’.²⁰ With separatist movements across the archipelago seeking to break away from Sukarno’s quasi-dictatorship,²¹ the issue of West Papua was used by Sukarno as ‘a rallying point for national unity’.²²

Numerous Indonesian military incursions into West Papua leading up to the *Agreement* were repulsed by the Netherlands.²³ Indonesia’s threat of alignment with the communist

¹⁴ ‘Colony’s Name Changed’, *New York Times* (Chicago, 1 December 1961).

¹⁵ *Land of the Morning Star* (Film Australia, 2003) 0:17:17.

¹⁶ ‘Inward Cablegram from Australian Embassy Djakarta’, *National Archives of Australia* (Web Page, 10 July 1958) pt 3, 99

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

¹⁷ ‘Inward Cablegram from Australian from Embassy Washington’, *National Archives of Australia* (Web Page, 22 July 1958) pt 3, 73

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¹⁸ *The Question of West Irian (West New Guinea)*, UN GAOR, 509th plen mtg, Agenda Item 61, UN Doc A/2831 (10 December 1954) para 102.

¹⁹ *Charter of the United Nations* ch XIV art 92.

²⁰ ‘Situation Report No 47’, *National Archives of Australia* (Web Page, 7 August 1958) pt 3, 16

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

²¹ ‘The Likelihood of Indonesia Gaining Control of West New Guinea’, *National Archives of Australia* (Web Page, 7 March 1957) pt 3, 296

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

²² ‘Situation Report No 47’ (n 20) pt 3, 16.

²³ ‘Indonesian Troops Infiltrate into New Guinea Area’, *The Palladium-Item* (Richmond, Indiana, 20 September 1961).

Soviet Union, however, was used by America to coerce the Netherlands to relinquish the Territory.²⁴ This only occurred, however, after the Netherlands attempted to have the United Nations take over the Territory in 1961 via a United Nations Trusteeship in order to ‘relinquish sovereignty to the people of Netherlands New Guinea’.²⁵ This proposal, however, failed to gain the required two-thirds majority in the General Assembly due to the Cold War and religious affiliations taking precedence over the legal rights of the West Papuan people. While the United Nations Secretariat was responsible for numerous breaches in relation to the *Agreement*,²⁶ as will be touched on below, this paper is concerned principally with the Territory’s *legal status* under the *Charter* following the transfer of administration from the Netherlands to the United Nations in 1962.

We will now examine West Papua’s legal status under the *Charter* — initially under the sovereignty of the Netherlands as a registered Non-Self-Governing Territory, then under the administration of the United Nations (and subsequently Indonesia) — and how the international law of the *Charter* and associated General Assembly Resolutions may apply.

II THE LEGAL STATUS OF WEST PAPUA UNDER INTERNATIONAL LAW

A West Papua as a Non-Self-Governing Territory

Chapter XI of the *Charter* governs Non-Self-Governing Territories ‘whose peoples have not yet attained a full measure of self-government’.²⁷ As confirmed in the United Nations list of Non-Self-Governing Territories,²⁸ this was the legal status of West Papua under the *Charter* prior to the transfer of the Territory to the United Nations. Article 73e of Chapter XI requires Members of the United Nations who assume responsibility for Non-Self-Governing Territories

²⁴ Letter from United States President JF Kennedy to Netherlands Prime Minister Dr J E de Quay, 2 April 1962, reproduced in *Free West Papua Campaign* (Web Page) <<https://www.freewestpapua.org/documents/secret-letter-from-john-f-kennedy-to-the-prime-minister-of-the-netherlands-2nd-april-1962/>>.

²⁵ *General Debate*, UN GAOR, 1016th plen mtg, Agenda Item 9, UN Doc A/PV.1016 (26 September 1961) 90 para 16.

²⁶ See, eg, John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969: The Anatomy of Betrayal* (Taylor & Francis, 2004).

²⁷ *Charter of the United Nations* ch XI art 73.

²⁸ See, eg, *Non-Self-Governing Territories: Summaries of Information Transmitted to the Secretary-General for the Year 1960*, UN Doc ST/TRI/SER.A/19 (1963).

to transmit regularly to the Secretary-General for information purposes ... statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.²⁹

The Netherlands fulfilled this legal requirement and reported yearly on its progress towards delivering 'a full measurement of self-government' up until the Territory's administration was transferred to the United Nations in 1962.³⁰

By way of example, the Netherlands 1961 report to the Secretary-General in accordance with Article 73e highlights the progress being made towards delivering a 'full measure of self-government' to the people of West Papua and planned independence. It describes how

the institution of the New Guinea Council has had a catalytic effect on the political awakening of the population of the Territory ... evident from the fact that ... the population resolved: 1. to call themselves Papuans and to refer to their country as West Papua; 2. to design a flag of their own (the design of which was laid down by ordinance) and 3. to adopt a national anthem to be played on official occasions after the Netherlands national anthem.

At the same time the need was felt to give expression abroad, too, to the newly gained awareness of national identity. The Netherlands Government met this expression of awakening national consciousness by including Papuans in the Netherlands delegations to sessions of the General Assembly of the United Nations, of the South Pacific Commission and of the International Labour Conference, and in other ways.³¹

The report also details the decentralised system of governance being implemented across the Territory, reflecting the hundreds of autonomous Melanesian tribes with their vast array of language groups, tribal grounds, local laws, and customs. Apart from the national body of the New Guinea Council, Regional Councils were established and, within these, any number of Village Councils with representation determined by direct local election.³²

²⁹ *Charter of the United Nations* ch XI art 73e.

³⁰ *Information from Non-Self-Governing Territories: Summaries of Information Transmitted under Article 73e of the Charter of the United Nations*, UN Doc A/5081 (15 March 1962).

³¹ Ministry of Home Affairs and Ministry of Foreign Affairs, Kingdom of the Netherlands, *Report on Netherlands New Guinea for the Year 1961: Presented to the Secretary General of the United Nations pursuant to Article 73(e) of the Charter* (Report, 1961) a ('*Report on Netherlands New Guinea for the Year 1961*').

³² *Ibid* 12.

Prior to the transfer of the Territory to the United Nations, the West Papuan people, with the assistance of the Netherlands, were creating their own unique form of indigenous 'self-government' and were firmly on the path to independence.³³

As detailed above, Article 73e of Chapter XI governing Non-Self-Governing Territories states that the obligation to report to the United Nations applies to territories 'other than those territories to which Chapters XII and XIII apply'.³⁴ These specific chapters apply to the International Trusteeship System and the Trusteeship Council respectively. The International Trusteeship System governs 'the administration and supervision of such territories as may be placed thereunder by subsequent agreements. These territories are hereinafter referred to as trust territories.'³⁵ Thus, the cessation of reporting under Article 73e by the Netherlands in 1962 was permissible only when Chapters XII and XIII applied: when the Non-Self-Governing Territory became subject to the International Trusteeship System. The Netherlands ceased its legal obligation to transmit regularly to the Secretary-General in accordance with Article 73e upon the transfer of the Territory to the United Nations in 1962 and as directed by the aide memoir from the Acting Secretary-General contained in Part IV of the *Agreement* between the United Nations, Indonesia, and the Netherlands.³⁶

The *Agreement* — where 'the Netherlands ... transfer[red] administration of the territory to a United Nations Temporary Executive Authority (UNTEA)'³⁷ — and the accompanying *ex officio* agreement between the United Nations, Indonesia, and the Netherlands ended the Netherlands' legal obligation to report to the Secretary General under Article 73e.³⁸ The *Agreement* thus shifted West Papua's *legal status* from a Non-Self-Governing Territory of the Netherlands to a Trust Territory of the United Nations. Under international law governed by the *Charter*, no alternative is available.

The details of Chapters XII and XIII governing the International Trusteeship System will now be examined in relation to the transfer of the Territory to the United Nations via the *Agreement*.

³³ *Charter of the United Nations* ch XI art 73.

³⁴ *Charter of the United Nations* ch XI art 73e.

³⁵ *Ibid* art 75.

³⁶ *Understandings relating to the Agreement* (n 1).

³⁷ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) art II.

³⁸ *Understandings relating to the Agreement* (n 1) pt IV.

B *West Papua as a Trust Territory*

Article 76 of Chapter XII details the basic objectives of the International Trusteeship System which include

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.³⁹

Chapter XII of the *Charter* thus reinforces the principles of decolonisation requiring trustees of Trust Territories to deliver ‘self-government or independence’. The option provided to the West Papuan people in the *Agreement*, ‘to decide (a) whether they wish to remain with Indonesia; or (b) whether they wish to sever their ties with Indonesia’,⁴⁰ thus fails to satisfy the legal obligation under the *Charter* to deliver ‘self-government or independence’.

The International Trusteeship System applies to ‘territories voluntarily placed under the system by states responsible for their administration’.⁴¹ The Kingdom of the Netherlands, in this instance, ‘voluntarily placed’ the inhabitants under the care of the United Nations.

The International Trusteeship System requires that the ‘terms of trusteeship for each territory to be placed under the trusteeship system ... shall be agreed upon by the states directly concerned’.⁴² The terms of the *Agreement* were agreed upon by ‘the states directly concerned’ — the United Nations, the Netherlands, and Indonesia — and was thus in compliance with the International Trusteeship System.

Under the terms of the *Agreement*,⁴³ the United Nations took over administration of West Papua as is only available under Article 81 of the International Trusteeship System which states:

³⁹ *Charter of the United Nations* ch XI art 76b.

⁴⁰ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) art XVIII.

⁴¹ *Charter of the United Nations* ch XI art 77c.

⁴² *Charter of the United Nations* ch XI art 79.

⁴³ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) art II.

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the 'Organisation itself'.

The United Nations, the 'Organisation itself', thus became the 'administering authority' of West Papua with the legal obligation under Article 76 of the *Charter* to deliver 'self-government or independence'. The transfer of sovereignty over a Non-Self-Governing Territory or Trust Territory to another UN Member is not available under Chapters XI, XII, and XIII governing decolonisation nor elsewhere in the *Charter*.

Finally, Article 85 of Chapter XII governing the International Trusteeship System requires that:

- 1 The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
- 2 The Trusteeship Council, operating under the authority of the General Assembly shall assist the General Assembly in carrying out these functions.⁴⁴

As required under Article 85, the terms of the *Agreement* were put before the General Assembly for adoption on 21 September 1962 via draft resolution;⁴⁵ however, the accompanying agreement between the United Nations, Indonesia, and Netherlands was interestingly omitted.⁴⁶ Without opportunity for discussion or debate,⁴⁷ the draft was voted on and adopted as General Assembly Resolution 1752(XVII), which (1) 'takes note of the Agreement'; (2) 'acknowledges the role conferred upon the Secretary-General in the Agreement'; and (3) 'authorizes the Secretary-General to carry out the tasks entrusted to him in the Agreement'.⁴⁸

⁴⁴ *Charter of the United Nations* art 85.

⁴⁵ *Draft Resolution — Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, UN Doc A/L.393 (21 September 1962).

⁴⁶ *Understandings relating to the Agreement* (n 1).

⁴⁷ *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, GA Res 1752(XVII), UN Doc A/RES/1752 (21 September 1962) para 171.

⁴⁸ *Ibid* art 1.

According to the UN, ‘takes note’ is a ‘neutral term and does not indicate approval or disapproval’.⁴⁹ However, the third component of Resolution 1752(XVII) ‘*authorizes* the Secretary-General to carry out the tasks entrusted to him’ and thus approves *only* those tasks to be undertaken by the Secretary-General within the terms of the *Agreement*.

Following criticism of the terms and implementation of the *Agreement* in the General Assembly in 1969, Indonesia argued that the *Agreement* — affecting the future of a Non-Self-Governing Territory — did not require the ‘approval’ of the United Nations:

And let us be clear, no approval of any kind is required or requested either of the Agreement itself or of the Secretary-General’s report ... Members of the Assembly may, of course, like or dislike the Indonesia-Netherlands Agreement of 1962 ... They are of course free to do so although it is, a matter of fact, not their Agreement.⁵⁰

Clearly under Article 85 of the *Charter*, approval *is* required for an agreement that makes the United Nations, ‘the Organisation itself’, trustee of a Non-Self-Governing Territory. While the terms of the *Agreement* were questioned by many UN Members at the time,⁵¹ and further critiqued by legal and other scholars,⁵² the transfer of administration over a Non-Self-Governing Territory that has not yet gained ‘a full measure of self-government’ is only available to ‘territories to which Chapters XII and XIII apply’ and thus only via a Trusteeship Agreement.⁵³

Consulting the Yearbook of the United Nations for 1963, ‘Netherlands New Guinea’ no longer appears in the list of Non-Self-Governing Territories subject to Article 73e reporting requirements, therefore confirming *a shift in legal status* for the Territory.⁵⁴ Resolution 1752 (XVII) thus created a Trust Territory of the United Nations.

The alternative legal position is to suggest the terms of the *Agreement* were never ‘approved’ by the General Assembly, and it is therefore illegal. As such, West Papua

⁴⁹ Nicole Ruder, Kenju Nakano and Johann Aeschlimann, Permanent Mission of Switzerland to the UN, *The PGA Handbook: A Practical Guide to the United Nations General Assembly* (2011) 46.

⁵⁰ UN GAOR, 1813th plen mtg, Agenda Item 98, UN Doc A/PV.1813 (19 November 1969) paras 96–7.

⁵¹ See, eg, arguments made in the 1127th and 1810th General Assembly plenary meetings.

⁵² See, eg, Melinda Janki, ‘West Papua and the Right to Self-Determination under International Law’ (2010) 34(1) *West Indian Law Journal* 1; Saltford (n 26); See also Pieter Drooglever, *An Act of Free Choice: Decolonisation and the Right to Self-Determination in West Papua* (One World Publications, 2010).

⁵³ *Charter of the United Nations* arts 73, 73(3).

⁵⁴ ‘The Trusteeship System and Non-Self-Governing Territories’ [1963] *The Yearbook of the United Nations* 435.

remains a Non-Self-Governing Territory abandoned by the Netherlands and invaded by the United Nations Security Force (and subsequently the Indonesian armed forces). Only the ICJ is authorised to provide clarification, as will be detailed later in this paper.

C The Role of the Trusteeship Council

The Trusteeship Council is one of the six principal organs of the United Nations and is governed by Chapter XIII of the *Charter*.⁵⁵ The Trusteeship Council, under the authority of the General Assembly,⁵⁶ may assist in the formulation of Trusteeship Agreements and must provide questionnaires to the Administering Authority of Trust Territories,⁵⁷ in order that the General Assembly is informed on a yearly basis of the ongoing progress towards ‘self-government or independence’ as required under the International Trusteeship System.⁵⁸

Since the General Assembly was not made aware of the legal status of the *Agreement* — a draft Trusteeship Agreement where the United Nations was to become the Administering Authority — the Trusteeship Council was not engaged by the Secretary-General to assist in the formulation of the terms of the *Agreement* and prepare a questionnaire for the ‘Organisation itself’ to report on ‘the political, economic, social, and educational advancement of the inhabitants’ as required under Article 88 of Chapter XIII.⁵⁹

The Netherlands’ report to the Secretary-General in 1961, in compliance with Article 73e detailing the ‘awakening national consciousness’ and unique decentralised system of indigenous representation,⁶⁰ was therefore the last official report on the progress of decolonisation in West Papua to this day. The United Nations as the new Administering Authority (and subsequently Indonesia) failed to provide an annual report to the United Nations detailing ongoing progress towards ‘self-government or independence’ as required for all Non-Self-Governing Territories and Trust Territories alike.⁶¹

⁵⁵ *Charter of the United Nations* ch III art 7.

⁵⁶ *Charter of the United Nations* ch XIII art 85.

⁵⁷ *Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/1/Rev.7 (1995) r 101.

⁵⁸ *Charter of the United Nations* ch XIII art 88.

⁵⁹ Under Article 98 of Chapter XV of the *Charter* governing the role of the UN Secretariat, the Secretary-General is responsible for the administration ‘of the General Assembly, of the Security Council, of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs’.

⁶⁰ *Report on Netherlands New Guinea for the Year 1961* (n 31) a.

⁶¹ *Charter of the United Nations* ch XIII art 88.

The only available options are ‘a full measure of self-government’ under Chapter XI governing Non-Self-Governing Territories (unless subjected to Chapters XII and XIII) or ‘self-government or independence’ under Chapter XII governing Trust Territories.⁶² Neither occurred.

D General Assembly Resolution 1514(XV)

General Assembly Resolution 1514(XV), titled *Declaration on the Granting of Independence to Countries and Peoples*, was declared on 14 December 1960 when it was deemed necessary by Members of the United Nations to strengthen and accelerate the decolonisation of Non-Self-Governing and Trust Territories.⁶³ Part 5 of General Assembly Resolution 1514(XV) states:

Immediate steps shall be taken in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories without any conditions or reservations in accordance with their freely expressed will and desire, without any discretion as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.⁶⁴

Therefore, regardless of whether West Papua is a Non-Self-Governing Territory under Chapter XI of the *Charter*, a Trust Territory under Chapter XII of the *Charter*, or any other form of territory, Resolution 1514(XV) requires ‘immediate steps’ be taken to ‘transfer all powers’ to the people so they can enjoy ‘complete independence and freedom’.

E General Assembly Resolution 1541(XV)

Given the General Assembly was not made aware of West Papua’s shift in legal status via the *Agreement*, West Papua should have remained a Non-Self-Governing Territory in the eyes of the United Nations Secretariat and the General Assembly. By taking over administration of the Territory, the United Nations therefore became responsible to ‘transmit information’ to the Secretary-General under Article 73e even if a shift in legal status was unrecognised at the time.

⁶² *Charter of the United Nations* ch XIII arts 73, 88.

⁶³ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), UN Doc A/RES/1514 (20 December 1960).

⁶⁴ *Ibid* para 15.

The shift in West Papua's legal status — from a Non-Self-Governing Territory to a Trust Territory — was not raised by the Netherlands or any other Member prior to its introduction to the General Assembly and adoption via Resolution 1752(XV).⁶⁵ It was, however, raised by Sir Garfield Barwick, representing Australia, immediately after its adoption in 1962. He stated:

Australia looks to the United Nations to perform its proper functions under the Agreement, and to Indonesia to place the welfare of the Papuans above all other considerations in its administration of the Territory — whatever the proper status of the Territory in relation to the Charter might be — a matter into which there is no present need to enter.⁶⁶

Clearly Australia was aware that the *Agreement* altered West Papua's legal 'status ... in relation to the *Charter*' but given the United Nations was entrusted to 'perform its proper functions' — the delivery of 'self-governance or independence' — Australia did not see any reason to raise the issue *at that time*.

General Assembly Resolution 1541(XV) provides clarification on the reporting requirements under Article 73e for administrators of Non-Self-Governing Territories, with Principle II stating:

Chapter XI of the *Charter* embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government'. As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.⁶⁷

Since the people of West Papua had not yet reached a 'full measure of self-government', the United Nations (and subsequently Indonesia) was required to transmit information under Article 73e. Neither administration did so. Principle III of Resolution 1541(XV) states that failing to satisfy the obligation to transmit information under Article 73e is a

⁶⁵ *Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter*, UN Doc A/Res/1541 (15 December 1960) ('*Principles*').

⁶⁶ UN GAOR, 1127th plen mtg, Agenda Item 89, UN Doc A/PV.1127 (21 September 1962) para 223.

⁶⁷ *Principles* (n 65).

breach 'of international law'.⁶⁸ The United Nations and Indonesia are thus in breach of international law.

Principle IV states:

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and distinct ethnically and/or culturally from the country administering it.⁶⁹

The animist Melanesian people of West Papua are both ethnically and culturally distinct from the 'Organisation itself' and the predominantly Javanese Muslim military who control Indonesia. Therefore, Principle IV demands that the obligation to transmit information continues under the new administration.

Principle V states that while other elements may be brought into consideration, including those that are 'administrative, political, juridical, economic, or historical' in nature,

[i]f they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the *Charter*.⁷⁰

While Indonesia's claim to West Papua was based upon it being a colonial territory of the Netherlands and that the dispute was of 'national unity' and therefore 'political' in nature,⁷¹ the relationship between the metropolitan State and the Territory put the latter in a clear position of 'subordination'. The legal obligation to report yearly to the Secretary-General therefore continued under Principle V.

Principle VI provides a definition for when the West Papuan people have 'reached a full measure of self-government'. Three options are available:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ UN GAOR, 1127th plen mtg, Agenda Item 89, UN Doc A/PV.1127 (21 September 1962) para 117.

(c) Integration with an independent State.⁷²

While the inhabitants of the Territory had already declared to the world their decision to embrace option (a) with a name, national flag, and national anthem already declared, the Indonesian dictator was obsessed with option (c).

Principle IX regarding integration requires that the Territory's inhabitants act

with full knowledge of the change of their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.⁷³

While most of the West Papuan people — estimates of 85% to 90% — were opposed to being integrated with Indonesia,⁷⁴ the *Agreement* did not provide 'universal adult suffrage', thus in clear violation of Principle IX of General Assembly Resolution 1541(XV).

Though not the principle subject of this paper, far greater analysis of how the *Act of Free Choice* and the *Agreement* fails international law is provided by Pieter Drooglever and John Saltford.⁷⁵

III DECLASSIFIED DOCUMENTS CONFIRM A PROPOSED TRUSTEESHIP

Over the years, the United Nations Secretariat and the governments involved have released secret documents from the period, which describe the transfer of West Papua to the United Nations (and subsequently Indonesia) as having occurred via a proposed trusteeship. Examples from the archives of the United States of America, Australia, and the United Nations are provided below.

⁷² *Principles* (n 64).

⁷³ *Ibid.*

⁷⁴ Airgram from American Embassy Djakarta to Department of State, 'West Irian: The Nature of the Opposition', 9 July 1969 <<http://nsarchive2.gwu.edu//NSAEPP/NSAEPP128/29.%20Airgram%20A-278%20from%20Jakarta%20to%20State%20Department,%20July%209,%201969.pdf>>.

⁷⁵ Drooglever (n 52); Saltford (n 26).

A Declassified American Government Records

A now-declassified secret despatch from the American Embassy in Indonesia to the Department of State, titled 'A Proposal for Settlement of the West New Guinea Dispute', reveals America's role in the transfer of West Papua to Indonesia. It reads:

[T]he Embassy submits a specific proposal for settlement of the West New Guinea dispute ... [envisaging] a special United Nations trusteeship over the territory for a limited number of years, at the end of which time sovereignty would be turned over to Indonesia.⁷⁶

A now-declassified telegram from America's embassy in Indonesia to the Department of State describes discussions with Indonesian officials and how Indonesia

once contended that UN trusteeship would be anathema under any circumstances ... [and], although they have not gone so far as to be willing to call a trusteeship a trusteeship, they talk in terms of "one or two years" of some kind of interregnum as being acceptable.⁷⁷

Revealed is America's covert negotiations with Indonesia who — already aware that any proposed Trusteeship would invoke the Trusteeship Council and the relevant articles of Chapters XII and XIII of the *Charter* — simply refused 'to call a trusteeship a trusteeship'.⁷⁸

Recently declassified files from the John F Kennedy Library reveal the plan was approved at the highest level. A proposed option put to the American president in April 1961 states:

The US might support a direct UN-administered trusteeship for New Guinea. As advanced in a State paper of February 15, this proposal contained no suggestion of a terminal date for the trusteeship. Though such a solution would be perhaps acceptable to the Dutch, it is highly unlikely that it would be acceptable to the Indonesians who have indicated that they would agree to a trusteeship only for a maximum of one year and then only with an a priori determination that at the end of the year the territory would become part of Indonesia ... A trusteeship which was terminated at a definite and early date by a self-determination plebiscite would be a somewhat more feasible alternative. It would provide

⁷⁶ Despatch from the Embassy in Indonesia to the Department of State, 'A Proposal for Settlement of the West New Guinea Dispute', 26 May 1959, reproduced in *Office of the Historian* (Web Page) <<https://history.state.gov/historicaldocuments/frus1958-60v17/d203>>.

⁷⁷ Telegram from the Embassy in Indonesia to the Department of State, 3 March 1961, reproduced in *Office of the Historian* (Web Page) <<https://history.state.gov/historicaldocuments/frus1961-63v23/d150>>.

⁷⁸ *Ibid.*

a face-saving approach for the Dutch and satisfy their demand for self-determination by the Papuans. At the same time, if the Indonesians were given full access to the Papuans during the period of the trusteeship, it would offer them the hope of early acquisition of the territory ... [S]ome version of such an approach may offer the best façade behind which a turnover to the Indonesians could be effected.⁷⁹

The 'façade' described above, in order to deliver West Papua to Indonesia, became reality the following year via the United Nations sponsored Bunker agreement.⁸⁰ The former secret documents cited above evidence America's shift in foreign policy to support Indonesia's (illegal) claim to West Papua, the covert negotiations with Indonesia, and the disclosure that the transfer of this Non-Self-Governing Territory to the United Nations came about via a trusteeship. America accommodated Indonesia's demands not to 'call a trusteeship a trusteeship'.⁸¹

B Declassified Australian Government Records

A declassified cable from the Australian Embassy in Washington to the Prime Minister of Australia in 1958, titled *Future Policy on New Guinea*, reads:

Most satisfactory arrangement from our point of view would be presumably an Australian Trusteeship over West New Guinea. But as a question of practical politics this seems clearly enough ruled out. Even if it could be got through the United Nations it would probably be at the cost of drawing down on Australia the full force of Indonesian hostility (which is now directed mainly at the Dutch). Only type of trusteeship which Indonesians in their present mood might be prepared to consider would be one in which they played a part, perhaps the predominant part. If this happened, it would be realistic to envisage that sooner or later West New Guinea would be virtually incorporated into Indonesian territory.⁸²

⁷⁹ 'The Dutch-Indonesian Dispute over West New Guinea (West Irian): A Discussion', in 'Netherlands: JFK-Luns Meeting', *John F Kennedy Presidential Library and Museum* (Web Page, 7 April 1961) 27 <<https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-122a-003.aspx>>.

⁸⁰ The American Ambassador to the United Nations Ellsworth Bunker was engaged by the Acting Secretary-General to liaise between Indonesia and the Netherlands and formulate the final *Agreement*.

⁸¹ Telegram from the Embassy in Indonesia to the Department of State (n 77).

⁸² 'Inward Cablegram from Australian Embassy, Washington, to Department of External Affairs, Canberra: Future Policy on New Guinea', *National Archives of Australia* (Web Page, 25 January 1958) pt 3, 188 <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=842558&isAv=N>>.

Apart from a preferred ‘Australian Trusteeship over West New Guinea’ — thereby reuniting the inhabitants of east and west Papua as proposed in the *Joint Netherlands/Australian Statement* detailed earlier — this document reveals that the Australian government also recognised that any transfer of administration over a Non-Self-Governing Territory created a ‘trusteeship’.⁸³ Furthermore, ‘the only type of trusteeship which Indonesians ... might be prepared to consider’ — where ‘they played ... the predominant part’ — played out four years later.⁸⁴

A declassified Australian memo, titled *Netherlands New Guinea*, written in January 1962, provides further insight. It details the request from the Netherlands’ Foreign Minister, Mr Luns, to the Australian Minister for External Affairs and Attorney General, Sir Garfield Barwick, to intervene. In part, it reads:

The [Netherlands] Ambassador approached me as I was about to sit down at an official luncheon to ask whether we had taken steps to express to the Americans our disapproval of a trusteeship proposal attributed to them — a step which the Ambassador had asked Sir Garfield Barwick to take at Mr Luns’ request.⁸⁵

This document again confirms America as the architect of the ‘trusteeship proposal’ and further reveals how the Netherlands, faced with ongoing Indonesian military incursions, was desperately seeking Australia’s intervention.⁸⁶

C United Nations Archives

The United Nations Archives and Records Management Section holds the United Nations archival material for the period of United Nations’ administration of West Papua. A 15-page online document, *Summary of AG-059 United Nations Temporary Executive Authority*

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ For the Record of Conversation with Netherlands Ambassador, Dr JG de Beus: ‘Dutch New Guinea — Policy of the USA’, *National Archives of Australia* (Web Page, 24 January 1962) 33 <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/ViewImage.aspx?B=1509606>>.

⁸⁶ While the Netherlands was desperately trying to protect the West Papuan people’s right to independence, any protracted war with Indonesia would be difficult to maintain without American and Australian military support.

in *West Irian (UNTEA) (1962–1963)*, provides further insight into the current legal status of West Papua according to the Secretariat of the United Nations.⁸⁷

Under the heading *Administrative History*, it states:

The United Nations Temporary Authority in West Irian (UNTEA) was formed to administer West Irian, which is located on the island of New Guinea. In 1963 Dutch New Guinea became Irian Barat, which in 1973 changed its name to Irian Jaya and is currently administered by Indonesia.⁸⁸

This UN summary document — written post-1973 — indicates that the United Nations Secretariat is aware that West Papua remains ‘administered by Indonesia’ rather than being a sovereign part of Indonesia.

Furthermore, now-declassified legal advice provided to then Secretary-General U Thant in April 1962 confirms that the proposed role of the United Nations was ‘analogous’ to Article 81 of Chapter XII governing the International Trusteeship System. In part, it states:

There would seem to be no doubt that with the agreement of the two parties the functions envisaged would come within the competence of the United Nations. The Charter specifically recognizes that the Organisation itself may be an ‘administering authority’ with respect to trust territories (Article 81). While the present case is not one relating to trusteeship it may be considered analogous.⁸⁹

There is, however, no other article within international law governed by the *Charter* that allows the ‘Organisation itself’ to take over a Non-Self-Governing Territory. Thus, Chapter XII governing the International Trusteeship System must apply.

⁸⁷ ‘Summary of AG-059 United Nations Temporary Executive Authority in West Irian (UNTEA) (1962–1963)’, *United Nations Archives* (Web Page) <<https://search.archives.un.org/united-nations-temporary-executive-authority-in-west-irian-untea-1962-1963>>.

⁸⁸ *Ibid.*

⁸⁹ Interoffice Memorandum from CA Stavropoulos to U Thant, ‘Agreement between the Governments of Indonesia and the Netherlands’, 12 April 1962, reproduced in ‘West Irian (West New Guinea) — Bunker Proposals’, *United Nations Archives* (Web Page) <<https://search.archives.un.org/uploads/r/united-nations-archives/c/d/d/cdde2ac79908f9b00742b88e83d6c9d3e363eb978460268e7b2faa12bae6014c/S-0884-0022-05-00001.pdf>>.

IV LEGAL RECOURSE VIA THE TRUSTEESHIP COUNCIL

The failure to provide West Papua 'self-government or independence' under Article 76b, and the ongoing human rights violations defined as 'slow-motion genocide' by several scholars,⁹⁰ is a matter for redress by the United Nations as well as the international community at large. Each Member of the United Nations has a legal obligation to uphold 'international law governing equal rights and self-determination of peoples' under the *Charter*.⁹¹

While a growing number of Members have raised the plight of the West Papuan people in the General Assembly,⁹² a method of legal redress via the *Charter* has yet to be advanced. A simple path to engage the ICJ to review West Papua's legal status is available via the United Nations Trusteeship Council. Rule 7(e) of the Rules of Procedure of the Trusteeship Council allows 'all items proposed by any Member of the United Nations' to be added to the provisional agenda via the Secretary-General.⁹³ Therefore, any Member can add an agenda item drawing attention to the failure of the International Trusteeship System regarding West Papua.

Following the presentation of this proposal in 2016 at the University of Western Sydney,⁹⁴ the Honourable Ralph Regenvanu, now Minister for Foreign Affairs for the Republic of Vanuatu, agreed to pursue this course of action. Consequently, a draft agenda item for the Trusteeship Council was prepared for the government of Vanuatu to lodge via the United Nations Secretary-General.⁹⁵

Rule 74 of the Rules of Procedure of the Trusteeship Council allows for petitions to be accepted by the Council 'if they concern the affairs of one or more Trust Territories or the operation of the International Trusteeship System as laid down in the *Charter*'.⁹⁶ Further,

⁹⁰ Jim Elmslie and Camellia Webb-Gannon, 'A Slow-Motion Genocide: Indonesian Rule in West Papua' (2013) 1(2) *Griffith Journal of Law & Human Dignity* 142.

⁹¹ *Charter of the United Nations* ch IX arts 55–56.

⁹² Liam Fox, 'Pacific Nations Call for UN Investigations into Alleged Indonesian Rights Abuses in West Papua', *ABC News* (online, 2 March 2017) <<http://www.abc.net.au/news/2017-03-02/pacific-nations-call-for-un-investigations-into-west-papua/8320194>>.

⁹³ *Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/1/Rev.7 (1995) r 7.

⁹⁴ Presented by Julian McKinlay King and Andrew Johnson at the West Papua Project Conference, 'At the Intersection: Pacific Climate Change and West Papua' (University of Western Sydney, 4 November 2016).

⁹⁵ Julian McKinlay King, 'West Papua: Failure by the United Nations to Deliver Self-Government or Independence, and a Path to Legal Recourse' (DPACS Working Paper, West Papua Project, University of Sydney, 17 October 2017) app.

⁹⁶ *Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/1/Rev.7 (1995) r 74.

Rule 75 states that '[p]etitioners may be the inhabitants of Trust Territories, or other parties'.⁹⁷ Thus, the people of West Papua and 'other parties' can forward petitions to the Trusteeship Council drawing attention to this breach of the International Trusteeship System.

The Trusteeship Council suspended regular operations on 1 November 1994 — no longer having *registered* Trust Territories to oversee — but continues to meet every two years in order to elect new office-bearers.⁹⁸ The last meeting was held on Friday, 15 December 2017.⁹⁹

UN Members or Petitioners — drawing attention to the breaches of the International Trusteeship System in relation to West Papua — can therefore request the Trusteeship Council to seek an advisory opinion from the ICJ as encouraged under Article 96 Part 2 of the *Charter* and subsequently authorised by General Assembly Resolution 171(II) Part B.¹⁰⁰ This resolution states:

The General Assembly ... [a]uthorizes the Trusteeship Council to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council.¹⁰¹

A legal opinion from the ICJ will confirm whether the *Agreement* is a Trusteeship Agreement creating a Trust Territory of the United Nations or whether West Papua remains a Non-Self-Governing Territory of the Netherlands. Either outcome will compel the United Nations General Assembly to take 'immediate steps' to fulfil its legal obligation to deliver complete independence and freedom to the West Papuan people.¹⁰²

V INTERVENTION VIA RESOLUTION 2621(XXV)

In 1970, the United Nations General Assembly held a special session to commemorate the 10th anniversary of Resolution 1514(XV), *Declaration on the Granting of Independence to*

⁹⁷ *Ibid* r 75.

⁹⁸ *Amendment of the Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/RES/2200(LXI) (25 May 1994) annex para 3.

⁹⁹ UN TCOR, UN Doc T/PV.1716 (15 December 2017).

¹⁰⁰ *Need for Greater Use by the United Nations and Its Organs of the International Court of Justice*, GA Res 171, UN Doc A/RES/171 (14 November 1947) pt B.

¹⁰¹ *Ibid*.

¹⁰² *Declaration on the Granting of Independence to Colonial Countries and Peoples* (n 63).

Countries and Peoples, in order to promote ‘practical action for the speedy liquidation of colonialism in all its forms and manifestations’.¹⁰³

The special session resulted in General Assembly Resolution 2621(XXV), *Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, which under Part 2

[r]eaffirms the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppress their aspiration for freedom and independence.

As recognised by former OPM freedom fighter and scholar, Otto Ondawame,¹⁰⁴ the use of arms and any other available means by the West Papuan people is here stated an ‘inherent right’.¹⁰⁵ The guerrilla warfare, waged by the West Papuan people since 1965,¹⁰⁶ may therefore be considered legitimate under General Assembly Resolution 2621(XXV).

Part 3(2) of Resolution 2621(XXV) states that ‘Member States shall render all necessary moral and material assistance to the peoples of colonial Territories in their struggle to attain freedom and independence’. Part 3 thus advocates for Members of the United Nations to provide ‘material assistance’ to the people of West Papua — which may include military hardware and intervention — to yet again remove the Indonesian armed forces from an illegally occupied Non-Self-Governing Territory.

VI DISCUSSION

In 1962, the Netherlands ceased the transmission of information to the Secretary-General, permitted only when either a full measure of self-government has been achieved or when Chapters XII and XIII apply. Yet to attain a full measure of self-government, West Papua should therefore have become subject to Chapters XII and XIII on 21 September 1962 and logically became a Trust Territory of the United Nations.

¹⁰³ *Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2621(XXV), UN GAOR, UN Doc A/8086 (12 October 1970) para 25.

¹⁰⁴ ‘OPM’ refers to the ‘Organisasi Papua Merdeka’ or ‘Free Papua Movement’.

¹⁰⁵ Otto Ondawame, *One People, One Soul: West Papuan Nationalism and the Organisasi Papua Merdeka* (Crawford House, 2010) 31.

¹⁰⁶ *Ibid* 64.

Following the take-over of the Territory, the United Nations failed to provide an annual report to either the United Nations Trusteeship Council or Secretary General — as a Trust Territory or Non-Self-Governing Territory — in breach of Chapters XI and XII governing decolonisation. Indonesia, since 1963, has similarly been in breach of legal reporting requirements on the decolonisation of the Territory until this day.

Indonesia's fraudulent act of self-determination orchestrated in 1969 was a breach of General Assembly Resolution 1541 governing Non-Self-Governing Territories by failing to allow all adults the opportunity to vote as well as failing to provide the options of independence, free association, or integration and a breach of Chapter XII governing Trust Territories by failing to provide the option of 'self-government or independence'. Furthermore, since the Netherlands was the colonial power of this Non-Self-Governing Territory, under General Assembly Resolution 1541, the option should have been to remain with the Netherlands rather than Indonesia who was only providing administration. Regardless, however, as announced to the world in 1961, the people of West Papua had already declared their desire to become a new nation called West Papua.

As presented by John Saltford in 2011,¹⁰⁷ Indonesia recognised the West Papuan people's right to self-determination following the signing of the *Agreement* which, from the outset, had 'in mind the interests and welfare of the people of the territory' and guaranteed 'the eligibility of all adults, male and female, not foreign nationals to participate in the act of self-determination to be carried out in accordance with international practice'.¹⁰⁸

Thus, Indonesia's original claim that West Papua was an integral part of the United States of Indonesia — let alone the Republic of Indonesia — instantly became null and void upon the signing of the *Agreement*. Furthermore, Indonesia's recognition of the West Papuan people's right to self-determination provides de jure recognition that West Papua's legal status was that of a Non-Self-Governing or Trust Territory.

As argued earlier, the *Agreement* was only 'noted' by the General Assembly in direct contrast to the required 'approval' for trusteeship agreements. Furthermore, the accompanying *ex officio* agreement between the United Nations, Indonesia, and the

¹⁰⁷ John Saltford, 'Reflections on the New York Agreement, the Act of Free Choice and Developments Since' (Speech, Comprehending West Papua Conference, West Papua Project, Centre for Peace and Conflict Studies, University of Sydney, 23–4 February 2011).

¹⁰⁸ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) Preamble, art XVII(d).

Netherlands — which directed the Netherlands to cease its responsibilities — was never provided to the General Assembly for consideration and debate, let alone ‘approved’. While West Papua may have been transformed into a Trust Territory,¹⁰⁹ such breaches of the UN Secretariat and the International Trusteeship System may well leave the Netherlands in the legal position of having abandoned its Non-Self-Governing Territory.

The failure to ensure that the *Act of Free Choice* complied with international standards, that the UN maintained a presence throughout the period of Indonesian administration, and that the people’s human rights were being upheld was a further failure of the UN Secretariat and International Trusteeship System. Given Indonesia’s military incursions prior to the *Agreement* and behaviour during the first phase,¹¹⁰ the United Nations’ decision to use its discretion and transfer *any* of the administration to Indonesia under Article 7 of the *Agreement* yet again highlights the complicity of the ‘Organisation itself’. But again, this paper is concerned principally with West Papua’s legal status following the *Agreement*.

As detailed earlier, a simple remedy is available by drawing this to the attention of the ICJ via the Trusteeship Council. This is most readily achieved through a petition from the West Papuan people (or other parties) or the addition of an agenda item to the Trusteeship Council by Vanuatu, Solomon Islands, or another UN Member. A legal opinion from the ICJ should logically confirm that West Papua became a Trust Territory of the United Nations or remains a Non-Self-Governing Territory. Either way, it will provide the catalyst for the General Assembly and the United Nations Secretariat to resume their responsibilities and finally deliver the West Papuan people’s long-awaited freedom.

A petition signed by a reported 1.8 million inhabitants of West Papua presented to the chairman of the United Nations Decolonisation Committee in September 2017 by the United Liberation Movement for West Papua (‘ULMWP’) was rejected on the grounds that West Papua is not on the UN’s list of Non-Self-Governing Territories.¹¹¹ However, as detailed above, the Trusteeship Council can receive petitions provided they draw

¹⁰⁹ As originally advanced by Andrew Johnson (n 3).

¹¹⁰ For a detailed analysis: See Saltford (n 26).

¹¹¹ ‘UN Committee Rejects West Papua Independence Petition’, *Radio New Zealand* (30 September 2017) <<https://www.radionz.co.nz/international/pacific-news/340570/un-committee-rejects-west-papua-independence-petition>>.

attention to a breach of the International Trusteeship System.¹¹² ULMWP can therefore put the West Papuan people's petition to this Council at any time and thus recommence the process of decolonisation.

In a publication presented in early 2018, Leon Kaulahao Siu and Mehmet Sukru Guzel support the notion that West Papua became a Trust Territory of the United Nations via Resolution 1752(XVII). They write:

West Papua became a UN trust territory when the General Assembly adopted Resolution 1752 approving the UN occupation and administration of West New Guinea (West Papua), as Article 85 of the UN Charter allows the General Assembly to do so. West Papua became a UN trust territory because that is the only way that General Assembly Resolution 1752 was able to authorize the deployment of UN troops to occupy the colony of West Papua.¹¹³

While these scholars cite the 'Colony of West Papua' website,¹¹⁴ which advances West Papua's legal status of Trust Territory,¹¹⁵ first published in 2012 and expanded upon in numerous academic conferences, public presentations, and online,¹¹⁶ they have failed to attribute recognition of this argument and claim precedence.

These scholars further suggest that the adoption of General Assembly Resolution 2504(XXIV) in 1969 — regarding the Secretary-General's report on the implementation of the *Agreement* — created a *modus vivendi* or 'provisional agreement' between the Netherlands and Indonesia.¹¹⁷ Resolution 2504(XXIV) however only '*takes note*' of the

¹¹² Julian McKinlay King presented this argument at the Port Vila ULMWP Summit meeting in November 2017.

¹¹³ Leon Kaulahao Siu and Mehmet Sukru Guzel, *Modus Vivendi Situation of West Papua* (Lulu Publishing Services, 24 January 2018) 140.

¹¹⁴ *Colony of West Papua* (Web Page) <<https://web.archive.org/web/20120825161613/http://colonyWestPapua.info>>.

¹¹⁵ Siu and Guzel (n 113) 114.

¹¹⁶ See, eg, Andrew Johnson and Julian McKinlay King (Speech, At the Intersection: Pacific Climate Change and West Papua Conference, West Papua Project, University of Western Sydney, 4 November 2016); See, eg, Julian McKinlay King (Speech, The Patriots vs The Elites, Round Table Forum, New South Wales Parliament House, 9 May 2017); See, eg, Julian McKinlay King, 'West Papua: On the Periphery of Globalisation' (Speech, Solidarity for West Papua, Bellingen Memorial Hall, 20 August 2017); See, eg, Julian McKinlay King, 'West Papua: The Geopolitical Context and Legal Recourse' (Speech, Beyond the Pacific: West Papua on the World Stage, West Papua Project, Department of Peace and Conflict Studies, University of Sydney, 1 September 2017) <<https://youtu.be/gYzspIFZJnY>>; See, eg, Julian McKinlay King and Stephen Hill, 'The Case of Papua: A Soul Divided' (Speech, Decolonisation, Sovereignty, and Human Security in the Pacific, University of Wollongong, 26–27 June 2018) <<https://youtu.be/QCmIVLJnR7s>>.

¹¹⁷ *Ibid* 135.

Secretary-General's report.¹¹⁸ As detailed above, 'takes note' is a 'neutral term' and therefore neither approves nor disapproves the content of the Secretary-General's report.¹¹⁹ This Resolution does not mention, let alone approve, any transfer of sovereignty to Indonesia, and neither is there any implication of a new 'provisional agreement' as suggested by these scholars.

Siu and Guzel also suggest that the International Trusteeship System was abolished in 1993,¹²⁰ argue that the Fourth Committee (of the General Assembly) governing Non-Self-Governing Territories is one of the six main organs of the United Nations,¹²¹ and have sent the Committee a petition seeking that the General Assembly request an advisory opinion from the ICJ regarding the legal status of Resolution 2504(XXIV).¹²² However, as detailed above: the Trusteeship Council has not been abolished and continues to meet as necessary; the Chairman of the Fourth Committee will not receive petitions from peoples who are not from Non-Self-Governing Territories listed with the Committee; and the General Assembly previously was unable to raise the required two-third majority support to revisit the matter. Additionally, as detailed above, a legal opinion from the ICJ regarding the shift in West Papua's legal status via General Assembly Resolution 1752(XVII) — and not Resolution 2504(XXIV) — should bring about a swift conclusion to the ongoing oppression of the West Papuan people.

Similarly, the co-founder of International Lawyers for West Papua, Melinda Janki, wrote in 2017:

[A]ll the General Assembly said is we take note of this report. There is nowhere anywhere in the United Nations General Assembly a resolution which says the General Assembly *approves* the integration of West Papua into Indonesia.¹²³

The West Papuan people have simply been denied their rightful independence, as Jennifer Robinson observed in 2012:

¹¹⁸ *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)* (n 47) art 1.

¹¹⁹ Ruder, Nakano and Aeschlimann (n 49) 46.

¹²⁰ *Ibid* 93.

¹²¹ *Ibid*.

¹²² *Ibid* 150.

¹²³ Melinda Janki, 'Matter of Time for Papuan Self-Determination, Says Lawyer', *Radio New Zealand* (4 October 2017) (emphasis added) <<https://www.radionz.co.nz/international/pacific-news/340800/matter-of-time-for-papuan-self-determination-says-lawyer>>.

Had the UN properly discharged its mandate back then, West Papuans would have celebrated more than 40 years of independence instead of having endured nearly 50 years of oppression. In that time, it is estimated that as many as 500,000 Papuans have been killed at the hands of the Indonesian security forces.¹²⁴

Former secret American and Australian government documents confirm that the *Agreement* was understood to be a *trusteeship*. However, Indonesia refused to ‘call a trusteeship a trusteeship’,¹²⁵ no doubt aware that it would invoke the Trusteeship Council to amend the *Agreement* to be compliant with international law and associated UN resolutions governing decolonisation.

The *Charter* requires all UN Members to pledge themselves to uphold the principle of equal rights and self-determination.¹²⁶ Since the General Assembly was responsible for this breach — albeit with the covert assistance of the UN Secretariat — all UN Members are legally responsible for this gross miscarriage of justice and human suffering that has been allowed to continue since 1962. Furthermore, General Assembly Resolution 2621(XXV) encourages Members of the United Nations to provide all necessary moral and material assistance to the West Papuan people and help end the nearly 60 years of slow-motion genocide.

The unique decentralised system of self-governance created by the West Papuan people reflecting the indigenous make-up of Melanesia — from the family clans to the Village Councils to the Regional Councils and up to the National Council — was instead replaced by a predominantly Javanese Muslim military dictatorship which has inflicted extreme suffering and hardship upon the Melanesian population, described by many as genocide.

Like the people of East Timor, the Non-Self-Governing Territory of West Papua has had its rightful independence postponed due to geopolitical manoeuvrings in breach of the *Charter*. While East Timor was illegally invaded and annexed by Indonesia, yet again with the covert support of America and the complicity of Australia and the United Kingdom,¹²⁷

¹²⁴ Jennifer Robinson, ‘UN’s Chequered Record in West Papua’, *Al Jazeera* (online, 21 March 2012) <<https://www.aljazeera.com/indepth/opinion/2012/03/201232172539145809.html>>.

¹²⁵ Telegram from the Embassy in Indonesia to the Department of State (n 77).

¹²⁶ *Charter of the United Nations* ch IX arts 55–6.

¹²⁷ Dana Milbank, ‘1975 East Timor Invasion Got US Go-Ahead’, *The Washington Post* (online, 7 December 2001) <https://www.washingtonpost.com/archive/politics/2001/12/07/1975-east-timor-invasion-got-us-go-ahead/b59c47dc-3e54-4a3c-bca8-9f9f5120686a/?utm_term=.fe820dd52ed2>; John Pilger, ‘Australia’s Complicity in the East Timor Genocide: Oil, Gas, and the Depravity of Power’, *The Ecologist*

the transfer of West Papua to the United Nations (and subsequently Indonesia) transpired without due recognition of the Territory's legal status.

Due to ongoing campaigns by the families of Australian and UK journalists murdered by the Indonesian military during the invasion of East Timor,¹²⁸ Max Stahl's footage of the brutal Dili massacre,¹²⁹ Indonesia's inability to crush the East Timorese guerrilla fighters, recognition at the UN,¹³⁰ the fall of Suharto in 1998, and global human rights campaigns, Indonesia finally withdrew from this illegally occupied Non-Self-Governing Territory. The Indonesian military, however, acted as ever with mass brutality, no doubt in order to dissuade other territories or indigenous communities seeking a similar exodus from the (illegal) Republic.

However, West Papua — closed to foreign journalists,¹³¹ despite Presidential claims of access,¹³² and, in particular, not being *legally* recognised as either a Trust or Non-Self-Governing Territory — has not received the same attention from the international community despite equivalent (or worse) human rights abuse.

Following East Timor's experience, the international community, the United Nations, and the West Papuan people in particular should prepare for the scorched-earth policy and mass murder perpetrated when last the Indonesian military was forced to vacate a Territory that had been denied its rightful independence.¹³³

(online, 31 March 2016) <<https://theecologist.org/2016/mar/31/australias-complicity-east-timor-genocide-oil-gas-and-depravity-power>>.

¹²⁸ Nick Xenophon and Clinton Fernandes, 'We Can't Forget the Lessons of Balibo: Six Journalists Were Killed and It Shouldn't Have Been Swept under the Carpet', *The Sydney Morning Herald* (online, 15 October 2015) <<https://www.smh.com.au/opinion/comment-nick-xenophon-and-clinton-fernandes-on-balibo-20151014-gk8jb3.html>>.

¹²⁹ Mary Boland, 'Footage of a Massacre that Changed History of Timor-Leste', *The Irish Times* (online, 10 November 2017) <<https://www.irishtimes.com/news/world/asia-pacific/footage-of-a-massacre-that-changed-history-of-timor-leste-1.3286091>>.

¹³⁰ United Nations General Assembly, 'Special Committee on Decolonisation Takes Up Questions of Western Sahara, East Timor, Hears Petitioners' (Press Release GA/COL/2982, 30 June 1998).

¹³¹ 'RSF's Decries Journalist's Expulsion from Indonesia's Papua Region', *Reporters Without Borders*, (online, 8 February 2018) <<https://rsf.org/en/news/rsfs-decries-journalists-expulsion-indonesias-papua-region>>.

¹³² 'Jokowi Opens Papua to Foreign Journalists', *The Economist* (online, 11 May 2015) <http://country.eiu.com/article.aspx?articleid=993153883&Country=Indonesia&topic=Politics&subtopic_5>.

¹³³ 'World: Asia-Pacific Scorched Earth in Timor', *BBC News* (online, 21 September 1999) <<http://news.bbc.co.uk/2/hi/asia-pacific/452802.stm>>.

VII CONCLUSION

The façade is over. A shift in West Papua's legal status should have occurred in 1962 upon the transfer of this Non-Self-Governing Territory to the United Nations creating a Trust Territory of 'the Organisation itself'. Alternatively, West Papua remains a Non-Self-Governing Territory, invaded by the United Nations (and subsequently Indonesia) and abandoned by the Netherlands.

The American, Australian, Dutch, and Indonesian governments are revealed as complicit in the understanding that a trusteeship had been created but failed to bring this to the attention of the General Assembly.

Either as a Non-Self-Governing Territory or a Trust Territory, the legal rights of the people of West Papua have been denied with every UN Member responsible and *legally bound* to uphold the *Charter* in order to correct this *breach of international law*.

Meanwhile, the West Papuan freedom fighters continue their legitimate armed rebellion with the international community duty-bound to provide immediate moral and material support. The Indonesian military's brutality should *this time*, however, be taken into account by all concerned.

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MADE BY THEM, FOLLOWED BY US: CHALLENGING THE PERCEPTION OF LAW THROUGH THE DECONSTRUCTION OF JURISPRUDENTIAL ASSUMPTIONS

JOY TWEMLOW*

The standard position within western thought is that the bulk of domestic law derives from, and is legitimised by, the local populous. Through the institution of democratic representation, it is rationalised that the resulting law produced reflects the social consciousness of the population at the time. While there are a number of limitations to this argument, this paper focuses on the juxtaposition of this stance with the public perception that law is inaccessible, complicated, and prestigious. By looking at the ways in which jurisprudential assumptions contribute to this dissonance between law and the public and exploring what accessibility to the law means, this paper argues that law must acknowledge and incorporate different perceptions — that, at its core, access to law is about being able to engage in a conversation.

* Joy is currently based in the Faculty of Law at the University of Technology Sydney. Her research interests include poststructuralist methodologies, phenomenology and the law, and human rights theory.

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I HOW WOULD YOU PERSONIFY THE LAW?

What gender is it? What is it wearing? What adjectives do you attach to it?

At the heart of this paper is a desire to examine how people define law, talk about law, view law, and experience law — and to create a space for these different understandings to engage. The above question, or more specifically the answer given, can conjure a rough illustration of the approach, values, and assumptions one might attach to law. Your personification elucidates the relationship that you have with law, and it is important that, as an institution, law facilitates positive relationships with its participants. Take your personifications with you as you read the following pages — talk to them, question them, listen to them.

When answering the personification question, many might describe law as a powerful institution that brings us security and predictability. Law sits above us: enforcing order, punishing wrongdoers, and protecting the weak. Much of the literature in both legal and political theory focuses on legitimising this omnipotent position — whether it is endorsement from the people or some other justification — the language we use to describe the functions of law reinforce a hierarchical structure. *Law is made for us to follow.* Others may replace fear and duty with a fidelity to law grounded in loyalty, ownership, and commitment. Through the institution of democratic representation, they believe that the bulk of domestic law derives from, and is legitimised by, the local populous. *We make laws we want to follow.*

The paper situates itself between these two perceived functions of law; specifically, it looks at how law is defined and the implications of this representation on access to law. Straying away from more orthodox discussions, this paper is not concerned with how to legitimise law, nor does it purport to provide a positive description of law. Instead, the paper grounds itself in understandings about society, individuals, communication, and cognitive processes to argue that law must acknowledge and incorporate different perceptions — that, at its core, access to law is about engaging in a conversation with all those who are impacted by the institution. The paper advances a request to the institution of law: listen more.

Prior to outlining my structure, it is useful to make a clarification. The issue explored here is not to make existing legal principles simple or comprehensible — it is not an argument situated in the Plain Language movement.¹ It is a question of shared understanding. Law, as a profession that primarily deals in words, cannot define itself without communication. Like any human institution, law is shaped by historical, social, and cultural contexts.² Legal theory and our understanding of law in general is situated in deciphering the coherency of these forces. Any identification of the coherency that law might possess relies on a description: a communication of a subjective interpretation of what law is.³ In this way, our understanding of law is shaped by how we think, write, and talk about it. Definitions reached may be based on objective realities, familiarity with content, experiences, etc. This paper does not deny that some people have a *better* understanding of law. Rather, it understands that these definitions — the *meaning of law* — does not exist until the subjective interpretation has been communicated.

Each section of this paper has a ‘persona’ attached: a characterisation of a package of values, assumptions, and tools — *perceptions* — which may be brought to this particular issue. The characters of the Democrat, the Analyst, and the Humanist are undoubtedly oversimplifications and not the only personas that can be brought to the issue of accessibility. This adoption of persona is used for a number of reasons; namely, it acts as a representation of some of the perspectives that might be brought to the issue of access. The utilisation of these personas allows a middle ground to be reached between leaving

¹ See, eg, Michele M Asprey, *Plain Language for Lawyers* (Federation Press, 4th ed, 2010).

² JM Balkin, ‘Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence’ (1993) 103(1) *The Yale Law Journal* 105, 141.

³ *Ibid* 139.

assumptions unacknowledged and digressing into an explicit — and likely disorientating — outline of influences. However, these personas are not only expository, but they contribute to the overall argument that this paper makes. Creating a space to speak and understanding the value of different perspectives is what access to law entails. This paper treats the relationship between these personas not as adversarial, but collaborative — that it is in the interplay between the different personas' strengths and weaknesses that we grow.

With this in mind, the paper is organised into three sections. In the first section, the Democrat concerns himself with the conflict between the perception that law is inaccessible and the ideal that law derives from, and is legitimised by, the local population. The Democrat draws an observation out of this tension — that, in many cases, access to law is understood as access to legal institutions. Not satisfied with the superior status that legal practitioners might hold within this conception, he claims that law itself must be made accessible to all: that it should no longer be seen as something that 'sits above' ordinary citizens, but as an articulation of the public's view of how society should be organised. In the second section, the Analyst seeks to explain, understand, and deconstruct the idea that law is the exclusive realm of practitioners. The Analyst starts by giving a tour of this construction by pointing out some of its defining characteristics and examples within legal theory. Pleased with the description, the Analyst proceeds to undertake her favourite activity: deconstructing it with whatever tools are at her disposal. In the last section, the Humanist brings the analysis back to the individual. While acknowledging the flaws in our understanding of law, the humanist concerns herself with the fact that law has very real impacts on real people. Access to law, the Humanist posits, is about conversation: how we talk and how we listen.

II THE DEMOCRAT

The Democrat works with Law often. He would describe Law as a common man, well-built with a full-bodied voice that echoes for miles. The Democrat likes that Law is very straight to the point, honest, and seems very knowledgeable.

Law — the Democrat says to himself — now that's a man I can be friends with.

But then the Democrat remembered the incident from the other day while waiting for coffee. The barista got Law's order wrong and what a scene Law made. The poor barista could not even get a word in. And the Democrat could swear he heard Law curse a homeless man on his way out.

Disgraceful — the Democrat thought — *on second thought I could never be friends with someone so entitled.*

The Democrat seems like the obvious persona to start any discussion about the inaccessibility of law. Using notions of consent, legitimacy, representation, participation, and, often, a normative claim about content, the Democrat paints an ideal picture of law: one that is relatively standardised in Western political discourse.⁴

This orthodox illustration usually starts with the assertion that there is an implicit social contract that instils the government with the legitimacy to govern. The social contract, typically Lockean in nature, requires the state to continuously check that the citizens consent to the exercise of state control, to frequently review the terms of the contract. Practically, this is undertaken through periodic demonstrations of consent giving, more commonly called elections. Through this process we choose select few people who are given the power to make laws. Theoretically, the role of these elected individuals is to represent the wishes of their constituents in their law-making activities. The result, ideally, is a body of law that reflects the collective consciousness of the populous. Law is essentially viewed as the terms of a social contract we have negotiated and agreed to.

Setting aside the flaws in the conceptualisation, the implication of this legitimising narrative is that people have a place in legal development. If law is to reflect the collective beliefs of the people, we must be able to talk to law — and law must listen. This sentiment was expressed by Fuller when he stated that law must

[o]pen up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. In this matter the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty. And if men will listen, that voice, unlike that of the morality of duty, can be heard across the

⁴ Here I mean popular political discourse, as opposed to Western political theory.

boundaries and through the barriers that now separate men from one another.⁵

However, most people do not view law as reflecting their ‘collective consciousness’. For many, laws are confusing, out of reach, and, at times, in complete opposition to their values and interests:

The ominous statement which begins Kafka’s famous parable of the futility of modern law — “Before the law stands a doorkeeper” — sums up much of our knowledge of access to legal justice. His villainous doorkeeper with ‘big sharp nose and long, thin, black Tartar beard’ fits well with the gloomy picture of the legal profession painted by much contemporary socio-legal scholarship ... Because lawyers do their most careful and creative work for the rich, the discourse of law becomes increasingly irrelevant, and oppressive, to those who have little access to it. It reflects the concerns of those who use it most, vivid in the technicalities of tax avoidance or takeovers; and excludes those who use it least, biased against women and ethnic minorities in language and content.⁶

Problems of legal access are not merely anecdotal or theoretical; it is supported by a number of empirical studies. The 2012 Australia-wide Access to Justice and Legal Needs (A2JLN) survey is one such example.⁷ Focusing on legal problems experienced by those over 15 in the last 12 months, the survey looked at the prevalence, response, and impact of legal issues. It found that in all jurisdictions approximately half of the respondents had faced at least one legal problem in the preceding year (47–55%).⁸ While a wide range of actions were taken in response to these problems, only about one-fifth of the respondents sought legal advice.⁹ About 20% took no formal or informal action: Their reasons included the length, cost, or stress of the process; lack of knowledge of options; and the belief that action would make no difference to the problem.¹⁰ Alongside this general ambivalence towards legal forms of resolution, the survey highlighted a considerable lack in knowledge of not-for-profit legal services. In fact, individuals often lacked even very basic knowledge about legal rights, remedies, and systems.¹¹ While legal problems were

⁵ Lon Luvois Fuller, *The Morality of Law* (Yale University Press, 1964) 186.

⁶ Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 1 (citations omitted).

⁷ Christine Coumarelos, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in New South Wales* (Report, August 2012) vol 7.

⁸ *Ibid* 157.

⁹ *Ibid* 186.

¹⁰ *Ibid* 97.

¹¹ *Ibid* 177.

experienced by all demographics, the survey found that disadvantaged groups were particularly vulnerable. They were more likely to experience multiple legal problems of a serious nature and often obtained unsatisfactory or no resolution.¹² These statistics reflect that access is a multi-faceted problem, both caused and perpetuated by subjective and objective factors.

This problem of accessibility is not new, and the attempts to address the issue have produced volumes of articles, books, speeches, and — of course — more law. The standard response is to focus on legal institutions or practitioners. As an example, in her book titled *Access to Justice*, Deborah L Rhode concludes that improvements can be made to access through increasing legal aid, dispute resolution processes, and the accountability of lawyers.¹³ While these types of reforms are important, stating that obtaining a lawyer constitutes accessing law seems disingenuous. Arguably, the legal institutions and practitioners are the very ‘doorkeeper’ Kafka speaks of — the aim is to get past them.

It is worth noting that most approaches are couched in the terms of access to justice as opposed to access to law. Rhode herself states that ‘access to law is not an end in itself; the goal is justice’.¹⁴ Similarly, the A2JLN discussion of a holistic approach to legal access focuses not only on obtaining traditional legal recourse but having the knowledge to identify potential legal problems and prevent their occurrence.¹⁵ Again, while such initiatives are important, this account does not satisfy the idea that law is made by the people for the people. It betrays the democratic sentiment of our legitimising narrative — while it allows citizens to recognise when law may apply, it does not give citizens the ability to question the fit of existing laws to their values and experiences. It is not a conversation: it is a lesson in dictation.

The next inquiry that must be undertaken is to examine whether there is a reasonable justification for denying individuals access to law — not justice, nor intuitions, nor legal information — but *law*. Is there a reason why citizens do not have the ability to shape our collective understanding of what law is and of what is meant by justice; to question the

¹² Ibid 201.

¹³ Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 185–94.

¹⁴ Ibid 189.

¹⁵ Coumarelos (n 7) 202.

structures and processes of legal institutions; to challenge the content of legal information; to present a valid interpretation of the thing we call ‘law’? This is not a question for the Democrat. The very conviction that acted as a strength in highlighting how we approach access to law can act as a barrier to gaining an understanding of the status quo. One might say that the Democrat is biased towards a particular outcome. However, it would be misguided to interpret this bias as a weakness rather than inescapable and desirable. Law has been influenced by a particular conception of human nature that divorces reason from emotions: that progress is made in suppressing passions. However, research shows that the cognitive process of reasoning cannot occur without emotion, convictions, and values.¹⁶ These idiosyncratic emotional measuring sticks are how we make sense of our world. Thus, in defining law, our values not only inescapably influence how we approach an issue, but also allow us to spot problems in other definitions, raise the questions that interest others, and provide unique solutions. Thus, a disposition that is central to access to law is ‘a view of the world in which one’s own self stands not at the centre, but appears as one object among many’.¹⁷ An acknowledgement that some questions are better answered by someone else.

III THE ANALYST

The Analyst cannot quite remember when she first met Law, but she vividly recalls the start of her infatuation. It was just a regular day. The Analyst and Law crossed paths like they had many times before, but this time the Analyst suddenly noticed Law anew — her poise, her perfectly pressed suit, not one hair out of place, the lyrical way in which she spoke.

How does Law do it — the Analyst asked — What is her secret?

With each additional encounter, the Analyst carefully observed Law’s actions — noting the order, predictability, and rationality in which Law conducted her affairs.

Whether motivated by a desire to understand Law’s perfection, or a compulsion to discover a fault, the Analyst committed herself to understanding the inner workings of Law’s mind. Tirelessly, the Analyst

¹⁶ Antoine Bechara, Hanna Damasio and Antonio R Damasio, ‘Emotion, Decision Making and the Orbitofrontal Cortex’ (2000) 10(3) *Cerebral Cortex* 295.

¹⁷ Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986) 4–6.

theorised, observed, engaged. Granted, there were rare moments when the Analyst thought she understood Law's secret. But as the days wore on, she was not so sure. In her dedication, the Analyst uncovered Law's faults, inconsistencies, unpredictability, injustices. Law's perfect image was shattered in the eyes of the Analyst.

She asked herself:

But why, despite her flaws, am I still so infatuated with Law?

The Analyst is given the task of understanding and challenging why law is not made accessible to citizens. Concerned with the inner workings of law, the Analyst explains the structure of the idea presented, identifies occurrences of the idea within our legal language, and assesses whether the idea is conceptually sound.

Faced with the argument that legal practitioners are better positioned to interpret law, the analyst questions the root of this assumption. The late Supreme Court Judge, Benjamin Cardozo stated:

It is [the] generalisations and abstractions that give direction to legal thinking, that sway the mind of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing over in reserve as a court of ultimate appeal.¹⁸

Cardozo implies here that law has a form of internal consistency, or at least multiple threads of internal consistency. Those who are trained at law are better equipped to decipher and apply them — to read the omnipotent mythical signs and communicate what it means in practice. The reason that citizens are unable to access law is that law is a technical language, one of which they are not part of.¹⁹ The argument of specialised legal knowledge is not limited to grand judgements seeking overarching consistency. For instance, words such as “reasonable” or “consideration” have special meaning in law

¹⁸ Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1963) 25–7.

¹⁹ For discussion on whether law is a technical language: Frederick Schauer, 'Is Law a Technical Language?' (2015) 52(3) *San Diego Law Review* 501.

which do not accord with general understandings.²⁰ Speaking law, it would seem, requires learning a whole new language.

Two ideas are contained within this position: (1) that there is a coherence to law and (2) that legal practitioners either know it or are best equipped to decipher it. This, in essence, describes the nature and practice of legal reasoning — or more accurately, a particular conception of legal reasoning. Unger refers to this type of legal reasoning as “rationalizing legal analysis”:

Rationalizing legal analysis is a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. It is a self-consciously purposive mode of discourse, recognising that imputed purpose shapes the interpretive development of law. Its primary distinction, however, is to see policies of collective welfare and principles of moral and political rights as the proper content of these guiding purposes. The generalising and idolising discourse of policy and principle interprets law by making sense of it as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right. Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of social life.²¹

When practitioners adopt this reasoning, there is a realisation that the existing physical body of law — that is legislation, common law, treaties, etc — may not all be consistent with each other. However, they are informed by a belief that these laws reflect an “imperfect approximation” of some higher order, somewhat analogous to the idea of Plato’s forms. Such an understanding imparts legal practitioners with two tasks: the first is to recognise the ideal element in law that they are duty bound to follow. Describing law, Owen Fiss states:

I continue to believe that law is a distinct form of human activity, one which ... differs from politics, even highly idealized politics, in important ways. Political actors can and often do make claims of justice, but they need not ... Judges on the other hand, have no authority other than to decide what is just ...²²

²⁰ Soha Turfler, ‘Language Ideology and the Plain-Language Movement: How Straight-Talkers Sell Linguistic Myths’ (2015) 12 *Legal Communication & Rhetoric: JALWD* 195, 202.

²¹ Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso, 1996) 36.

²² Owen M Fiss, ‘The Law Regained’ (1989) 74(2) *Cornell Law Review* 245, 249.

The second task is to ensure that law is reflective of these ideals, to interpret and improve law in light of them. As Dworkin states: '[I]dentifying true propositions of law is a matter of interpreting legal data constructively, and that constructive interpretation aims both to fit and justify the data.'²³

Certain discourses and approaches within jurisprudence can be seen as a search for the source of coherence. The most obvious example is the natural law doctrine: the belief that morality is intrinsically linked to law. While students of jurisprudence understand the difficulties that lie in such a claim, the natural law position is a powerful sentiment that continues to consciously, or unconsciously, inform peoples' understanding of law.²⁴

The positivists, however, do not escape this search for coherence, nor the prioritisation of legal thinkers. Acknowledging the difficulties that arise out of claiming morals provide predictability, they instead look to social practice. Raz claims that coherence in law is revealed by the 'internal point of view' — that is, the understanding possessed by those who participate in the legal system. To Raz, it doesn't matter that law may be incoherent under certain views and argues that 'even the [outside] observer, in order to acquire a sound understanding of the law, must understand it as it would be seen by a participant. If it must be coherent to a participant then coherent it is.'²⁵

Even critics claim that law possesses a certain consistency, albeit an undesirable one. Take for example this passage from LM Finley:

Legal language is a male language because it is principally informed by men's experiences and because it derives from the powerful social situation of men, relative to women ... The fact that there are many women trained in and adept at male thinking and legal language does not turn it into androgynous language — it simply means that women have learned male language, as many French speakers learn English.²⁶

As opposed to saying that those within the legal system have a privileged understanding of the technical language of law, they argue that the legal language is foreign and

²³ Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006) 171.

²⁴ Natural law assumptions, for example, inform much of human rights law.

²⁵ Joseph Raz, 'The Relevance of Coherence' (1992) 72(2) *Boston University Law Review* 273, 293.

²⁶ Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64(5) *Notre Dame Law Review* 886, 893–4.

oppressive. The claim does not deny the privileged position in interpreting legal language — they merely reverse the value judgement attached to that finding.

While a number of observations can be made about this method of reasoning, the Analyst chooses two which are directly relevant to the issue of accessibility. The first is a common critique levelled against the way in which law is understood. The representation of law as a coherent entity neutralises legal principles and processes, hiding questions of power, bias, and human limits. The position is described by historian Peter Novik:

The assumptions on which [the ideal of neutrality] rests include a commitment to the reality of the past, and to truth as correspondence to that reality; a sharp separation between knower and known, between fact and value, and, above all, between history and fiction. Historical facts are seen as prior to and independent of interpretation: the value of an interpretation is judged by how well it accounts for the facts; if contradicted by the facts, it must be abandoned. Truth is one, not perspectival. Whatever patterns exist in history are "found," not "made."

The objective historian's role is that of a neutral, or disinterested judge; it must never degenerate into that of advocate or, even worse, propagandist. The historian's conclusions are expected to display the standard judicial qualities of balance and evenhandedness. As with the judiciary, these qualities are guarded by the insulation of the historical profession from social pressure or political influence, and by the individual historian avoiding partisanship or bias — not having any investment in arriving at one conclusion rather than another.²⁷

The quote is interesting — not only does it explain the idea of neutrality, it also demonstrates how those outside of the legal profession define law by its impartiality. The extent to which judges are neutral as debated within legal theory is considered a myth in legal practice,²⁸ but neutrality is taken as a given for those who are outside of the profession.

The important focus here is not if law is neutral, nor if the general public are mistaken in thinking it is neutral, but how the belief that law is neutral impacts access to justice. Legal theory focuses on the big questions in law, and when it does look to practice, inevitably it

²⁷ Peter Novick, *That Noble Dream: The 'Objectivity Question' and the American Historical Profession* (Cambridge University Press, 1988) 1-2.

²⁸ Cf Pierre Schlag, 'Normativity and the Politics of Form' (1991) 139(4) *University of Pennsylvania Law Review* 801.

looks at the really meaty difficulties — uncomfortable questions about personal autonomy, problems with agency in criminal law, particularly unjust laws or applications of law. However, law is everything from homicide to the most mundane regulations, and for some, these mundane regulations constitute their daily exposure to law. Legislation that determines how much water you can put on crops, requirements for rigging circus equipment, the type of fishing equipment you can use on certain boats — there are a series of regulations that impact very specific people. Legal theories and legal reasoning are not particularly concerned with these regulations. If the legislation no longer reflects industry standards or fails to include new understandings, the problem isn't one of legal theory but one of updating statute books. However, those individuals who deal with mundane regulation every day, and thus best positioned to challenge these specialist laws, may not feel they are able to.

Language, and the manner in which law is communicated, impacts whether an individual feels they are able to engage with law.²⁹ The compounding of different legal propositions, all deemed to be true, alongside the privileged position given to legal professionals can result in stagnation. In order to understand this, it is important to understand a process of communication Peter Gabel calls *reification*:

For reification we do not simply make a kind of private error about the true nature of what we are talking about; we participate in an unconscious conspiracy with others to whereby everyone knows of the fallacy, and yet denies the fallacy exists. More specifically, in a reified communication the speaker: (1) misunderstands by asserting that an abstraction is concrete; (2) understands that he misunderstands or knows the communication is “false”; and (3) denies both to himself and the listener that he knows either of these things by the implied assertion that the communication is “true”, or concrete. Thus, reification is not simply a form of distortion, but also a form of unconscious coercion, which, on the one hand, separates the *communicated* or *socially apparent* reality from the reality of experience and, on the other hand denies that this separation is taking place. The knowledge of the truth is both repressed and “contained in” the distorted communication simultaneously.³⁰

²⁹ Practical considerations aside.

³⁰ Peter Gabel, ‘Reification in Legal Reasoning’ (1980) 3 *Law and Society Review* 25, 26.

The issue is not simply one of individuals internalising questionable and oppressive legal assumptions as *truth*. It is the belief that law has a coherence they are unable to see that acts to silence, to play with a jurisprudential phrase — *a rule of unrecognition*. As an illustration:

- A citizen might face a regulation that does not reflect their practice;
- But then they tell themselves that law is omnipotent and beyond their reach;
- They quash this discomfort through reassurance that they form part of a democratic system.

Realising that the series of positions are inconsistent, or at least disjointed, they assume a coherence they are unable to recognise because they do not have legal training. The same could be applied to wider concerns:

- An individual faces discrimination from law enforcement;
- They are upset but do not warrant it serious enough for the cost of legal proceedings;
- They quash the discomfort through the reassurance that they possess rights.

Instead of highlighting any inconsistencies, the rule of unrecognition acts to preserve the coherence and virtue of law, denying any questions about their experience with law or justice and instead making them believe they are exercising autonomy. The silencing is compounded to the extent that individuals, while aware of substantive issues, are denied access to law.

The second observation is about the impact of the idea of coherency on the manner in which legal practitioners view their role. It is true that law has been dominated by an elite and that they have shaped the discourse of law to reflect their understanding of the world — a world view that excludes other demographics. Critics are quick to attribute malice on the part of legal practitioners claiming, like Bentham did,³¹ that lawyers purposefully retain a monopoly on law. Such a position fails to appreciate the self-referential nature of a profession like law:

Since the origin of authority, the foundation or ground, the position of the law can't by

³¹ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice* (Hunt and Clarke, 1827).

definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of 'illegal.' They are neither legal nor illegal in their founding moment.³²

That is to say, without individuals in the legal profession, there would be no "legal" or "illegal" actions. Law knows that it rests on shaky grounds; most contemporary definitions of law don't try to hide this. When summarised, their justification of law comes down to: 'we all have a community of legal actors and legal interpreters whose task it is to make it so'.³³ This uncertainty, the inability to locate the source of law's objectivity, makes law's authority vulnerable. And law, when representing itself, attempts to numb this realisation — law makes the uncertain certain; law pretends that it does not affect people;³⁴ law pontificates.³⁵ And those within law, unconsciously aware of their precarious position, define themselves by their ability to know law *when they hear it*.³⁶ The form of reasoning taught and observed becomes a habit — an intuition.³⁷ What is difficult for the practitioner to see is that legal intuition becomes more about linguistic aesthetic than substance. There is a certain idea of what constitutes a 'valid' legal argument and, when it fails to meet the prescribed structure, it not only fails to convince but it becomes incomprehensible.

When applying these observations in the context of accessibility, we see that not only does the focus on legal coherence silence citizens, but it makes those in law poor listeners. Listening requires comprehension and understanding; the current dominant mode of legal understanding does not encourage this. For example, if one insists on coherence, there is a greater incentive to justify or reject anomalies instead of learning and understanding them. Further, coherence does not encourage revisiting and questioning already existing assumptions. Finally, insistence on coherence as a necessary element of valid legal understandings leads to a binary approach: does the information I am faced

³² Jacques Derrida, quoted in Gunther Teubner, 'Economics of Gift — Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (2001) 18(1) *Theory, Culture & Society* 29, 31.

³³ Pierre Schlag, "'Le Hors de Texte, C'est Moi': The Politics of Form and the Domestication of Deconstruction' (1990) 11(5-6) *Cardozo Law Review* 1,631, 1,658.

³⁴ Here I do not mean that legal practitioners deny that individual cases or policy decisions affect people, but law denies that decisions regarding its self-definition can affect people.

³⁵ Brené Brown, *Daring Greatly: How the Courage to Be Vulnerable Transforms the Way We Live, Love, Parent, and Lead* (Penguin Publishing Group, 2012).

³⁶ Schlag (n 33) 1,666.

³⁷ For information on intuition-based knowledge: See Matthew D Lieberman, Johanna M Jarcho and Ajay B Satpute, 'Evidence-Based and Intuition-Based Self-Knowledge: An fMRI Study' (2004) 87(4) *Journal of Personality and Social Psychology* 421.

with fit or not fit? To be in the legal profession means to look at the world a certain way — a view that inhibits the ability to look beyond themselves.³⁸ Those in law set out to capture a picture of the world, but instead they gain a distorted image of their own reflection. It seems, when it comes to law:³⁹

We had talk enough,
but no conversation.

The Analyst, through her deconstruction, comes to the conclusion that the understanding of law as a coherent entity creates the reality of inaccessibility, that the rhetoric of coherency demands legal practitioners present law in an inaccessible fashion. She realises that the enemy is in all of us: in defining law the citizens are excluded and the practitioners constrained. She is left with more questions, and no answers, about how to address access to law. Experiencing a sudden bout of post-modern despair, she quotes Mark Kelman in exasperation:

One real conclusion, one possible bottom line, is that I've constructed a very elaborate, schematized, and conceptual piece of winking dismissal: Here's what they say, this is how far they have gotten. You know what? There is not much to it.⁴⁰

IV THE HUMANIST

Law? — The Humanist says — Oh, I've never met Law; I only know of Law through my friends.

I am really not sure what to make of Law — the Humanist confesses.

You see — the Humanist explains — My neighbour said to me that Law helped him set up his family business. This neighbour, he said he couldn't have secured a premises, obtained a loan, organised products, employed workers, and generally conducted his business if it wasn't for Law. When my neighbour told me this, I thought Law seemed like a really helpful and resourceful man.

³⁸ Balkin (n 2) 168.

³⁹ Jack Lynch (ed), *Samuel Johnson in Context* (Cambridge University Press, 2012) 154.

⁴⁰ Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33(4) *Stanford Law Review* 591, 672-3.

But then my family friend — the Humanist continues — she was treated horribly by her husband; the poor girl was hospitalised repeatedly. Knowing that Law was a helpful man, my friend reached out. Law did not seem to care though — well, Law said he could only help her if she brought all the tools to do the job. I don't think my friend even knew what those tools were. My friend — she is no longer with us. I guess it is not really Law's fault ... But it seems strange how resourceful he is in one case, and not in the other.

I would really like to have a chat with Law before I really form an opinion — the Humanist concludes — But I am not entirely sure where he lives if I am perfectly honest.

The humanist isn't so much concerned with law, but how law relates with people. Law is intertwined with the daily lives of individuals — and individuals are intertwined within the institution of law. When it comes to access to law, the problem, at least in part, is that our current legal understanding acts as a bulwark to maintaining open channels of conversation: the very channels required to form new definitions of law. Effective conversations require both thoughtful representation and active listening, neither of which are present. The law shouts with conviction, lacking the requisite disposition for a meaningful discussion. Luckily conversation is a skill, not a trait, and can thus be learnt. Here, it is worth making two clarifications. The first is the reiteration that law is made up of — and made up by — people. While we may think about law as a wide-reaching force, there is always an individual behind anything we label law. Second, this paper does not purport to provide a grand solution to the problem of access. Citizens are not going to flood their public office motivated by a newfound enthusiasm for the legislative process. The dispositions and approaches that will be outlined are humble, offered as food for thought for anyone who thinks about, writes about, and talks about law.

The case for accessibility lies in our social structures, in ourselves, and in what it means to live together. Psychologists attribute the growth of human society to our ability to communicate. While the first hunting tool was important, our ability to convey its use, incorporate improvements, and cooperate in its utilisation — *conversation* — is what was fundamental to human development. Language is what has given us the indeterminate ability to question, marry, deconstruct, and construct ideas. In turn, the positive-feedback system created through communication allowed humans to direct evolution and shape

their own physical and theoretical environments.⁴¹ Being part of a society involves taking part in the positive-feedback system, in the context of law; this means allowing people to direct the course of law's evolution and create a more inclusive legal environment. Conversely, it requires the legal profession to effectively communicate the ideas, concepts, and understandings with others.

There are a number of points that can be raised about communication and access to law, but here three are offered. First, where society restricts the scope of participants, its evolution can not only stagnate but can regress.⁴² It is not in the transfer, but through the marrying, incorporation, and abandonment of ideas that society develops. If law limits who is able to partake in this exchange, it is impacting its own ability to grow. To understand why collective input is important, we must develop the skill of equipoise: to acknowledge and accept biases and limitations in our own mind. This may be difficult, as Pierre Schlag notes, 'traditional legal discourse rhetorically establishes the self of the legal thinker as a privileged individual subject — as the author of his own thoughts, the captain of his own ship, the Hercules of his own empire'.⁴³ As desirable as that conception may be, the legal profession can benefit from the input of the rest of society.

Sandra Harding argued that other people can provide a vantage inaccessible to ourselves — that in sharing different perspectives we can obtain a more objective view of the social phenomena we are observing.⁴⁴ With the understanding that it is always an individual, and usually one in the profession, who confers meaning onto law — all definitions of law must account for human error. This is not a simple argument of judges making a mistake in legal reasoning — it is the realisation that we have cognitive limitations by virtue of us being human. In brief, in constructing a consistent understanding of the world (or a consistent understanding of a concept such as law), we utilise a number of different cognitive functions, and these can blind us to alternative interpretations. For one, people

⁴¹ Michael C Corballis, *The Lopsided Ape: Evolution of the Generative Mind* (Oxford University Press, 1993).

⁴² See I Davidson and D Roberts, '14,000 BP — on Being Alone: The Isolation of Tasmania' in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History* (UNSW Press, 2009).

⁴³ Schlag (n 33) 1637.

⁴⁴ Sandra Harding, 'After the Neutrality Ideal: Science, Politics, and "Strong Objectivity"' (1992) 59(3) *Social Research* 567.

have varying abilities to spot potential inconsistencies and thus activate the process of evaluation.⁴⁵ Some people simply do not see a problem where there is one.

Second, the part of the brain that holds our ability to combine, compare, and sequence multiple sources of information is limited by processing constraints.⁴⁶ On average, people can only hold up to seven considerations in their mind at one time — in an expansive concept such as law, this poses the danger of overlooking relevant considerations. Finally, resolving conflicts takes a great deal of energy, and therefore, once resolved, humans form a habit of approaching similar issues in the same manner, *even if the original calculus was mistaken*. Challenging the view requires multiple instances of new conflicts, different from the original evaluation undertaken.⁴⁷

The understandings that those within law develop through law school and through their practice makes certain ways of thinking habitual, and thus difficult to challenge by one's self. This internalisation acts to reinforce the shared understanding. In order to uncover possible inconsistencies, alternative voices must be given the opportunity to challenge key legal assumptions — *without others, we simply cannot see new possibilities*.

Third, to state that law is a technical language out of the reach of citizens denies the legal practitioner's position within society. This quote, from a middle school teacher, seems apt:

The way they exclude one another is the way eight-year-olds would play. They don't seem able to put themselves in the place of other children. They say to other students: "You can't play with us."⁴⁸

To state that law is a different language denies the fact that legal practitioners are members of society who are capable of conveying meaning in non-legal contexts. Communicating law is not a case of a native French speaker talking with an English speaker, but the process of one person conveying new knowledge to another within their society. Humans have an amazing ability to share our social world through

⁴⁵ Matthew Lieberman and Naomi Eisenberger, 'Conflict and Habit: A Social Cognitive Neuroscience Approach to the Self' in Abraham Tesser, Joanne V Wood and Diederik A Stapel (eds), *Building, Defending, and Regulating the Self: A Psychological Perspective* (Taylor & Francis, 2004) 86.

⁴⁶ Ibid 84.

⁴⁷ Ibid 85.

⁴⁸ Sherry Turkle, *Reclaiming Conversation: The Power of Talk in a Digital Age* (Penguin Publishing Group, 2015) 16–17.

communication — to induce a mirroring of brain activity in our listener.⁴⁹ However, we also comprehend the world differently — humans have diverging understandings of even basic concepts such as time.⁵⁰ There are two key components to effective communication: the first is an awareness of one's own values, assumptions, approaches — the aforementioned skill of equipoise. The second is the locating of a common ground with the listener, contextualising one's idea within the listener's lived experience, and continuously catering communication to their understanding. On a practical level, it calls for the abandonment of the assumption that there is an objectively clear manner in which law can be presented.⁵¹ Rather, it is a conscious reflection on whether the words written or uttered allow your audience to access your thoughts, beliefs, and passions. It is not a science, nor an art, but a practice.

Communication of this form is essential for access to law. It allows individuals to understand law without being coerced into accepting it as an unquestionable truth. It is the basis upon which individuals can determine whether law reflects their needs, wants, and understandings. People who are unable to take part in the positive-feedback system are extra-society; to take part, they have to be given the ability to question dominant understandings. In this manner, access to law involves allowing people to 'enter into [law], to criticise it without utterly rejecting it, and to manipulate it without self-abandonment to *their* system of thinking and doing'.⁵² Arguably those within the legal profession benefit as well — the focus on objectivity denies their ability to share their definition of the legal world. Joy is rarely found in the accepted or the normalised, it is usually found in the unexplained, the new, the unique; being forced to pretend that their perspective is objective almost transforms it into something mundane.

Finally, a conversation cannot occur unless there is an exchange of ideas. Law must not only explain, but also listen. At the most basic level, listening has been linked with greater empathy and the ability to overcome differences. Fostering a sense of value through listening can have positive impacts generally, helping to address key social issues without

⁴⁹ Uri Hasson et al, 'Brain-to-Brain Coupling: A Mechanism for Creating and Sharing a Social World' (2012) 16(2) *Trends in Cognitive Sciences* 114.

⁵⁰ Lera Boroditsky and Alice Gaby, 'Remembrances of Times East: Absolute Spatial Representations of Time in an Australian Aboriginal Community' (2010) 21(11) *Psychological Science* 1,635.

⁵¹ Turfler (n 20).

⁵² D Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982) 62.

the need for law to demonstrate its force.⁵³ However, in the context of access to law, listening requires the active participation of individuals. It is the essential mechanism through which new ideas can be incorporated into our current legal understanding. Alongside the recognition of fallibility, and the contextual framing of information, this requires that one

suspend or bracket one's own perceptions long enough to enter sympathetically into the alien and possibly repugnant perspectives of rival thinkers. All of these mental acts — especially coming to grips with a rival's perspective — require detachment, an undeniably ascetic capacity to achieve some distance from one's own spontaneous perceptions and convictions, to imagine how the world appears in another's eyes, to experimentally adopt perspectives that do not come naturally.⁵⁴

The different perspectives gained in this process of “stepping out” are where the seeds for growth are found, where ideas are merged, and law developed.

The Humanist accepts that her contributions are minor as they call for those within law to actively reflect on their role as a legal thinker, speaker, and listener. Her focus is on the individual level and does not deny that more holistic methods have to be adopted to make law more accessible. However, no matter how one conceptualises law — whether an objective entity we can positively describe, a set of coherent structures guided by principles, a directional endeavour, or a mere construction — communication is the only means through which we can identify and solve problems. The dispositions and practices highlighted are not sufficient to ensure access to law, but it would be impossible without them. How might this be practically implemented: That is a question for another person.

V THE LAW

In examining the issue of inaccessibility, this paper set out to highlight the role that different perspectives play in the act of defining law. In relation to the issue of accessibility, the paper advanced the proposition that the way we understand, express, and comprehend law can create limitations on individuals to speak, practitioners to listen,

⁵³ Arie W Kruglanski et al, 'The Psychology of Radicalization and Deradicalization: How Significance Quest Impacts Violent Extremism' (2014) 35 *Political Psychology* 69.

⁵⁴ Thomas L Haskell, 'Objectivity Is Not Neutrality: Rhetoric vs Practice in Peter Novick's *That Noble Dream*' (1990) 29(2) *History and Theory* 129, 132.

and law to develop. Currently, Law silences citizens and constrains practitioners. The offered solution is a change in disposition and practices when talking about law — to offer a lesson for law in conversation.

Weaved into this position on accessibility was a demonstration of the importance of engagement. Through the adoption of different personas, it was shown that individuals bring their own skills and values, providing unique perspectives on law and legal issues. The Democrat, Analyst, and Humanist each brought with them a position that added to the conversation but also prohibited them from drawing a conclusion. The personas' preoccupation with their relationship with law — the Democrat's bend towards populism, the Analyst's focus on 'truth', and the Humanist's desire to contextualise individual experience — prohibits law's ultimate goal: to make a determination. The Democrat cannot incorporate every perspective, the Analyst is unlikely to discover a grand truth, and the Humanist wishes to keep listening to the detriment of reaching a conclusion. Law must make a judgement in order to be operational, but this paper is a call for the Law, and more accurately those individuals who form part of law as an institution, to listen more openly.

Law must remember that it is people who constituted her; that in a collective enterprise they came up with the most effective tool of social organisation; that without their input, she will cease to be authoritative — worse still, she will no longer be loved.

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