Griffith Journal of Law & Human Dignity

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

Volume 3(2) 2015

Published in November 2015, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity* ISSN: 2203-3114

CONTENTS

BLOOD ON ITS HANDS

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The actions of the Australian Federal Police, in providing to the Indonesian National Police the identity of eight Australian citizens, comprising eight of the Bali Nine, and the details of their intended crime, exposing them to the death penalty, can never be justified. This paper will argue that inferences and implications arising from Australian legislation and guidelines impose restrictions on cooperation with foreign nations, where such cooperation could lead to the death of an Australia citizen. Furthermore, it will be argued that the Australian Federal Police possessed more than sufficient evidence to justify the apprehension of those eight Australian citizens. The Australian Federal Police continue to contend that they would act, in similar circumstances, in the same way. Therefore, immediate steps must be taken to ensure that no Australian citizen is ever again exposed to the risk of the death penalty in similar circumstances.

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CONTENTS

I INTRODUCTION

The actions of the Australian Federal Police ('AFP'), in providing to the Indonesian National Police ('INP') the identity of eight Australian citizens, comprising eight of the so-called "Bali Nine", and the details of their intended crime, within Indonesia, exposing them to the inevitable consequence of death by firing squad, can never be justified.

II WERE THE ACTIONS OF THE AFP LEGAL?

It is the contention of the AFP that it acted legally in providing, to the Indonesian authorities, the identities of eight of the Bali Nine, their intended movements from and to Australia, and details of their intended illegal importation of heroin into this country. The AFP places reliance on the decision of Finn J, in the Federal Court of Australia at Darwin, in *Rush v Commissioner of Police* (2006) 150 FCR 165 ('*Rush's Case*') in support of its contention. Although Finn J found no illegality in the actions of the AFP, it is a distortion of his judgment to say that he determined that the AFP acted legally.

Rush's Case comprised an interlocutory application on behalf of the applicants for preliminary discovery of the records relating to the Bali Nine operation. It was a condition precedent to the entitlement to disclosure that the applicants were able to identify a possible cause of action, based upon a legal wrong, that had been done to the applicants.

It was the applicants' assertion that the activities of the AFP, in providing information to the INP of the intention to illegally export heroin from Indonesia into Australia, exposing the eight identified Australian citizens to the death

penalty, constituted a breach of the *Death Penalty Abolition Act 1973* (Cth); the *Australian Federal Police Act 1979* (Cth); the *Mutual Assistance in Criminal Matters Act 1987* (Cth); and the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth).

There was clearly nothing in the *Death Penalty Abolition Act 1973* (Cth) preventing the disclosure of information which might result in the imposition of a death penalty. Similarly, there was no prohibition on the provision of like intelligence contained within the *Australian Federal Police Act 1979* (Cth). The latter Act did, nevertheless, define the functions and powers of the AFP being, 'the provision of police services in relation to laws of the Commonwealth … [and] the safeguarding of Commonwealth interests'[1] and 'to do anything incidental or conducive to the performance of … [those] functions.'[2]

Similarly, there was no prohibition in either the *Mutual Assistance in Criminal Matters Act 1987* (Cth) or the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth) that prohibited the provision of information of the kind that was conveyed to the INP on 8 and 12 April 2005. The aim of the legislation as particularised in the outline to the Explanatory Memorandum to the 1996 Bill was to, inter alia:

- clarify the areas in which mutual assistance in criminal matters may only be sought by the Attorney-General and the areas in which assistance may be sought using other channels
- enable the Attorney-General to grant or request assistance without the Act having to be applied by regulation to a particular country
- give the Attorney-General *a discretion to refuse assistance where the request relates to the prosecution or punishment of a person* for an *offence in respect of which the death penalty could be imposed or carried out*
- enable the Attorney-General to refuse assistance where he considers it appropriate in the circumstances of a particular request …[3]

[1] *Australian Federal Police Act 1979* (Cth) s 8(1)(b).
[2] Ibid s 8(1)(c).
[3] Explanatory Memorandum, Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996 (Cth), 1 (emphasis added).

Finn J found that the *Mutual Assistance in Criminal Matters Act 1987* (Cth) had no application to the provision of the information in this case. It is clear that that was so. However, his Honour did record, in the course of his judgment, that the following paragraphs were inserted into s 8 of the principal Act, by the 1996 amending Act:

> (1A) A *request* by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.
>
> (1B) A *request* by a foreign country for assistance under this Act may be refused if the Attorney-General:
>
> (a) believes that the provisions of the assistance may result in the death penalty being imposed on a person; and
> (b) after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the *request* should not be granted.[4]

The ultimate failure of the application for disclosure and the implicit support of the actions of the AFP resulted from the fact that no *request* had been made by the INP in this instance. Rather, the unilateral actions of the AFP in providing the information that had not been requested by the Indonesian authorities was not caught by the legislation and hence the AFP, in providing that information, did not act illegally.

It has always been the contention of the AFP that the provision of information to the INP, in this instance, was done pursuant to a Memorandum of Understanding between Australia and Indonesia entitled Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation. Certainly, amongst the criminal matters in relation to which the *Treaty Between*

[4] *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 8, quoted in *Rush's Case* (2006) 150 FCR 165, 177–8 [40] (emphasis added).

Australian and the Republic of Indonesia on Mutual Assistance in Criminal Matters ('*Mutual Assistance Treaty*') envisaged that assistance could be granted was 'an offence against the law relating to dangerous drugs or narcotics'.[5]

Notwithstanding this contention the *Mutual Assistance Treaty*, effected pursuant to the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth), contemplated, in art 4(2)(d), that assistance under the Treaty might be refused if the *request* related to 'the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out.'[6]

Further, reference should be made to the AFP official guideline, the AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations ('Death Penalty Charge Guide'), which provides:

> The Attorney-General in consultation with the Minister for Justice has determined that in future Australia will exercise a discretion when considering foreign *requests* for mutual assistance in criminal matters where the *request* relates to a charge attracting the death penalty under the law of the *requesting* country. In exercise of that discretion, assistance may be refused in the absence of an assurance from the *requesting* country that the death penalty would not be imposed or carried out. The Attorney-General has decided that this policy will also apply to police *requests*.
>
> Consistent with the Attorney-General's decision, in future the following will apply in relation to AFP cooperation with overseas law enforcement agencies:
>
> - police to police cooperation may continue on the present basis, i.e. the AFP may provide such assistance as *requested*, provided it meets existing policy guidelines, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.
> - where the assistance of the AFP is *sought* by the police or another law enforcement agency of a foreign country in relation to a matter in which a charge has been laid under the law of that foreign country, for a crime attracting the death penalty, no action is to be taken, nor should any

[5] *Treaty Between Australian and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, signed 27 October 1995, [1999] ATS 10 (entered into force 17 July 1999) annex.
[6] Ibid art 4(2)(d).

> indication be given as to the decision likely to be made in respect of the *request*. All such *requests* are to be notified to the Director International Operations as soon as possible after receipt. Following consultation with the Attorney-General's Department, the General Manager National Operations will provide the Commissioner and Deputy with such advice as considered necessary in order that advice may be provided to the Minister for Justice and the Attorney-General …[7]

Again, it was recognised that the Death Penalty Charge Guide had no application in this instance. Of course the Death Penalty Charge Guide relates only to requests for assistance. The AFP circumvented the application of any of the prohibitions relating to the supply to a foreign police force of information or intelligence that might lead to the imposition of the death penalty on an Australian citizen by deliberately, and quite callously, providing the information in this instance, without any request, recognising that there was no specific prohibition upon it so doing.

In the light of the restrictions imposed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth), the *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999* (Cth), the *Mutual Assistance Treaty* and the Death Penalty Charge Guide it is naive, in the extreme, for the AFP to contend that it was acting with propriety and in accordance with the laws of Australia in providing the information to the INP, which it did on 8 and 12 April 2005.

It is significant that Finn J in, effectively, refusing to find any illegality on the part of the AFP said of his judgment that:

> *Whatever the moral wrong* to a caring parent that may have been involved in so doing [knowingly misleading Lee Rush for the purposes of securing the Bali investigation from potential compromise] it [the actions of the AFP] could not have authored a duty of care such as has been proposed in this application.[8]

[7] Australian Federal Police, 'AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations', quoted in *Rush's Case* (2006) 150 FCR 165, 179 [50] (emphasis added).
[8] *Rush's Case* (2006) 150 FCR 165, 197 [118] (emphasis added).

It is of significance that it is not contended by the AFP that it acted in ignorance of the relevant principles. The argument seems to be one relating to what the AFP perceived to be the "greater good"; that is to say that one or more of the Bali Nine be executed rather than innocent Australians be exposed to the scourge of illegally imported heroin and the concomitant risks associated therewith. As it was put by Commissioner Andrew Colvin, on the occasion of the AFP press conference on 4 May 2015 'so my first point to that is which Australian citizens do you want us to protect? Those that are impacted by narcotics each and every day – I know that's not your question, but that needs to be put into context.'[9]

Deputy Commissioner Phelan, in the course of the press conference said:

> I've seen the misery that drugs cause to tens of thousands of families in this country. We are charged with executing the laws of this country to the best of our ability. That's the sort of thing that weighed on my mind at the moment. Yes, I knew full well that by handing over the information and requesting surveillance and requesting the evidence gathered [sic] if they found them in possession of drugs they would take action and expose them to the death penalty. I knew that.
>
> I went in with an open mind but I weighed up a number of things in my mind as to what I thought was appropriate and I've agonised over it for ten years now and every time I look back, I still think it's a difficult decision, but given what I knew at that particular time and what our officers knew, I would take a lot of convincing to make a different decision. It was not easy.[10]

The "greater good" argument has no place in the law, or, for that matter, in society. It is an issue, as was foreshadowed by Finn J, of "morality". The 19th century British individualist, Auberon Herbert, addressed the issue of the "good of the greater number". He wrote in the July 1898 edition of *The Free Life*:

> There never was invented a more specious and misleading phrase. The Devil was in his most subtle and ingenious mood when he slipped this phrase into the brains of men. I hold it to be utterly false in essentials. It assumes that there are two opposed 'goods', and that the one good is to be sacrificed to the other good – but

[9] Australian Federal Police, 'Commissioner Andrew Colvin, Deputy Commissioner Michael Phelan and Deputy Commissioner Leanne Close Discuss Bali Nine' (Transcript of Media Release, 4 May 2015), 16 <http://www.afp.gov.au/media-centre/news/afp/2015/may/transcript-bali-nine>.
[10] Ibid 24.

> in the first place this is not true, for liberty is the one good, open to all, and requiring no sacrifice of others; and secondly this false opposition (where no real opposition exists) of two different goods means perpetual war between men – the larger number being forever incited to trample upon the smaller number. I can only ask: why are two men to be sacrificed to three men? We all agree that the three men are not to be sacrificed to the two men; but why – as a matter of moral right – are we to do what is almost as bad and immoral and short-sighted – sacrifice the two men to the three men? Why sacrifice any one set of men to another set, when liberty does away with all necessity of sacrifice?[11]

The AFP recognised that it was doing the work of the "Devil" when it communicated details of the Bali Nine conspiracy to the INP. The AFP contends that it was confronted with a dilemma. There was no dilemma. The answer was clear. It was morally wrong to take the decision that exposed these young Australian citizens to the death penalty. As the AFP acknowledged in the course of its press conference, one of its number was clearly concerned about the moral implications of the Bali Nine operation and refused to take part in the "AFP conspiracy".

The obligations of the AFP were not only to uphold the law of Australia, including obligations to be implied and inferred from not only Australia's objection to the death penalty but also the clear inferences and implications arising from both legislation and guidelines imposing restrictions on cooperation with foreign nations, upon request by the latter, when the provision of cooperation could lead to the death of an Australian citizen; there was also an obligation to prevent the commission of a crime.

III THE AFP HAD THE EVIDENCE

The AFP, over the course of the past decade and in the course of its recent press conference, suggested that it had insufficient evidence to prevent the departure, from Australian shores, of the eight identified members of the Bali Nine.

[11] Auberon Herbert, *The Free Life* (United Kingdom), July 1898.

Obviously, it is a matter of judgment for prosecutors whether there is sufficient evidence to prosecute any given charge.

Finn J, in the course of his judgment in *Rush's Case*, referred to the 'precise details provided to that police [the INP] by members of the AFP,'[12] resulting in the arrests of the Bali Nine, and the fact that 'the AFP was already possessed of a considerable body of information relating to past and likely prospective moves of (inter alia) the applicants.'[13]

The letter from Paul Hunniford, the AFP Senior Liaison Officer in Bali, of 8 April 2005, was headed 'Heroin couriers from Bali to Australia – Currently in Bali'.[14]

It went on to say:

> Dengan hormat,
>
> The AFP in Australia have [sic] received information that a group of persons are allegedly importing a narcotic substance (believed to be Heroin) from Bali to Australia using 8 individual people carrying body packs strapped to their legs and back. More specifically the information received that:
>
> The group planned to conduct an importation in December 2004. The group travelled to Bali in December 2004 but the importation was cancelled because there was not enough money to buy 'the stuff' and that they would be travelling again in 3-6 months. The group returned to Australia.
>
> The couriers were given instructions not to smoke cigarettes for two weeks prior to travel as they would not be allowed to smoke on the return flight as they may appear nervous. They were to carry body packs (containing white powder) back to Australia by using packs on both legs and the back supports. The packs were to be tightly taped to the person's body. Members of the group were given expense money and told to change the money into local currency to allow them to buy oversized clothes and thongs. The clothes and thongs were not to have any metal on them to avoid the metal detectors at the airports. The couriers received pre-

[12] *Rush's Case* (2006) 150 FCR 165, 168 [2].
[13] Ibid 195 [107].
[14] Letter from Paul Hunniford to INP, 8 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 172 [22].

paid mobile telephones. On return through Customs they were told to be carried [sic] a wooden carving for declaration to Quarantine to by-pass Customs.

Couriers –

YANG, Alice dob 9 Dec 1985

NGUYEN, Thanh Nhan dob 30 Nov 1986

LEE, Francis dob 14 March 1983

CAO, Shaode dob 26 Sep 1986

HUANG, Danny dob 7 Dec 1986

LAU, Ina Yuk Teng 3 Feb 1986

LAWRENCE, Renae dob 11 Oct 1977

NORMAN, Matthew 17 Sept 1986

Enquiries reveal that Andrew CHAN bn: 12/0111984 [sic] (21)…Sydney (NSW D/L) organised travel for some of the December 2004 couriers. Travel movements show that CHAN has travelled previously to Bali in August 2004 (11 days) and October 2004 (7 days).

On Sunday 3 April 2004 CHAN departed Sydney for Denpasar, Bali. His travel itinerary indicates that he is booked to stay at the Hard Rock Café Kuta and is due to return on Friday 15 April 2005.

On Wednesday 6 April 2005 four suspected couriers departed Sydney for Denpasar on AO7829:

Renae LAWRENCE bn: 11/10/1977

Matthew NORMAN bn: 17/09/1986

Martin STEPHENS bn: 13/04/1976

Si Yi CHEN bn: 19/03/1985

They are due to return to Australia on Friday 15 April 2005, the day after CHAN returns. At this stage it is unknown who is the source of the narcotics in Bali. If identified by INP it is strongly requested that no action is taken until interdiction

commences in Australia as early interdiction will hamper the identification of the organiser/recipients in Australia. Also until the possible narcotics are located on the couriers it is possible that the syndicate is still in the organisational phase.

About 0900 hrs this date Friday 8 April the AFP have [sic] received information that a further 3 suspect couriers departing on Australian Airlines flight no AO7829 to Denpasar. Return date not confirmed at this stage.

Tan Duc Thanh NGUYEN bn: 30/10/1982

Michael William CZUGAJ bn: 21/06/1985 (Russian)

…

Scott Anthony RUSH bn: 03/12/1985

…

Request

The AFP would like to identify the source of the drugs and the organisers (other than CHAN) in Australia. We would also like to gain evidence of association between CHAN and the suspected couriers. To do this it [sic] I ask that

1. That the suspected couriers due to arrive this date be oversighted to identify their intended address in Australia.

2. INP obtain as much evidence/intelligence as possible to assist AFP identify the organisers in Australia and source of narcotics in Indonesia.

3. We request surveillance to be carried out on CHAN and the couriers until departure.

4. should they suspect that CHAN and/or the couriers are in possession of drug at the time of their departure that they take what action they deem appropriate.

5. Could INP make inquiries to establish if CHAN is staying at the Hard Rock Hotel and to identify any associates, especially meetings with the above mentioned or the identity of other possible couriers.

6. Could copies of all passenger arrival cards be obtained.

7. Request photos be taken of any meetings for possible use in proceedings here.

8. If possible obtain phone records of any numbers being called in Australia by either CHAN or the couriers. This may assist AFP identify the organisers in Australia and possible telephone interception.[15]

On 12 April 2005, Officer Hunninford sent another letter to the INP. It stated:

> Subject:
>
> Suspected heroin couriers from Bali to Australia – Additional intelligence
>
> Dengan hormat
>
> Enquiries reveal that:
>
> Andrew CHAN bn: 12/011984 [sic]
>
> Renae LAWRENCE bn: 11/10/1977
>
> Matthew NORMAN bn: 17/09/1986
>
> Martin STEPHENS bn: 13/04/1976
>
> Csiyi CHEN bn: 19/03/1985
>
> are due to return to Australia on Thursday 14 April 2005, on the Australian airlines flight AO7830 scheduled to depart at 22.40 hrs. Intelligence suggests that CHAN may not be in possession of narcotics but will possibly act as oversight on the flight. It is also suspected that Chan would take possession of the narcotics after they arrived in Australia.
>
> Enquiries reveal that:
>
> Tan Duc Thahn NGUYEN bn: 30/10/1982
>
> Michael William CZUGAJ bn: 21/06/1985 (Russian)
>
> ….
>
> Scott Anthony Rush bn: 03/12/1985

[15] Ibid 172–174 [22].

> …
>
> are due to return to Australia on Saturday 16th April 2005, on Australian Airlines flight AO7830 scheduled to depart at 22.40 hrs. Intelligence suggests that NGUYEN may also not have narcotics in his possession and may only oversight/organise the couriers.
>
> Request
>
> If arrests are made on 14 April it is likely that NYUYEN [sic], CZUGAJ and RUSH will become suspicious of the arrest and decide not to attempt to board the Saturday flight with narcotics. I therefor [sic] request that you consider searching NYUYEN [sic], CZUGAJ and RUSH soon after the first group are intercepted.[16]

As noted by Finn J, the intelligence provided to the INP contained 'precise details' of the activities of the Bali Nine.[17] His Honour also noted that 'the AFP [by 8 October 2004] was already possessed of a considerable body of information'.[18] The AFP had clearly received substantial information from informants within Australia. The AFP investigation had been ongoing since February 2005. The last three of the Bali Nine departed Australia on 8 April 2005. Scott Rush was one of those three. On the occasion of the press conference Deputy Commissioner Phelan said of that departure:

> The important point to note here is that Scott Rush was linked to three airport alerts, not one, but three. First, the alert that was placed on as a result of the conversations with his father; the second, an alert was placed because proximate to the same time an anonymous information came in to Crime Stoppers into New South Wales, and a pass alert or an alert was put on at the same time. The third one was another alert that had been previously put on in relation to one of the subsequent people arrested in Bali. He was directly linked through travel bookings with that individual. So on three separate occasions, Scott Rush was linked to this syndicate.[19]

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[16] Letter from Paul Hunniford to INP, 12 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 174 [23].
[17] *Rush's Case* (2006) 150 FCR 165, 168 [2].
[18] Ibid 195 [107].
[19] Australian Federal Police, 'Commissioner Andrew Colvin, Deputy Commissioner Michael Phelan and Deputy Commissioner Leanne Close Discuss Bali Nine', above n 8, 9.

It goes without saying that the AFP was possessed of sufficient intelligence at that time to link Scott Rush with the ongoing investigation. It is also idle to suggest, as the AFP now does, that there was never an agreement to, at the very least, speak to Scott Rush as he departed from Australia. As Deputy Commissioner Phelan conceded, one of the three alerts was placed there at the request of Scott Rush's father. There was no point in establishing that alert unless it was intended for a purpose. I will return to consider the cavalier way in which the activation of, at the very least, the alert initiated at the request of Lee Rush was treated.

James Watson, an AFP member and legal adviser to the Commissioner and to AFP members, said in the course of his evidence on the occasion of the hearing before Finn J that:

> It was the triggering of this alert [one of the three passenger analysis clearance and evaluation system ('PACE') alerts that had been activated by Scott Rush on the occasion of his departure] which connected Mr Rush with eight other persons of interest. It was information obtained in the course of this extant AFP investigation (including as a result of the activation of the PACE alert handled by Federal Agent Hingst) which caused Mr Rush's details to be included in the AFP letters of 8 and 12 April.[20]

Although, as I say, it is a matter for judgment, it would be my view that prior to the departure of the known eight of the Bali Nine (excluding Myuran Sukumaran), the AFP possessed more than sufficient evidence to justify the apprehension of those eight Australian citizens, with the inevitable consequence that they would have been subjected to Australian law, charged, tried, and, in all likelihood convicted and sentenced in relation to the crimes that they intended to commit against Australia and its citizens.

There is obviously, in every proposed prosecution, some uncertainty whether a conviction would necessarily result. It is not to the point that one or more of these eight young Australians citizens may have been acquitted. What is to the point is that the timely arrests prior to the departure of eight of the Bali Nine would have

[20] *Rush's Case* (2006) 150 FCR 165, 174–5 [24].

ensured that none of the nine were ever exposed to the death penalty and that Myuran Sukumaran and Andrew Chan would not now be dead.

It was the obligation of the AFP to prevent the commission of the crime in this instance. It would have accomplished that obligation had it apprehended the identified eight within Australia. The result of the apprehension of the known eight may well have meant that Sukumaran might never have been identified and might never have been brought to justice as a co-conspirator. The fact is that in delegating its obligations to investigate and prosecute any crimes associated with the Bali Nine to its Indonesian counterparts, the AFP put it beyond its control to 'identify the organisers in Australia' and to identify 'source of narcotics in Indonesia'[21] — the AFP's stated purpose in communicating with the INP, at first instance, on 8 April 2005.

Further, misleading information, purportedly supporting the decision to delegate responsibility for this operation to the INP, was offered by the AFP on the occasion of the recent press conference. It was said, in the course of that conference, that it was not for Australia to impose its will or direction in relation to the investigation and prosecution of charges on a foreign shore to a foreign police force.

The AFP letter to the INP of 8 April gives the lie to that assertion. The letter seeks cooperation. The AFP would hardly suggest that in 'strongly request[ing] [of the INP] that no action is taken until interdiction commences in Australia as early interdiction will hamper the identification of the organiser/recipients in Australia' it was making an idle request.[22] Further, there can be no doubt that the request made in the paragraph numbered 4 that 'should they suspect that CHAN and/or the couriers are in possession of drug at the time of their departure that they take what action they deem appropriate'[23] and the 'request that you consider searching NYUYEN [sic], CZUGAJ and RUSH soon after the first group are intercepted' were consistent with the initial request for cooperation.[24]

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[21] Letter from Paul Hunniford to INP, 8 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 173 [22].
[22] Ibid.
[23] Ibid.
[24] Letter from Paul Hunniford to INP, 12 April 2005, quoted in *Rush's Case* (2006) 150 FCR 165, 174 [23].

There can be no doubt that the Indonesian authorities would have cooperated, in the way that was first envisaged, had they been requested to do so. Having said that, the ultimate invitation to arrest was not only callous, but as is now conceded, deliberate. Finally, there can be no doubt that the AFP knew that one or more of the Bali Nine would likely be executed in consequence of the "intelligence" provided to the INP by the AFP. Deputy Commissioner Phelan, in the course of the recent press conference, said:

> We understood – and I'll be clear, and I've been saying this now for the best part of ten years – that decision was made in the full knowledge that we may very well be exposing those individuals to the death penalty. I've said that before and it's not a position that the AFP has stepped away from. We knew what may occur as a result of that.[25]

The resignation of one of the case officers from the investigation is overwhelming evidence of the AFP's expectation of the inevitability of the imposition of the death penalty. It is, of course, to the credit of that police officer that he or she distanced himself or herself from participation in the AFP conspiracy. It is of concern that the officers charged with the obligation of 'safeguarding ... Commonwealth interests' and 'do[ing] anything incidental or conducive to the performance of' such function would act as the AFP did in this instance.[26]

The cavalier approach of the AFP to the likely imposition of a death sentence on one or more of the Bali Nine was reflected in the evidence given by Federal Agent Collins in the hearing before Finn J in the Federal Court. Federal Agent Collins had been informed by a Queensland police officer on secondment to the AFP, Damon Patching, that Scott Rush's father Lee 'wanted Scott to be approached.'[27] Collins commented to Patching that 'this was not usual practice.'[28] Collins, who was on duty at the AFP office at Sydney Airport on 8 April, having been informed of the activations of the alert on Scott Rush, swore:

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[25] Australian Federal Police, 'Commissioner Andrew Colvin, Deputy Commissioner Michael Phelan and Deputy Commissioner Leanne Close Discuss Bali Nine', above n 9, 9.
[26] *Australian Federal Police Act 1979* (Cth) s 8(1)(b)(iii), 8(1)(c).
[27] *Rush's Case* (2006) 150 FCR 165, 171 [17].
[28] Ibid.

> My conclusion at this stage [passengers having commenced boarding the flight to Bali] was that there was no reason for Scott Rush to be detained and that he should be allowed to leave without being disturbed. My view was that despite the concerns of Lee Rush, Scott Rush was an adult and there was no basis for detaining Scott Rush. I recall running my decision past my supervisor after outlining the result of my investigations and that my supervisor agreed with my decision.[29]

The overall actions of the AFP demonstrate an administrative avoidance by it of government policy. Further, the contention that a decision to provide assistance to a foreign nation, in the circumstance of this case, is regarded as an "operational decision for the AFP not involving notification to either the Attorney-General or Minister for Justice and Customs" is unsupportable. The decision of the AFP to expose the identified members of the Bali Nine to the death penalty was a cold and callous decision. It exposed all of the eight identified Australian citizens to an almost inevitable execution by firing squad. Fortunately, the death sentences imposed on four of the six had been reduced to sentences of life imprisonment by the time of the conclusion of the appeal procedures in Bali.

The AFP continues to contend that it would act, in circumstances similar to those giving rise to the cooperation with the INP in the case of the Bali Nine, in the same way if presented with similar circumstances today; that is to say, notwithstanding the execution of both Chan and Sukumaran, the current AFP practice is to:

> cooperate [with a foreign police force notwithstanding the availability of the death sentence as a punishment] up to the point a charge is laid irrespective of whether the dossier [being prepared in cooperation with the intelligence provided by the AFP] is being prepared for a likely charge which will eventuate in the death penalty.[30]

[29] Ibid 172 [21].
[30] *Rush's Case* (2006) 150 FCR 165, 180 [53].

IV LESSONS NOT LEARNT

That attitude on the part of the AFP is abhorrent. If the AFP cannot deduce from relevant legislation, treaties, and guidelines that they are not permitted to cooperate with a foreign police force, where the likely outcome of such cooperation will expose an Australian citizen to the death penalty, then clearly it is time for legislation, prohibiting cooperation in those circumstances, to be imposed on the AFP.

Alternatively, to adopt the suggestion of my colleague, Colin McDonald QC, of the Northern Territory Bar:

> In order to avoid as much as is possible the exposure of Australian citizens to the death penalty, the first practical suggestion is for Australia to domestically legislate and incorporate into domestic law the *Second Optional Protocol to the International Covenant of Civil and Political Rights*.[31] This practical step would prevent any Government in Australia in the future, in the law and order auction world of Australian politics, from reintroducing the death penalty. It would also ensure the exposure of an Australian citizen to the death penalty was a relevant legal consideration in administrative decision making which might expose such a citizen to the death penalty.
>
> The second practical step involves the writing of one letter by the Minister for Justice to the Commissioner of the Australian Federal Police, pursuant to section 37(2) of the *Australian Federal Police Act 1979*. That letter would be a direction to the Commissioner that AFP members are not to intentionally and predictably expose Australian citizens to the death penalty in AFP operations. By subsection 37(4) of the same Act the Federal Police Commissioner is obliged to comply with such a direction.[32]

[31] *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty,* opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

[32] Colin McDonald, 'Don't Bury us Before we're Dead' (Paper presented at the Criminal Lawyers Association of the Northern Territory 11th Biennial Conference, Remote Justice, Bali Hyatt Hotel, Sanur Beach, Bali, Indonesia, 5 July 2007) 10 <http://clant.org.au/index.php/the-bali-conference/2007>.

Finally, in the context of the actions of the AFP, something should be said about the doctrine of substantive, legitimate expectations — the doctrine that was rejected by Finn J as not having any application in Australia.

The Hong Kong Court of Final Appeal summarised the doctrine in *Tung v Director of Immigration* [2002] 1 HKLRD 561:

> The doctrine recognises that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which a person has a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court. Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority.[33]

In rejecting the application of the doctrine in *Rush's Case* Finn J relied, principally, upon the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 where, in a joint judgment, McHugh and Gummow JJ said:

> The doctrine of "legitimate expectation" has been developed in England so as to extend to an expectation that the benefit in question will be provided or, if already conferred, will not be withdrawn or that a threatened disadvantage or disability will not be imposed. This gives the doctrine a substantive, as distinct from procedural, operation.
>
> The earlier English decisions with respect to "legitimate expectations" were discussed by Mason CJ in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 and by McHugh J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In *Quin*, Mason CJ observed:
>
> > In the cases in this Court in which a legitimate expectation has been held entitled to protection, protection has taken the form of procedural protection, by insisting that the decision-maker apply the rules of natural justice. In none of the cases was the individual held to be entitled to substantive protection in the form of an order requiring the decision-maker to exercise his or her discretion in a particular way.

[33] *Tung v Director of Immigration* [2002] 1 HKLRD 561, 600 [92].

> The prevailing view in this Court has been, as Stephen J observed in *Salemi (v MacKellar (No 2)* (1977) 137 CLR 396), that: '(t)he rules of natural justice are "in a broad sense a procedural matter"',[34] echoing the words of Dixon CJ and Webb J in *Commissioner of Police v Tanos* [(1958) 98 CLR 383].[35]
>
> That remains the decision in this Court and nothing in this judgment should be taken as encouragement to disturb it by adoption of recent developments in English law with respect to substantive benefits or outcomes.[36]

Colin McDonald QC in addressing the issue at the Criminal Lawyers Association of the Northern Territory 11th Biennial Conference Remote Justice in Bali on 5 July 2007 said:

> it is difficult to think of a more basic and legitimate expectation of Australian citizens than that their Government and Commonwealth officers not intentionally and by deliberate act expose them predictably to the death penalty in accordance with often repeated Government policy on Australia's abhorrence of the death penalty.
>
> ...
>
> Justice Felix Frankfurter observed in 1960 'in a democracy, in our society the most important office is the office of citizen'.[37] It is hard to argue with the proposition ... If [it is] ... correct, and given the abhorrence of the death penalty as a basic value of Australian Society is it not a *legitimate* expectation of Australian citizens that their own Commonwealth officers will not predictably expose them to the death penalty overseas by administrative decisions even where those decisions are made to combat crime?[38]

It is virtually impossible to resist the notion.

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[34] *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 442, quoted in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 22, quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [67].
[35] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 22, quoted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [67].
[36] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [66]–[67].
[37] McDonald, above n 32, 34, quoting Felix Frankfurter and Phillip B Kurland (ed), *Of Law and Life and Other Things That Matter: Papers and Addresses of Felix Frankfurter* (Harvard University Press, 1965).
[38] McDonald, above n 32, 33–5 (emphasis in original).

V CONCLUSION

In summary, it is submitted that immediate steps must be taken to ensure that no Australian citizen is ever again exposed to the risk of the death penalty in circumstances similar to those that gave rise to the deaths of Andrew Chan and Myuran Sukumaran. Further, there should be an acknowledgement, on the part of the Australian Government, of the immoral behaviour of the AFP and a condemnation of its actions to both the Australian people and the Indonesian Government, with a request of the latter, as a close ally and friend, that the improper actions of the AFP be recognised by an order for deportation of the remaining seven of the Bali Nine to Australia, to be dealt with in accordance with Australian law.

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AUSTRALIAN ALTRUISTIC SURROGACY: STILL A WAY TO GO

RACHEL KUNDE*

This article is a first-person narrative of the author's lived experience as an altruistic surrogate in Australia. The author highlights the complex and emotional difficulties faced by all parties in surrogacy arrangements to advocate for various legislative reforms. Touching on the phenomenon of international commercial surrogacy and the relevance of ensuring personal autonomy for surrogate mothers, the author ultimately paints a picture of an Australia that can approach surrogacy ethically: respecting the rights of children and the dignity of each individual.

* Rachel Kunde is a wife and mother of three children who has been involved with the infertility community since 2006 when she became an administrator of an online egg donor support group. When surrogacy laws in Queensland came under review in 2009, Rachel entered a submission to the parliamentary investigation committee and spoke at the committee hearing in favour of surrogacy. Since then, she has been an advocate for all forms of surrogacy within Australia and has now been a traditional surrogate twice. Rachel has been volunteering her time to the not-for-profit surrogacy organisation Surrogacy Australia since 2011 and is also a full-time midwife. Rachel would like to thank Molly Jackson for her invaluable guidance and helpful support throughout the writing process.

CONTENTS

I INTRODUCTION

Surrogacy has been a phenomenon in Australia since the birth of Alice Kirkman in 1988. As a legal concept, however, surrogacy is still relatively new. Most Australian states have only introduced legislation regulating altruistic surrogacy arrangements in the last 10 years.[1] Even more recently, the 2014 media controversy about baby Gammy has now projected surrogacy and its ethical issues into Australian homes almost *ad nauseam*.[2]

My personal journey into surrogacy started when I decided to donate my eggs and ended when I gave birth to twins for a same sex couple in 2011. In this essay, I explore my journey and use my experience to discuss current issues surrounding surrogacy in Australia, and how I believe surrogacy can move forward ethically from the baby Gammy incident.

[1] Legislation that has been passed to legalise altruistic surrogacy arrangements within Australia include the *Surrogacy Act 2010* (Qld), *Surrogacy Act 2010* (NSW), *Assisted Reproductive Technology Act 2008* (Vic), *Parentage Act 2004* (ACT), *Statutes Amendment (Surrogacy) Act 2009* (SA), *Surrogacy Act 2008* (WA), and *Surrogacy Act 2012* (Tas). Before these, only the Australian Capital Territory's *Substitute Parentage Act 1994* (ACT) provided some regulation on surrogacy arrangements.

[2] See, eg, Australian Broadcasting Corporation, 'Fears of Surrogacy Ban after Australian Couple Deserts Thai Surrogate Mother of Baby with Down Syndrome', *ABC News* (online), 3 August 2014 <http://www.abc.net.au/news/2014-08-02/outrage-as-australian-parents-desert-surrogate-mother/5643074>.

II EGG DONATION AND THE BEGINNING OF A LIFE'S PURSUIT

In 2003 I was pregnant with my second daughter Ciara when I read an article in a Brisbane newspaper about a woman who had donated her eggs to an infertile couple. I rubbed my pregnant belly and wondered how anyone could give away a child. Even so, in my mind a seed was sown that would flourish into what I feel is one of my life's great achievements. After Ciara was born, I often thought about the article I had read and decided to explore this topic on the Internet. During my research I found an online support forum called *Aussie Egg Donors*. After gaining an understanding of the hardships people in this community had gone through to start a family, I felt comfortable with the concept of egg donation. I also found the first couple I was to donate my eggs to.

This decision, of course, was not instantaneous. Firstly, I consulted with my husband Simon. Some donors looked for couples who were under a certain age, or who were childless. Some donors had a list of requirements that they would like from intended parents. For me, it was more about the connection I felt with the couple. In donating my eggs, I wanted to find people who shared the same ideals that Simon and I had — a couple who were easy-going and didn't take life too seriously. Most importantly, I wanted to know that they would always put their children's needs first when it came to disclosing the nature of their conception. For me, that meant a couple that would involve us in their family in some small way throughout the years; a simple photo here and there, and the knowledge that we were always available if the child (that would grow up into an adult) ever had questions for us. Mark and Samantha were a couple from a Queensland country town three hours away from where we lived. They had one child already and had tragically lost their second child to an extremely rare medical condition when he was one month old. Samantha was also at an age where her eggs were simply not viable any more. We quickly became friends, and, after extensive counselling and legal advice, I chose to donate my eggs to them.

This was not a simple process. Egg donation is an altruistic act — an egg donor cannot charge fees for their donation, but the recipient does need to cover any medical expenses of the IVF process. The egg donation occurs in generally the same way as an IVF cycle. It also involved me injecting synthetic hormones daily and undergoing surgery to retrieve the eggs I had produced. After the eggs had been fertilised in the clinic laboratory, in accordance with

clinical guidelines, I was no longer in control of my genetic material. My eggs were in the possession of the IVF clinic and Mark and Samantha had the right to use them. The donation and IVF process were extremely successful and one of the embryos created was transferred to Samantha, and led to the birth of their third child — a beautiful daughter whom by all accounts was perfect, slept like an angel, and had my eyes. Unfortunately Samantha developed a heart condition while pregnant and was strongly advised against pursuing another pregnancy. This prevented Samantha and Mark using the other embryos created during IVF.

III CONSIDERING ALTRUISTIC SURROGACY

After Samantha gave birth, I became a more active member of the infertility support community and decided to donate my eggs to another couple that I had met through the *Aussie Egg Donors* forum. I became a strong advocate for egg donation and although the concept of surrogacy was often discussed on our forum, surrogacy in Queensland was illegal at the time.[3] Following the success of my second and then third egg donation, Simon and I completed our family with our third daughter, Addison. My attention was now drawn to surrogacy. During this time I had met women and their families who had been altruistic surrogates in New Zealand and had examined the legal issues of surrogacy in Australia while providing general advice to people who were suffering from infertility.

In 2008, the Bligh Government announced a review of the *Surrogate Parenthood Act 1988* (Qld) and I felt the need to advocate for overturning the previous laws introduced by the Bjelke-Petersen Government. These laws prohibited anyone in Queensland from becoming a surrogate or engaging a surrogate, both internationally and locally. At this time there were very few (or no) support or advocacy groups for surrogates in Queensland. On behalf of the people I knew who had a need for altruistic surrogates in Queensland, I entered a submission to the parliamentary review,[4] and was honoured when I was asked to speak at the parliamentary committee hearing. Whilst my first venture into public speaking was shameful, there was overwhelming support for altruistic surrogacy legislation. The updated

[3] *Surrogate Parenthood Act 1988* (Qld) s 3. It was an offence for a Queensland resident to enter into a surrogacy contract in Queensland or elsewhere. The maximum penalty was 3 years imprisonment.
[4] Rachel Kunde, Submission to Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, 12 June 2008.

legislation was to be made two years retrospective meaning that anyone who became parents through a surrogacy arrangement in Queensland, or who acted as a surrogate prior to the commencement of the Act, could apply for transfer of parentage without prosecution.[5]

The knowledge that the law would be retrospective spurred me to actively consider becoming an altruistic surrogate. Having helped three couples through egg donation and seeing the joy that their daughters brought to their lives, I was keen to help another family as an altruistic surrogate. I was open to becoming a traditional surrogate; where an embryo is created using my own egg and the intended parent's ('IP's') sperm. This is opposed to a gestational surrogate, who becomes pregnant with an embryo created by the intended mother or otherwise donated gametes, and has no genetic tie to the child. Having donated my eggs already and remaining in touch with the families I had helped, I felt emotionally prepared to disconnect myself from the baby I would carry. I had created such a strong friendship with Samantha and Mark and, knowing they dearly wanted another child, it seemed natural to offer to carry their baby for them.

Making this decision entailed an enormous amount of emotional, legal, and financial considerations. The process of becoming a surrogate is extremely complex — not simply a matter of determining how to get pregnant. There are also ongoing issues in regards to the sort of support that would be offered, what expenses were to be covered, and how much contact there would be during and after the pregnancy. I have always believed the principal issue to consider is the impact the surrogacy will have on those around us, especially the child that will result from the surrogacy. There were very limited resources available to us at the time and, as surrogacy was new in Queensland, there were no agencies or individuals that we could approach to help us with this process. This made the experience very isolating.

Most of my support came from Mark, Samantha, Simon, and the online communities I was engaged in. People were always happy to listen to me voice any concerns I had regarding the timing of my cycle or the impact surrogacy would have on those around us. Proceeding at the time we did, our surrogacy arrangement required little practical pre-planning: it was merely an issue of timing my cycle and conducting a home insemination. We underwent no

[5] *Surrogacy Act 2010* (Qld) s 63.

counselling, had no legal advice, and had no written agreement other than the information we had covered in countless emails prior to the birth of the baby. As a result, our relationship required a level of trust that few people would be comfortable with. Mark and Samantha had to trust that I would do what was best for their baby while pregnant — and of course that we would willingly give them the child after birth. We had to trust that they would support us throughout the pregnancy and agree to raise the child with full disclosure about the nature of their birth. While some people would not be comfortable going ahead in a situation like this, it was one I had no concerns about due to the relationship that my family and I had with Samantha, Mark, and their family.

With surrogacy having been quite common in the United States for some time, there are extensive personal accounts available from children who had been born through surrogacy. One of the blogs I had read while considering the surrogacy was by a man in his early 20s who had been born through a traditional surrogate and had only in his teens been told the truth about his conception.[6] He was clearly traumatised by the truth that had been denied him for his entire life. He questioned his whole personality: his parents' love, the price that was paid for his life, and everything about the world around him. He had tracked down his surrogate mother and clearly struggled to define their relationship. The latest blog I read before going ahead with the surrogacy was about his surrogate mother having another child of her own. He was in angst about why she chose to keep *that* baby but not him. The blog was distressing to me for so many reasons and my heart hurt for a young man who was clearly suffering because of other people's actions.

While I felt strongly for him and the clear struggle he was having with his human identity, I felt that becoming an altruistic surrogate and having the child grow up with complete disclosure could prevent this happening to any child I conceived through surrogacy. I also had the added advantage of having a close friend in New Zealand who had successfully been an altruistic surrogate to draw advice and support from. Through her I could see the vast ethical differences between altruistic and commercial surrogacy.[7]

[6] Brian C, *The Son of a Surrogate* (9 August 2006) <http://sonofasurrogate.tripod.com>.
[7] The American online surrogacy support group *Surrogate Mothers Online* has also helped me gain a more balanced view on commercial surrogacy in the United States; See Surrogate Mothers Online LLC, *Surrogate Mothers Online Q & A* <http://www.surromomsonline.com/answers/index.htm>.

IV MY EXPERIENCES AS AN ALTRUISTIC SURROGATE

Going into my first surrogacy, I had the strong sense that I would happily be able to give the baby to his rightful parents when he was born: for Simon and myself, our family was complete with our three daughters. But the bond between a woman and the baby she carries can be a remarkable thing and so I couldn't truly know how I would feel until it happened. Samantha and Mark were well aware of this and always assured me that if I could not give the baby to them they would never force me to. Regardless, the thought of keeping someone else's child didn't sit well with me despite the detriment it could have on my mental wellbeing. If a situation like this were to occur and both parties wanted to keep the child, the dispute would be heard through the family court and an inquiry into the best interests of the child would be undertaken.[8] Luckily it didn't come to that and the day of Christopher's birth was something I will always remember and reflect on as a beautiful day. While there were moments after the birth where I struggled emotionally, as all women who recently give birth do, I never once thought that I had done the wrong thing in becoming a surrogate.

The *Queensland Surrogacy Act* was passed in Parliament a month before Christopher's birth. We were the first surrogacy case the hospital had ever had and the first birth that fell under the new legislation. The hospital accommodated most of our wishes and went out of their way to make things easier for me. I had no idea how I would feel post-birth so I simply took things as they came. Over the three days I was in hospital I could feel my emotions growing and I was eager to go home. I distinctly remember Simon picking me up to go home. We waved goodbye to Samantha, Mark, and their now completed family, and drove away from the hospital ourselves. As soon as our car drove out of the hospital car park and there was no one left but Simon and myself, my emotions burst from me. I sobbed and sobbed unable to articulate what I was feeling at that moment. I was not sad that my time with Christopher was over because I knew he and his family would always be a part of our lives. I was sad that our journey was over. I felt like I had hit a brick wall and I was battered and bruised because all of a sudden I no longer had to think about the surrogacy. I no longer had to wonder how it would all end. I no longer woke with Christopher kicking merrily against my bladder and

[8] *Surrogacy Act 2010* (Qld) s 22.

texting Samantha about how cheeky he was going to be. It was over and I was emotionally and physically exhausted.

Over the next week I would often lay awake at night wondering if I had done the right thing. Thinking back to the blog written by the American man who struggled with the knowledge that he was born through surrogacy, I wondered if Christopher would grow up hating me for the choices I made on his behalf. Finally when the baby blues lifted and with much support from my friend in New Zealand, I knew I had made the right choice. I knew Christopher would grow up with us in his life and he would always know how we felt about him and the amazing role we played in his creation. It only took me three months after the birth of Christopher to know that I wanted to try again. Simon was not so keen but after much discussion I talked him into it. I won't pretend that he jumped on my bandwagon. Simon is simply the type of man that wants to please his wife and, knowing that it was something I felt I needed to do, he just didn't try to stop me.

I met Michael and Jared, a same sex couple who lived only a few suburbs away from us, through an online support group. They had been trying to have a family through surrogacy for quite some time when we connected. An unsuccessful attempt in America had exhausted their bank account and after trying for 18 months with an Australian surrogate, they all decided to call it a day and look into other possible options to create their family. We met a month later and it was only four months after entering into our agreement that we received a positive pregnancy test. Our experience with meeting Michael and Jared was somewhat different to the experiences of meeting potential intended parents in the past. Previously we took the time to form relationships with our intended parents through months of emailing which finally lead to face-to-face meetings. I only exchanged emails with Michael and Jared briefly before meeting and this was simply due to the fact that they lived so closely and I felt comfortable with them from the beginning. How quickly we seemed to jump into our surrogacy arrangement is not something that I recommend to any party I counsel who is looking to undergo surrogacy. When I reflect on the situation, I often realise how blindly we all trusted each other from the get-go. This was an extremely risky thing to do when, if successful, the lives of children would be involved.

In hindsight, I am grateful that we had two negative cycles prior to becoming pregnant in order for our relationship to be tested through hard times before arriving at the good times. Our experience did turn out to be a very positive one, but it could have easily gone the other way if we weren't the people we portrayed ourselves to be from our first communications. From the beginning, the pregnancy also felt very different to my previous pregnancies. I should have known that the excessive morning sickness I was experiencing was unusual. An ultrasound at 9 weeks explained why — two heartbeats were seen flickering on the screen. Michael and Jared were thrilled. Simon and I constantly joked that they had no idea what they were getting into. The pregnancy was extremely difficult and meant that I had to give up work at 18 weeks. I spent most of my days resting, as simply walking upstairs left me dizzy and unable to catch my breath.

At 27 weeks and three days, after Simon had left for work, I began bleeding heavily with what ended up being a suspected placental abruption (where the placenta separates from the uterine wall). I phoned Simon, Michael, and Jared, who all rallied. Jared was home so he came straight over while I waited for the ambulance. Michael was already at work in the city and decided to go straight to the hospital and meet us there. Simon jumped on the first bus home. He arrived just as I was taken away by the ambulance. What occurred after my arrival in hospital is a blur. Identifying the source of the bleeding seemed almost impossible and there was talk of me staying in hospital for the rest of the pregnancy on bed rest. Simon was waiting for my mother to arrive to look after the children before coming into the hospital so unfortunately he had no idea what was happening. Theatre was on standby in case I had to be rushed in for an emergency caesarean. We spoke to countless doctors, midwives, paediatricians, and anaesthetists and a scan showed both babies were still alive and seemingly healthy. When it was clear the bleeding was not subsiding the decision was made to deliver the babies within three hours: their health was not at risk, but mine clearly was.

Not long after the decision was made, Simon finally arrived at hospital. When he walked into the room and saw me he started crying. The look on his face broke my heart. I wondered how I could do this to him — how could I do something that made such a strong man reduce to tears? Jared was present when Simon arrived and later confided to me that it was in that moment that he became aware of just how much the surrogacy impacted on my health and

my family. Simon also confided in me much later that he took a photo of me when he arrived because he thought it could be the last time he saw me alive. This situation is not something that I thought about when deciding to become a surrogate. Having had relatively healthy pregnancies in the past, the thought that my own life could be at risk as a result of carrying someone else's child was not something that ever entered my mind. This is now something I talk to potential surrogates about when they are considering walking the same path.

Despite the gravity of the situation, the twins were born healthy that afternoon — tiny — at just over one kilogram each. After ten weeks in hospital they were finally home to wreak havoc on their fathers' lives. Simon and I were right — Michael and Jared had no idea what they were getting into. We watched with smug satisfaction as they struggled with sleepless nights and unsettled babies, whilst also delighting in the fact that they took it all in their stride. Thinking back on my two surrogacies, I found my emotional recovery after the birth of Christopher prepared me for my second surrogacy journey. I rolled with my emotions instead of fighting against them as I did with Christopher and by the time the twins were born I had a vast support group to help me process my feelings.

Now, five years on from my first surrogacy experience, I can honestly say that I would not change a thing. My family has helped create other families that are unequivocally connected to our own. No amount of words can express how blessed I feel to have been able to experience the joy of a truly altruistic act despite the trials and tribulations we have been through.

V AUSTRALIAN SURROGACY & HUMAN DIGNITY: WHERE ARE WE NOW?

After the twins' birth I became actively involved in the not-for profit organisation *Surrogacy Australia,* eventually becoming Executive Officer in May 2014.[9] I have been a point of support, advice, and education for individuals and other organisations that are interested in surrogacy. In August 2014, only three months into my executive officer role, the news of baby Gammy was picked up by the media. The surrogacy community was aware of the story months before it became international news and had privately been raising funds for the family in Thailand. Unfortunately when the story hit the media it turned the community on

[9] Surrogacy Australia, *Surrogacy Australia: Home* <http://www.surrogacyaustralia.org>.

its head. All of a sudden people who were actively involved with surrogacy in Thailand were left in limbo. The ethical issues of both international and local surrogacy were thrust into the spotlight: peoples' personal struggles were being aired like dirty laundry.

> Is surrogacy ethical? Is it another form of child trafficking? How can impoverished women truly be making an informed decision to become surrogates? Should we ban surrogacy completely? Is surrogacy a violation of the United Nations Convention on the Rights of the Child?

Questions such as these made international headlines and brought the issue of surrogacy into every home across Australia. Millions of people watched while the Farnell's tried to explain their reasoning behind leaving their son with a poor Thai woman. They emphatically stated that it would not have ended that way if surrogacy in Thailand was more controlled, if the baby had been terminated as requested (which didn't occur as the surrogate controlled the pregnancy and didn't consent to the procedure), and if they had been allowed more involvement.

There is no denying that surrogacy can go wrong, usually because of some human failing: failure to communicate, failure to consider the wishes of others, failure to consider the potential legal and parental issues, or failure to plan for any unwanted medical outcomes. However, I believe that the actions of one should not affect the intentions of many. In the odd instance when a surrogacy journey does end negatively, it will always be the child that suffers the direst consequences — they are denied knowledge behind the truth of their conception, they are left with citizenship in limbo, or worse, they are left with no one to claim them. Circumstances like this happen often in everyday life. It is unfortunate that when surrogacy is involved, a large amount of attention is brought to the possible pitfalls of surrogacy. Children are born to drug-addicted mothers every day, newborn babies are left abandoned to die in storm water drains, and children are neglected or abused by their parents. When this occurs, the nature of their conception is never called into question. I do not think, therefore, that we can paint all infertile couples with one brush.

Each Australian state that has surrogacy legislation has the same guiding principle — the rights of the child are to be protected at all times. When the rights of the child are protected, so too is the child's inherent human dignity. Despite this, many argue that surrogates are

being taken advantage of, children are being used as commodities, and so, their dignity is jeopardised. I feel that this argument is largely redundant, as it seems to see human dignity as one-dimensional. Dignity is of course an extremely multi-faceted concept, often largely determined by personal values and beliefs. Recognising the emotional complexity of surrogacy is surely the first step in determining its effect on human dignity.

Towards the end of last year I was involved with the SBS program *Insight*. Fellow guest Kajsa Ekis Ekman likened all forms of surrogacy to reproductive prostitution, commenting off camera that it is always women who sacrifice themselves and put their lives on the line when it comes to the needs of others. Eighteenth century philosopher Immanuel Kant's categorical imperative may support her argument[10] if the surrogate was only being used as a means to an end — something that would violate her personal autonomy.[11] I cannot say this was the case for me. I have confidence in, and respect for, my personal autonomy. In other words, I believe my decision to become a surrogate was made completely free from coercion. I willingly entered into an arrangement that was not legally enforceable against me. I also had complete control over the pregnancy and the choices on how the pregnancy was managed. In fact, I believe my decision to become an altruistic surrogate mother was the epitome of true autonomy.

Australian legislation on surrogacy also distinguishes between commercial and altruistic surrogacy, the former of which is accused of coercing surrogate participation — financially incentivising women to sell their reproductive abilities.[12] Only altruistic surrogacy, where the surrogate gains no incentives of a financial value, is legal in Australia.[13] The same legislation also makes it difficult to solicit or advertise as an altruistic surrogate,[14] and criminalises the taking or providing of financial reward for acting in surrogacy

[10] Mark Thomas Walker, *Kant, Schopenhauer and Morality: Recovering the Categorical Imperative* (Palgrave Macmillan, 2011).
[11] Lawrence O Gostin, *Surrogate Motherhood: Politics and Privacy* (Indiana University Press, 1990) 142.
[12] See, eg, Kajsa Ekis Ekman, *Being and being bought: prostitution, surrogacy and the split self* (Suzanne Martin Cheadle trans, Victoria Spinifex Press, 2013) ch4 [trans of: *Varat och varan: Prostitution, surrogatmödraskap och den delade människan* (first published 2010)].
[13] See, eg, *Surrogacy Act* 2010 (Qld) s 57; *Surrogacy Act 2010* (NSW) s 8. The only exception is the Northern Territory, which currently has no legislation on surrogacy. A commercial surrogacy arrangement could theoretically be legally undertaken here, however an appropriate transfer of parentage could not occur due to the lack of supportive legislation.
[14] See, eg, *Surrogacy Act 2010* (Qld) s 55; *Surrogacy Act 2010* (NSW) s 10; *Assisted Reproductive Technology Act 2008* (Vic) s 45.

arrangements.[15] Therefore, the surrogacy that can legally exist in Australia is the kind that requires a strong, altruistic act of personal autonomy on behalf of a surrogate mother. This legislation is clearly intended to provide protections for surrogate mothers and the children born from surrogacy arrangements. In my experience, aspects of the current legislation also make it very difficult for surrogacies to run smoothly and for people to discuss the complexities of pursuing surrogacy. Furthermore the legislation creates complications for surrogate mothers to be fairly compensated for the expenses they incur during the surrogacy arrangement.

VI POTENTIAL SOLUTIONS

In the last six years I have gained personal experience in being a surrogate while also being a keen observer of countless other local and international surrogacy arrangements through the support groups I have facilitated. As a result I feel I have pinpointed the ingredients necessary to make a surrogacy arrangement work as well as seeing where current legislation is failing people. The Gammy case highlighted the fact that there are clear problems with the current legislation in Australia. A 2014 study highlights that Australians are the highest per-capita users of overseas surrogacy of any country in the world.[16] For many couples facing barriers to starting a family in Australia, such as inconsistent state legislation, lack of Australian women willing to be surrogates, and lack of legal protection for intending parents, going overseas appears to be the only solution. This clearly highlights that surrogacy in Australia still has a long way to go to ensure it is safely accessible to everyone.

There are shortcomings in the current framework in terms of few resources for people who are looking to become surrogates or are looking for a surrogate to create their family. Unless people are willing to do extensive research themselves, join a support forum and share their personal stories, or outlay considerable upfront legal costs, they can find the process too hard and confusing. This could be mitigated if the government looked at funding an independent not-for-profit body with the purpose of educating people about their rights and

[15] See, eg, *Surrogacy Act 2010* (Qld) s 57; *Surrogacy Act 2010* (NSW) s 9(1); *Assisted Reproductive Technology Act 2008* (Vic) s 44(1).
[16] Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australian's Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 270, 273.

responsibilities regarding surrogacy. The Victoria Assisted Reproduction Technology Authority ('VARTA') provides advice on surrogacy and egg donor matters in Victoria.[17] Due to the differences in legislation on reproductive technology across the states and territories, VARTA cannot provide appropriate advice outside of Victoria. A national government body that is funded similarly to VARTA would be extremely beneficial to the fertility community within Australia and could help guide people along the surrogacy path, ensuring they are educated and making informed decisions when it comes to choosing which path to follow to create their family.

In each state it is a requirement that surrogates and IPs have counselling and legal advice prior to entering into an arrangement, however once the surrogate is pregnant, parties are left to their own devices. The onus is left on the surrogate and the IPs to make sure things run smoothly. Surrogacy is a highly emotive topic for those involved, requiring a lot of openness, honesty, and flexibility to allow for a smooth journey. This is something that each individual will handle in their own way and the current government failing lies in the lack of support for surrogates and intended parents during the pregnancy and after the birth. Surrogacy could be idealised as a beautiful event where parties see eye to eye on all matters and at the end of the day the surrogate proudly hands over the baby to the gushing intended parents and all is well.

The reality is extremely different and, like all relationships, communication is key. When communication fails, feelings are hurt, emotions run high, and relationships can go sour between IPs and surrogates. This could be addressed in the establishment of some form of government rebate for counselling, applicable to all relevant parties, at various stages of the pregnancy (not simply prior to entering into the agreement). Although this may incur additional time and costs for parties involved, it is hard to put a price on the emotional wellbeing of each individual. I have experienced first-hand the pain caused when communication and support systems break down: ultimately it is the resulting child that will suffer the consequences.

I also believe Australian states should be looking into compensated surrogacy through uniform national legislation. Compensated surrogacy is not to be confused with commercial

[17] Victoria Assisted Reproductive Treatment Authority, *VARTA* <https://www.varta.org.au>.

surrogacy as undertaken in countries such as India, Thailand, and the United States, where a woman is paid in a commercial sense for a service at an agreed rate. Crucially, in commercial surrogacy arrangements, the IP's generally manage the pregnancy and thereby risk removing the surrogate's personal autonomy. A compensated surrogacy approach means that all the surrogate's relatable expenses can be covered without fear of prosecution. To some extent, Australian surrogacy legislation follows this practice although the limits of compensation are worryingly unclear. I also believe that the compensation scheme should be broadened so as to address the risk pregnancy places on the surrogate's health and to cover any unexpected burden the pregnancy may place on her or her family.

Currently in Australia, only the *New South Wales Surrogacy A*ct and *Queensland Surrogacy Act* outline examples of what pregnancy-related expenses are. Other legislation, such as the *Victorian Assisted Reproductive Treatment Act,* only determines that the surrogate mother is entitled to be recompensed the 'prescribed costs', without actually defining what those costs entail.[18] This delineation is not definitive and leaves confusion over what could be a reasonable cost. Other state legislation is even more vague, leaving surrogates, IPs, and lawyers alike disputing what a pregnancy-related expense is and what it isn't. In fact, I have had one surrogate mention to me that her lawyer suggested that bio oil (used in pregnancy to prevent stretch marks) is not a relatable expense and, if she were to claim it, she could be seen to be breaking the law. Another was told that claiming the paid parental leave supplied by the government could also be seen as profit from the pregnancy, regardless of the fact that the Australian government allows the claim for surrogate mothers and intended parents.[19] This issue of coverable expenses could be addressed in two ways: either each state outline clearly what is a relatable pregnancy expense, or the government considers compensated surrogacy with a cap on how much the surrogate can claim. This would ensure she does not end up out of pocket and can reduce undue stress on the IP-surrogate relationship.

Extending the Medicare rebate to IVF cycles would also provide relief to families trying to pursue surrogacy within Australia, potentially encouraging couples to undergo domestic

[18] *Assisted Reproductive Technology Act 2008* (Vic) s 44(2).
[19] See Australian Government, *Paid Parental Leave Guide: 1.1.S.100 Surrogacy* (21 February 2015) Guides to Social Policy Law <http://guides.dss.gov.au/paid-parental-leave-guide/1/1/s/100>.

surrogacy, and avoiding other ethical complications that arise with international surrogacy. Medicare does not currently provide support for couples wishing to access IVF in the context of a domestic surrogacy arrangement which can leave intended parents significantly out of pocket. Standard IVF procedures can start at $1200 after Medicare rebates with subsequent cycles being offered for only $600. This is in stark contrast to IVF procedures for surrogacy purposes, which set couples back in excess of $16 000. The simple explanation for the discrepancy in expenses for the same procedure is due to the fact that the latter is not eligible for Medicare rebates.

At a federal level, creating a framework of harmonised legislation sanctioning compensated altruistic surrogacy arrangements with revisions to Medicare that gives surrogates access to IVF funding, and allows surrogates to be compensated $10 000 to $15 000, would significantly lower the costs of creating surrogacy arrangements — quite likely to below the level of international surrogacy arrangements. On top of IVF expenses, IPs are also paying for legal expenses which can cost in excess of $10 000, covering both their own lawyer and their surrogate's legal expenses. The IPs are also responsible for counselling fees, which extend into the thousands of dollars, placing further financial burden on intended parents whose only option of creating a family is through a surrogacy arrangement. If costs could be kept to a minimum through offering Medicare rebates for IVF procedures, Australians may be incentivised to have children under a well-regulated, domestic framework instead of being lured into overseas arrangements which often offer "simpler" and more expeditious arrangements.

VII CONCLUSION

There is an old saying: 'you can choose your friends, but you can't choose your family'. I like to think that I have done what I can to prove this saying redundant. I look at each family that I have helped create as a form of my extended family. The people I helped were chosen on the basis of our relationship, not on our common goals. I chose to help these people with every intention that they would continue to play a role in our lives. I am proud to say that I selected my family and have an open and transparent relationship with all of them because of the nature of our experiences. I feel that if the Australian government consulted with the surrogacy community and adopted the suggestions outlined in this essay, then surrogacy

within Australia would be a smoother and more accessible experience for all involved. Furthermore, if advances in this area are successful, surrogacy in Australia could finally be approached ethically — respecting the rights of children and the dignity of each individual.

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MEXICO'S ENERGY REFORM IN CONFLICT WITH THE HUMAN RIGHTS OF INDIGENOUS AND AGRARIAN COMMUNITIES

ALEJANDRA ANCHEITA* & ERIC JASON WIESNER**

Among the grave human rights violations that exist in Mexico, torture and forced disappearances are two of the most serious examples of the atmosphere of generalised violence that pervades the country. The lack of access to justice for the victims and their families has become established in a seemingly endless cycle of impunity. It is in this context that Mexico's agrarian and indigenous communities are experiencing attacks that seriously threaten their community life for generations to come. These attacks come in the form of violations of the right to the free use and enjoyment of their land, territory, and natural resources at the hands of transnational corporations in the absence of protection from the Mexican State. On 20 December 2013, reforms to Articles 25, 27, and 28 of the Mexican Constitution were published in the Official Journal of the Federation ('OJF'). These reforms authorised the private sector to pursue oil and gas exploration and the generation of electricity within national territory. Subsequently, on 11 August 2014, nine new laws and amendments to another 12 were published in the OJF that directly affect agrarian and indigenous communities' rights to the free use and enjoyment of their land, territory, and natural resources and to free, prior, and informed consultation. This article seeks to analyse the Mexican State's legal basis for placing the interests of private enterprise above the respect, protection, guarantee, and promotion of collective rights. It will also explore transnational strategies that human rights organisations and affected communities are developing to resist such infringement on their rights by corporate actors.

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I INTRODUCTION

On 20 December 2013, historic reforms to the *Mexican Constitution* took effect that opened up the country's energy sector to private investment for the first time since President Lázaro Cardenas nationalised Mexico's mineral and oil resources in 1938. Only a few months later, Mexican President Enrique Peña Nieto was hailed on the cover of TIME Magazine as "Saving Mexico", crediting him with pushing through controversial reforms that prior administrations had failed to achieve.[1] However, the TIME cover sparked harsh criticism and outrage in Mexico, where the reforms continued to face fierce resistance from those who viewed them as a giveaway of the nation's patrimony to Transnational Corporations ('TNCs').[2]

Despite the deep undercurrents of dissent, the Mexican Congress moved ahead with its project of opening the energy sector to foreign investment, and on 11 August 2014, it passed a series of secondary laws aimed at implementing the prior year's constitutional reforms.[3] Among those secondary laws were provisions prioritising hydrocarbon exploration and production, as well as electricity generation and distribution, over any other use of land.[4] New legal easements became available that allow energy companies to demand access to indigenous and agrarian lands, with no right of refusal provided to affected communities.[5] These secondary laws came into conflict with international human rights standards, recognised by Mexico, that protect indigenous lands from incursions without prior, free, and informed consultation and consent. Since these international human rights standards are now enshrined in the Federal Constitution itself, they must take priority over secondary legislation implementing the energy reform.

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[1] See Michael Crowley, 'The Committee to Save Mexico', *TIME* (online), 13 February 2014 <http://content.time.com/time/covers/pacific/0,16641,20140224,00.html>.

[2] See, eg, Carolina Moreno, 'Enrique Pena Nieto's TIME Cover Sparks Outrage in Mexico', *The Huffington Post* (online), 17 February 2014 <http://www.huffingtonpost.com/2014/02/17/enrique-pena-nieto-time_n_4803677.html>; Moreno's article highlights a Change.org petition, that at the time had collected close to 9000 signatures, demanding that TIME remove Peña Nieto from the cover.

[3] See, eg, Rodrigo Dominguez Sotomayor, *Mexico Energy Reform: Secondary Legislation Enacted* (12 August 2014) National Law Review <http://www.natlawreview.com/article/mexico-energy-reform-secondary-legislation-enacted>.

[4] See *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 4, arts 100–17; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation] ch 8, art 71.

[5] See *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], arts 106–9; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], arts 79–81.

On 11 June 2011, the Mexican Congress enacted a series of amendments to the National Constitution that, for the first time, expressly incorporated protections provided by 'international human rights treaties to which the Mexican State is a party'.[6] Through these amendments, known as the Human Rights Amendments, the Constitution directly bound the Mexican State to provide its citizens the human rights protections guaranteed under international law. Thus, for example, where a TNC seeks to use land held communally by an indigenous community for an energy-related project, the Mexican government must ensure that the development of such a project adheres to international human rights standards. These include the International Labor Organization ('ILO') *Convention 169*, the *United Nations Declaration on the Rights of Indigenous Peoples,* and the *American Convention of Human Rights.*

Nonetheless, having human rights protections enshrined in the National Constitution is one matter, but ensuring that those rights are respected in practice is another. In the Isthmus of Tehuantepec ('the Isthmus') in southern Mexico, natural wind currents have attracted Spanish energy companies to build wind-turbine parks in areas with large indigenous populations. While conglomerates like Bií Hioxo ('BH') and Eólico del Sur ('ES') have already constructed at least 20 wind-turbine parks in the region by ignoring well-established collective landholding systems,[7] indigenous and agrarian communities in the Isthmus are demanding real and meaningful participation in the development process. They are doing this not only by bringing cases before international tribunals like the Inter-American Court for Human Rights, but by tenaciously pressing on the levers that are available to them within the Mexican System. It is only through the collective demands of those negatively affected by the land-use provisions of the energy reform, like the largely Zapotec communities of the Isthmus, that the promise of the 2011 Human Rights Amendments can be made real and become institutionalised within the Mexican legal system.

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[6] *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 1, para 1 [Victor Elk trans]; see also Victor Manuel Collí Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges' (2012) 20(1) *Human Rights Brief* 1, 7–14.

[7] See Asociación Mexicana de Energía Eólica [Mexican Wind Energy Association], *Capacidad Instalada de Energía Eólica en México* [Installed Wind-Energy Capacity in Mexico] <http://www.amdee.org/parques-eolicos-mexico-2015>; 'En 2016, Oaxaca tendrá 23 parques eólicos: Cué' [In 2016, Oaxaca will have 23 wind energy parks: Cué], *Noticiasnet.MX* (online), 22 January 2015 <http://www.noticiasnet.mx/portal/oaxaca/general/gobiernos/258298-2016-oaxaca-tendra-23-parques-eolicas-cue>.

Mexican human rights defenders and non-governmental organisations ('NGOs') are assisting affected indigenous and agrarian communities to make those collective demands. One of these NGOs, the Project of Economic, Social, and Cultural Rights ('ProDESC'),[8] has been working for several years with Zapotec communities in Juchitán, Oaxaca, an area within the Isthmus, who are seeking a greater say in the development of wind-turbine farms on their communally-held, or *ejidal*, lands. ProDESC has had significant success utilising the *amparo*, a judicial process used in Mexico that is similar to an injunction, to slow down development of wind-turbine farms in Juchitán and press the Mexican government to comply with its now constitutional obligation to respect international human rights norms.

Mexico's slow march towards a greater democracy and transparency in government institutions has taken a major leap forward with the end of one-party rule in 2000. However, the environment for human rights defenders in Mexico remains hostile, and often dangerous, which the forced disappearances of 43 student teachers in Iguala, Guerrero on 26 September 2014 so shockingly demonstrated.[9] Mexico is still a country where organised crime asserts its interests with violent impunity, while poverty and government corruption makes access to justice a near-impossible goal for much of the population. Nevertheless, some of the most impoverished and politically-powerless communities in Mexico have stood up to threats and harassment to demand that their government place the human rights of its citizens ahead of the economic interests of TNCs.

II LAND USE PROVISIONS OF MEXICO'S ENERGY REFORM

In December 2013, a set of constitutional reforms took effect that opened Mexico's energy sector to private investment and competition.[10] Less than a year later, President Enrique Peña Nieto signed decrees enacting a series of secondary laws implementing the constitutional energy reforms, consisting of nine new laws and 12 amendments to

[8] 'ProDESC' is based on the Spanish-language acronym.
[9] See, eg, Randal C Archibold, 'Mexico Officially Declares Missing Students Dead', *The New York Times* (online), 27 January 2015 <http://www.nytimes.com/2015/01/28/world/americas/mexico-officially-declares-missing-students-dead.html?_r=0>.
[10] See *Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía* [Decree that amends different provisions of the Political Constitution of the United Mexican States in energy matters] (Mexico) 20 December 2013, *Diario Oficial de la Federación* [Official Journal of the Federation] arts 4, 7, 9, 10, 11, 13, 18, 20, and 21.

existing laws.[11] Two of these secondary laws are the Hydrocarbons Law,[12] which creates a new legal framework for all hydrocarbon-related activities, and the Electricity Law,[13] which opens the electric industry to private-sector participation in generation, transmission, distribution, and power marketing activities. Both of these laws include land use provisions that force property owners to allow energy companies access to their land to pursue hydrocarbon or electricity-related projects.

A *Hydrocarbons Law*

The land use provisions of the Hydrocarbons Law state that hydrocarbon-related activities are in the public interest, and therefore must take precedence over any other activity that requires surface or subsoil use.[14] The law further creates a detailed process by which property owners and energy companies must negotiate consideration for the purchase, use, or occupation of land for the purpose of energy exploration or production.[15] If these negotiations do not produce an agreement within 180 days, the law allows the energy company to either (1) request a 'legal hydrocarbon easement' from a civil or agrarian court; or (2) request the Institute of Administration and Appraisals of National Assets, a state entity in charge of administering national assets, to conduct a mediation pursuant to a specific process established in the law.[16] Where a mediation session occurs but does not result in agreement between the parties, the law provides that the national Ministry of Energy ('SENER'),[17] may ask the executive branch to impose a legal hydrocarbon easement.[18]

The legal hydrocarbon easement is a new procedure created by the Hydrocarbons Law, which can be imposed either judicially, by a competent judge, or administratively, by the

[11] *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation]; *Ley de Ingresos Sobre Hidrocarburos* [Hydrocarbon Revenues Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation]; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation].
[12] *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation].
[13] *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation].
[14] *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 4, arts 100–17.
[15] Ibid.
[16] Ibid art 106.
[17] 'SENER' is based on the Spanish-language acronym.
[18] See *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 4, arts 100–17art 108.

executive branch.[19] Once established, the easement grants the right to (1) transit personnel; (2) transport, handle, and store any construction materials, vehicles, and goods; and (3) construct, install, and maintain infrastructure or carry out any works necessary for carrying out a hydrocarbon-related entitlement or contract.[20]

The availability of the legal hydrocarbons easement denies property owners the right to refuse energy companies with contracts for hydrocarbon exploration or production access to their land. The only issue to be negotiated is under what terms and conditions that access will be granted. Although the Mexican Government has stated that the Hydrocarbons Law creates equality between parties negotiating over the use or occupation of land, and carefully extricated any mention of the term expropriation from the law,[21] the ultimate trump card that the new easement hands to one side of the negotiation belies the government's claim.[22]

B *Electricity Law*

The Electricity Law enacted under the energy reform amendments gives special priority to activities related to the transmission and distribution of electricity, in much the same way that the Hydrocarbons Law gives priority to activities related to exploration and production of hydrocarbons.[23] More specifically, the Electricity Law establishes the right of energy companies to occupy privately-owned land for the location, construction, and operation of site-specific generation projects and transmission and distribution facilities.[24]

As under the Hydrocarbons Law, the Electricity Law requires that the energy company first negotiate directly with property owners for the purchase, use, or occupation of land.[25] If the parties do not reach agreement, however, the energy company may (1)

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[19] *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation]art 109.
[20] Ibid 14.
[21] See Mexican Ministry of Energy ('SENER'), 'La Reforma Energética Establece Condiciones de Equidad para el Uso y Ocupación de la Tierra: Pedro Joaquín Coldwell' [The Energy Reform Establishes Equitable Conditions for the Use and Occupation of Land: Pedro Joaquín Coldwell] (Media Release, 22 May 2009) <http://www.sener.gob.mx/portal/Default_blt.aspx?id=2948> [author's trans].
[22] See Tony Payan and Guadalupe Correa-Cabrera, 'Land Ownership and Use Under Mexico's Energy Reform' (Issue Brief No 10.29.14, Rice University's Baker Institute for Public Policy, 2014) 3.
[23] See *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation] ch 8, art 71.
[24] Ibid.
[25] Ibid art 73.

request a legal easement from a civil or agrarian judge; or (2) request a mediation with the Ministry of Agricultural, Territorial, and Urban Development.[26] If a mediation session occurs and does not result in an agreement within a set time, the executive branch may impose an easement.[27] Again, the availability of easements for electricity-related projects denies property owners the right of outright refusal, and therefore forces them to negotiate with energy companies on drastically unequal footing.

III MEXICO'S SYSTEM OF SOCIAL LAND OWNERSHIP

Mexico has a unique system of land ownership that must be taken into account when energy companies seek to reach agreements with property owners to access or occupy land for hydrocarbon or electricity-related projects. Energy companies in Mexico have often attempted to circumvent collective land rights by entering into rental agreements with small landholders. Where land is held in a social trust that is recognised under Mexican law, however, such rental agreements are invalid without the consent of the community as a whole.

Article 27 of the *Mexican Constitution* establishes the framework for ownership of the country's land and natural resources.[28] The Article vests in the nation 'ownership of the lands and waters within the boundaries of the national territory' and 'direct ownership of all natural resources of the continental shelf … all minerals and substances … deposits of precious stones … solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons'.[29] The Constitution grants to the federal government 'the right to transmit title [of land] to private persons.'[30]

Article 27 further sets out three categories of land ownership: private, public, and social.[31] Private land ownership grants title to possession and use only of the surface of the land, with no rights to subsoil resources.[32] Public ownership means that government agencies control possession or use of the land.[33] The third category, social land

[26] Ibid art 79.
[27] Ibid art 81.
[28] See *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 27 [Victor Elk trans].
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] See Payan and Correa-Cabrera, above n 22, 3.
[33] Ibid.

ownership, is unique to the Mexican system, and includes a form of communal property called *ejido*.[34]

After the Mexican Revolution, the Federal Government expropriated lands from private owners and distributed them primarily to peasant communities to be held collectively as *ejidos*.[35] In its initial form, the Mexican land tenure system allowed *ejido* members, or *ejidatarios*, to use this communal property for their own benefit, but not to transfer title to the land to third parties.[36] In February 1992, however, a reform of Mexico's land tenure rules was enacted that gave *ejidatarios* 'formal title to their land, enabling them to lease or sell their plots if a majority of members of their *ejido* agreed'.[37] The reform also halted any further distribution of *ejido* lands and legalised joint ventures between *ejidos* and private enterprises.[38]

The 1992 reform of the *ejido* system was followed by a major push on the part of the Mexican Government to encourage privatisation of collectively held lands through the division of *ejidos* into individual parcels, title to which could be sold or conveyed by their owners.[39] In the end, however, the Government's privatisation effort largely fell flat, as only a small proportion of *ejidos* took the step of subdividing and selling off their parcels.[40] In fact, most of the land that was initially designated as *ejido* still maintains that classification, and as of April 2012, socially-held land comprised 51 per cent of the Mexican national territory.[41]

In October 2014, a paper written by Tony Pavan and Guadalupe Correa-Cabrera, for Rice University's Baker Institute for Public Policy, presciently highlighted the potential for social conflict in many parts of Mexico that contained both large tracts of social land and

[34] Ibid.
[35] See Gabriela Sanchez Luna, 'Algunas notas en relación con la tenencia de la tierra en México' (1995) 84 *Boletín Mexicano de Derecho Comparado* (1995) 1139–54.
[36] See Payan and Correa-Cabrera, above n 22, 3.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Secretaría de Desarrollo Agrario, Territorial y Urbano ('SEDATU'), *Boletín No. 053, La Superficie de Ejidos y Comunidades de México, Más Grande Que Algunos Países* [Bulletin No 053, The Surface Area of Ejidos and Communities of Mexico, Bigger than Some Countries] (22 April 2012) <http://www.sedatu.gob.mx/sraweb/noticias-2012/abril-2012/12166/>.

significant areas targeted for energy development projects due to rich hydrocarbon deposits:[42]

> Given the [Hydrocarbon] law's prioritization of land use for energy sector activities, the development of Mexico's hydrocarbon resources will face challenges ranging from peaceful protests to potentially violent social unrest associated with the displacement of farmers, ranchers, and other land users, including indigenous peoples.[43]

The same reasoning applies where energy companies seek to develop electricity generation and transmission projects in parts of Mexico, like the Isthmus, with high proportions of social land ownership. Moreover, social lands are often held by indigenous communities, who may have cultural or spiritual bonds with their land that transcend monetary value, and thus they may not be willing to cede their land rights to energy companies for mere 'market value'.[44]

Where indigenous or agrarian communities seek to resist encroachment on their lands by energy companies, social land tenure is one tool they may utilise within the Mexican legal system. Energy companies cannot legitimately obtain rights to occupy or use *ejido* land by negotiating rental or lease agreements with individual parcel holders. Instead, they must negotiate with the *ejido* itself through its chosen leaders. Well-organised *ejidos* will be in much better positions than individual property owners to negotiate effectively with energy companies seeking access to their land, and to extract concessions that will benefit the community as a whole.

IV LEGAL REMEDIES AVAILABLE TO INDIGENOUS AND AGRARIAN COMMUNITIES AFFECTED BY ENERGY REFORM LAND USE PROVISIONS

A *Amparo*

The writ of *amparo* is a legal procedure established in Articles 103 and 107 of the *Mexican Constitution* that allows an affected party to seek an injunction of the implementation of a law, project, or governmental administrative action until the

[42] See Payan and Correa-Cabrera, above n 22, 2–4.
[43] Ibid 4.
[44] See generally Ethelia Ruiz Medrano, *Mexico's Indigenous Communities: Their Land and their Histories* (University Press of Colorado, 2011).

constitutionality of the action can be determined by a court of law.[45] Article 103 states that the purpose of the *amparo* is to protect against 'general rules, acts or omissions of the authorities that violate human rights and guarantees recognised for their protection granted by this Constitution and by international treaties to which the Mexican State is a party'.[46] The legal standard for the procedure is set out in Article 107, and then further developed in a secondary law called the '*Amparo* Law'.[47] The *amparo* procedure provides a powerful tool for Mexican citizens to challenge government actions that undermine the basic rights provided to them in their Federal Constitution.

B *2011 Human Rights Amendments*

On 10 June 2011, a series of amendments to the *Mexican Constitution* (the 'Human Rights Amendments') were enacted that significantly enhanced the human rights protections afforded to the country's citizens.[48] As of that date:

> there was no longer any doubt that international human rights standards contained in treaties to which Mexico was a signatory formed part of the Mexican legal system and enjoyed the same rank in the hierarchy as the norms established in the Constitution.[49]

First among the Human Rights Amendments was a change to the name of Title 1, Chapter 1 of the Constitution from 'Individual Rights' to 'Human Rights and their Guarantees', signalling a change in how rights are viewed in the constitutional framework.[50] This was the first change to this Chapter since the Constitutional Assembly of 1917, which further demonstrates its import.[51]

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[45] See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges' above n 6, 13 n 9.
[46] *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 103, para 1 [Victor Elk trans]; see also Elk, above n 6, 13 n 9.
[47] *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 107, para 1 [Victor Elk trans]; see also Elk, above n 6, 13 n 9.
[48] See Carlos Cerda Dueñas, 'Incorporating International Human Rights Standards in the Wake of the 2011 Reforms of the Mexican Constitution: Progress and Limitations' (2013) 10(9) *Sur International Journal on Human Rights* 37 <http://www.conectas.org/en/actions/sur-journal/issue/19/1000455-incorporating-international-human-rights-standards-in-the-wake-of-the-2011-reform-of-the-mexican-constitution-progress-and-limitations>; Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 7–14.
[49] Dueñas, above n 48, 43.
[50] *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917[Victor Elk trans]; see also Elk, above n 6, 8.
[51] See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 8.

The next change was to Article 1 of the Constitution, amended to state:

> In the United States of Mexico, all persons shall enjoy the rights recognised by the Constitution and international treaties to which the Mexican State is party, as well as guarantees for their protection, the exercise of which may not be restricted or suspended, except in cases and under conditions established by this Constitution.[52]

Article 1 was further modified to state that 'rules on human rights shall be interpreted in accordance with the Constitution and international treaties on the subject, at all times favouring the broadest protection for the people'.[53] According to Victor Manuel Collí Elk, a researcher and Constitutional Law professor at the Universidad Autónoma de Campeche, Mexico, this new language establishes in the Constitution the principle of *pro homine*, meaning that the text should be interpreted to provide the broadest possible protections to the individual.[54] Previously, courts had often applied a highly restrictive mode of constitutional interpretation, limiting human rights protections to those expressly recognised in the Constitution itself.[55] By adopting the *pro homine* principle, the amendment requires courts to now interpret rules consistently not only with rights explicitly provided in the Constitution, but also with international human rights agreements ratified or endorsed by Mexico.[56]

On 3 September 2013, a ruling by Mexico's highest court, the National Supreme Court of Justice ('SCJ'), definitively resolved the question of the rank of international human rights standards in the country's legal framework.[57] As Carlos Cerda Dueñas, a Professor and Researcher at the Monterrey Institute of Technology, explained the ruling, the SCJ in a ten-vote majority determined:

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[52] *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 1, para 1 [Victor Elk trans].
[53] *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United States of Mexico] (Mexico) 5 February 1917, art 1, para 2 [Victor Elk trans].
[54] See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 9.
[55] Ibid, citing Action of Unconstitutionality 22/2009, 4 March 2010.
[56] Ibid.
[57] See Contradicción de Tesis 293/2011, 'SCJN determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional' [National Supreme Court of Justice determines that the human rights norms contained in International Treaties have constitutional rank], 3 September 2013 <http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556> [author's trans].

> [I]nternationally-framed human rights based on amended [A]rticle 1 of the *Mexican Constitution* possessed the same normative efficacy as the rights set forth in the Constitution. In other words, they were henceforth acknowledged as enjoying the same constitutional status.[58]

At the same time, however, the SCJ arguably took a step back from the *pro homine* principle established in the amended Article 1, when it held in the same case that an internationally-recognised human right could be limited by an express constitutional provision.[59]

In the words of Professor Elk, the Human Rights Amendments mean that the national Constitution 'now accepts the application of international law and human rights standards to Mexican laws and allows human rights advocates to use international standards as a tool for asserting human rights violations'.[60] The legal superiority of international human rights protections over secondary energy reform legislation is now clearly established under Mexican law. Where the two are in conflict, rights provided in international human rights agreements recognised by Mexico must take precedence.

C *International Human Rights Agreements*

Indigenous and agrarian communities may rely in particular on three international human rights agreements to demand a real and meaningful say in how hydrocarbon or electricity-related projects on their land proceed: (1) the International Labor Organization ('ILO') *Convention No 169*; (2) the *United Nations Declaration of the Rights of Indigenous Peoples*; and (3) the *American Convention on Human Rights*.[61] As all three of these agreements have been ratified or endorsed by Mexico, the human rights protections they provide are afforded constitutional authority through the 2011 Human

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[58] See Dueñas, above n 48.
[59] See Contradicción de Tesis 293/2011, ficha técnica, 3 September 2013 <http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556>.
[60] See Elk, 'Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges', above n 6, 9.
[61] *General Recommendation No 23 on Indigenous Peoples* UN Doc CERD/C/51/Misc.31/Rev.4 (1997), art 4, para d; The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations, including the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') and the International Covenant on Civil and Political Rights. For example, the ICERD requires States to '[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.'

Rights Amendments, and thus take precedence over the land use provisions of secondary legislation enacting the energy reform.

1 *ILO Convention No 169*

The ILO *Convention No 169* on Indigenous and Tribal Peoples (the 'Convention') has been ratified by twenty countries and covers a broad spectrum of issues ranging from land rights to education.[62] 'The fundamental principles of the Convention are that indigenous and tribal peoples should be consulted and should fully participate at all levels of decision-making processes that concern them'.[63] Mexico ratified the Convention on 5 September 1990, and it remains in force in the country.[64]

The Convention does not narrowly define who are indigenous and tribal peoples, but instead takes a practical approach by providing only criteria for the peoples it aims to protect.[65] Overarching these criteria is the principle of 'self-identification' which 'shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.[66] Thus, if a group views itself as indigenous, the group should generally be considered as such with respect to the Convention.

(a) Right to Consultation

Article 6 of the Convention states:

> In applying the provisions of this Convention, governments shall … consult the peoples concerned, through appropriate procedures and in particular through their respective institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.[67]

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[62] See ILO, *Indigenous and Tribal Peoples, Conventions* <http://www.ilo.org/indigenous/Conventions/lang--en/index.htm>.
[63] Ibid.
[64] ILO, *NORMLEX Information System on International Labour Standards* <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102764>.
[65] See ILO, *Indigenous and Tribal Peoples, Convention No 169* <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>; According to the ILO website, elements of indigenous peoples include: (1) traditional life styles; (2) culture and way of life different from the other segments of the national population, eg, in their ways of making a living, language, customs, etc.; (3) own social organisation and political institutions; and (4) living in historical continuity in a certain area, or before others 'invaded' or came to the area; Ibid.
[66] *Indigenous and Tribal Peoples Convention No. 169*, opened for signature 7 June 1989, art 1, s 2.
[67] Ibid art 6, s 1(a);

A tripartite committee of the ILO governing body emphasised that 'the spirit of consultation and participation constitutes the cornerstone of *Convention No. 169* on which all its provisions are based'.[68]

The Convention further sets out the standard that 'consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.[69] An ILO Committee determined that such a good faith consensual decision-making process requires that States 'endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with indigenous peoples which favours productive dialogue'.[70] Creating a climate of confidence in consultation proceedings is of particular importance when the interests of indigenous peoples are at issue, 'given their lack of trust in State institutions and their feelings of marginalisation, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome'.[71]

One critical element of a consensus-based consultation process that involves natural resource exploitation or development projects affecting indigenous lands is access to 'full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment'.[72] To this end, the State must 'carry out environmental and social impact studies so that the full expected consequences of the project can be known', which should then 'be presented to the indigenous groups concerned at the early stages of the consultation, allowing them time

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> The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected in regard to their particular interests.

James Anaya, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (15 July 2009), para 63.

[68] *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No 169)*, made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres ('CEOSL'), para 31.

[69] *Indigenous and Tribal Peoples Convention No 169*, opened for signature 7 June 1989, art 6, s 2.

[70] *Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No 169)*, made under article 24 of the ILO Constitution by the Federation of Country and City Workers ('FTCC') GB.294/17/1; GB.299/6/1 (2005), para 53.

[71] *Report of the Committee set up to examine representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No 169)*, made under article 24 of the ILO Constitution by the Authentic Workers' Front ('FAT'), para 107.

[72] Anaya, above n 67, para 53.

to understand the results of the impact studies and to present their observations and receive information addressing any concerns'.[73]

In the context of the Mexican energy reform, the Convention obligates the national government to engage in timely and meaningful consultation with indigenous communities before allowing hydrocarbon or electricity-related projects to go forward on their land.[74] Under the plain language of the Convention, consultation is insufficient when the outcome is predetermined or the affected communities have not been provided with adequate information to make a free and informed decision. Rather, indigenous communities must have a real opportunity to influence the terms and conditions under which a project proceeds with full access to information, including environmental and social impact studies.[75]

(*b*) Indigenous Land Rights

Buffeting affected communities' right to consultation with respect to development of energy projects are the Convention's provisions specifically protecting the land rights of indigenous and tribal peoples. Article 13 provides:

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[73] Ibid.

[74] Ibid; The State cannot evade this obligation by passing it along to private enterprises to which it has granted contracts or concessions. As Special Rapporteur Anaya explained:

> [T]he State has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples' rights and lands. In accordance with well-grounded principles of international law, the duty of the State to protect human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity.

The Mexican Government itself recognised this obligation when it included provisions in the energy reform legislation mandating that the National Government undertake prior, free, and informed consultation with indigenous communities prior to authorising development projects on their land; see *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 5, art 120; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación,* tit 4, ch 2, art 119.

[75] *Ley de Hidrocarburos* [Hydrocarbons Law] (Mexico) 12 August 2014, *Diario Oficial de la Federación* [Official Journal of the Federation], ch 5, art 119; *Ley de la Industria Eléctrica* [Electricity Law] (Mexico) 11 August 2014, *Diario Oficial de la Federación*, tit 4, ch 2, art 120; The secondary energy reform laws require federal authorities or companies seeking contracts to conduct social impact assessments prior to granting authorisation for hydrocarbon or electricity-related development projects. While including these provisions in the energy reform legislation was potentially a positive step on the part of the Mexican Government toward protecting the rights of affected communities, they have little value unless the assessments are openly shared in the consultation process and are allowed to guide project development. No such assessment has been shared with affected communities in connection with the Consultation in Juchitán. Moreover, none of these provisions contemplates any direct involvement of affected communities in guiding social impact assessments for projects that affect them. Thus, affected communities may be easily relegated to a marginal role in this critical piece of the decision making process.

> [G]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[76]

This provision is especially pertinent where affected communities may be unwilling to accept 'market value' for the sale or use of their socially-owned property due to higher cultural or spiritual value they place on the land.[77] The Convention requires that this non-monetary value be taken into consideration when governments or TNCs are negotiating with indigenous communities.

The Convention also specifically addresses circumstances where the State retains ownership of mineral or sub-surface resources of lands occupied by indigenous or tribal peoples, which is the case in Mexico where land ownership is constitutionally limited to surface use and does not extend to underground hydrocarbon or mineral resources. In such cases:

> [G]overnments shall establish or maintain procedures through which they consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.[78]

This provision further reinforces the principle of meaningful prior consultation, set out in Article 6.

When development projects require relocation of indigenous peoples as a 'necessary and an exceptional measure' Article 16 provides that 'such relocation shall take place only with their free and informed consent'.[79] If such consent cannot be obtained, 'such relocation shall take place only following appropriate procedures established by

[76] *Indigenous and Tribal Peoples Convention No 169*, opened for signature 7 June 1989, art 13.
[77] See generally Medrano, above n 44.
[78] *Indigenous and Tribal Peoples Convention No 169*, opened for signature 7 June 1989, art 15, s 2.
[79] Ibid art 16, s 2.

national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'.[80]

Thus, the Convention imposes a much higher bar when governments carry out projects that cannot reasonably coexist with an indigenous community's continued presence on the land. In those cases, consultation alone is not sufficient. Such projects can only proceed with the consent of affected communities.

2 *United Nations Declaration on the Rights of Indigenous Peoples*

The *United Nations Declaration on the Rights of Indigenous Peoples* (the 'Declaration') was adopted by the General Assembly on 13 September 2007, with 144 states in favour, four votes against, and eleven abstentions.[81] The principles of the Declaration are in harmony with those established in the Convention, and its adoption by the General Assembly highlights a broadening acceptance of those principles in the international community.[82]

Mexico voted in favour of the Declaration.[83] Moreover, Mexico publicly reaffirmed its strong support for the Declaration when its Permanent Representative to the United Nations, Ambassador Luis Alfonso de Alba, made a statement at a high-level commemoration of the fifth anniversary of the Declaration on 17 May 2012.[84] In his remarks, the Ambassador emphasised the relevance of the Declaration in protecting indigenous land and territory, and in guiding the Mexican government in its consultations with indigenous communities.[85]

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[80] Ibid.
[81] United Nations, *Permanent Forum on Indigenous Issues* <http://undesadspd.org/indigenouspeoples/declarationontherightsofindigenouspeoples.aspx>.
[82] See ILO, *Indigenous and Tribal Peoples, Convention No 169* <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.
[83] United Nations, *Bibiographic Information System* <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295>.
[84] *Foro Permanente para las Cuestiones Indígenas de la Organización de las Naciones Unidas, 11o Periodo de Sesiones, Tema 9, Quinto aniversario de la aprobación de la Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas*, GA Res 66/142 <http://www.un.org/esa/socdev/unpfii/documents/5th-anniv-undrip/pf12alfonso327es.pdf>.
[85] Ibid; En los últimos años hemos podido constatar la revelencia de la Declaración en ámbitos tan diversos como … la protección de las tierras y territorios … En México la Declaración ha sido de gran utilidad para guiar con mayor claridad las políticas del Gobierno en los aspectos relacionados con el desarrollo de los pueblos indígenas, incluyendo mecanismos de consulta que se deben seguir perfeccionando a través de la experiencia adquirida y la práctica constante [In recent years we have been able to maintain the relevance of the Declaration in areas as diverse as … the protection of land and territory … In Mexico the Declaration has been of great utility in guiding with greater clarity the policies of

The Declaration reiterates the Convention's outright prohibition of forced relocation of indigenous people:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.[86]

The Declaration also reinforces the right to consultation provided in the Convention:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[87]

States are further obligated to:

> [O]btain [the] free and informed consent [of indigenous peoples] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.[88]

This provision is particularly relevant in the context of hydrocarbon or electricity-related projects developed on land socially owned by indigenous communities. The Declaration makes clear that such projects can only be undertaken after consultation with the affected communities, and with their free and informed consent.

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the Government with respect to the development of indigenous communities, including consultation mechanisms that we must continue perfecting through acquired experience and constant practice] [author's trans].

[86] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 10; see also Anaya, above n 67; The Declaration recognises two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands.

[87] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 19.

[88] Ibid art 32.

3 *American Convention on Human Rights*

The American Convention on Human Rights, also known as the *Pact of San José, Costa Rica* ('the Pact'), was ratified by Mexico on 2 March 1981.[89] Article 21 establishes the 'Right to Property', stating that '[e]veryone has the right to the use and enjoyment of his property'.[90] Although the Pact places limitations on the right to property, providing that '[t]he law may subordinate such use and enjoyment to the interest of society',[91] case law interpreting the Pact makes clear that special consideration must be provided before a government may infringe on the land rights of indigenous or tribal peoples.[92] Specifically, the affected indigenous community must give prior, free, and informed consent before a development project may proceed on its traditionally-held territories.[93]

In the *Saramaka* case, a tribal community from the upper region of the Suriname River brought a complaint against the State of Suriname for losses that it suffered when a large hydroelectric project caused flooding of its lands.[94] In finding that the State violated the Saramaka tribe's right to property, as established in Article 21 of the Pact, the Inter-American Court of Human Rights held:

> [R]egarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[95]

In distinguishing between consultation and consent, the Court relied on the observation of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, that whenever there are large-scale projects in areas occupied by indigenous communities, it is likely that those communities will go through profound social and economic changes

[89] Organization of American States, *Department of International Law* <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm>.
[90] *American Convention on Human Rights*, art 21.
[91] Ibid.
[92] See Contradicción de Tesis 293/2011, ficha técnica <http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556>; Mexico's Supreme Judicial Court recently affirmed that all Mexican national courts are bound by decisions of the Inter-American Court of Human Rights, including in cases to which Mexico was not a party, provided the decision is protective of human rights.
[93] See *Pueblo Saramaka vs Surinam*, Inter-American Court of Human Rights, 28 November 2007[James Anaya trans].
[94] Ibid paras 1, 11.
[95] Ibid para 134.

that government authorities are incapable of understanding, much less anticipating.[96] Therefore, the Special Rapporteur concluded, free, prior, and informed consent are essential to protect the human rights of indigenous peoples when large development projects are involved.[97]

The right of indigenous communities to effective and fully-informed consultation in decisions that will affect their traditional territories was also recognised in *Comunidades Indígenas Mayas en el Distrito de Toledo v Belice*.[98] In that case, the Inter-American Commission on Human Rights held that 'full and informed consent' at a minimum required that 'all the members of a community are fully aware of the nature and consequences of the process and are provided an effective opportunity to participate in an individual or collective manner'.[99]

Thus, under the jurisprudence of the Inter-American system, which is binding on Mexico as a signatory to the Pact, hydrocarbon or electricity-related activities can only proceed on indigenous lands with effective and fully-informed consultation of the affected communities, and in the case of large-scale development projects, with their free, prior, and informed consent. Unfortunately, as the experience of Zapotec communities in the Isthmus bears out, the Mexican State has yet to live up to this standard.

V CASE STUDY OF WIND-TURBINE PARK DEVELOPMENT IN JUCHITAN, OAXACA

A *Context for Human Rights Defenders in Mexico*

Mexican human rights defenders and communities opposing encroachment of TNCs on their land often face severe threats, harassment, and intimidation — in some cases with the involvement or tacit support of government authorities. According to Human Rights Watch's World Report, the United Nations High Commissioner for Human Rights registered 89 aggressions against human rights defenders in Mexico between November 2010 and December 2012, yet none have resulted in a conviction.[100] Similarly, the UN

[96] Ibid para 135.
[97] Ibid.
[98] *Indigenous Mayan Communities in the District of Toledo v Belize*, Inter-American Commission of Human Rights, Informe 40/04, Fondo. Caso 12.052 [author's trans].
[99] Ibid.
[100] Human Rights Watch, *World Report 2014: Mexico* <http://www.hrw.org/world-report/2014/country-chapters/mexico>; see also Amnesty International, *Mexico Human Rights*

Committee Against Torture stated in a December 2012 report that it was 'seriously concerned at the large number of murders, disappearances and acts of intimidation' committed against human rights defenders and journalists in Mexico.[101]Mexico's National Human Rights Commission ('CNDH') has itself reported that since 2005, 18 human rights defenders have been killed and many more have faced death threats.[102] The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has cited evidence that 'many of the attacks against journalists and advocates are carried out by authorities'.[103]

Human Rights Watch recently highlighted that many of the reported attacks against human rights defenders occurred 'in the context of opposition to infrastructure, or resource extraction "mega-projects".[104] Amnesty International has likewise concluded that '[m]arginalised communities whose lands are sought for economic development are at risk of harassment, forced eviction or denial of their right to adequate information and consultation'.[105]

Forced disappearances, extrajudicial killings, and torture persistently occur on a wide scale in Mexico, adding to the already hostile environment for human rights defenders. In February 2013, the administration of Mexican President Enrique Peña Nieto acknowledged that more than 26 000 people had been reported disappeared or missing since December 2006.[106] A year-and-a-half later, 'the government acknowledged that the whereabouts of over 22 000 people who had gone missing since 2006 remained unknown, but failed to disclose corroborating evidence, or information on how many of these cases are forced disappearances'.[107]

<http://www.amnestyusa.org/our-work/countries/americas/mexico>: 'Journalists and human rights defenders are killed, harassed or face fabricated criminal charges.'

[101] *UN Committee against Torture: Concluding observations on the combined fifth and sixth periodic reports of Mexico as adopted by the Committee at its forty-ninth session*, UN Doc CAT/C/MEX/CO/5-6 (11 December 2012) para 14.

[102] See Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/26/36/Add.1 (28 April 2014) para 75.

[103] Ibid para 76.

[104] Human Rights Watch, *World Report 2014: Mexico* <http://www.hrw.org/world-report/2014/country-chapters/mexico>.

[105] Amnesty International, *Mexico Human Rights* <http://www.amnestyusa.org/our-work/countries/americas/mexico>.

[106] See, eg, Catherine Schoichet, 'Mexico reports more than 26,000 missing', *CNN* (online), 27 February 2013 <http://edition.cnn.com/2013/02/26/world/americas/mexico-disappeared/>.

[107] Human Rights Watch, above n 100.

In June 2013, Mexico's CNDH reported that it was investigating 2443 disappearances in which it had found evidence of involvement of state agents.[108] The CNDH has since 'issued 12 reports documenting the enforced disappearance of 30 victims … and found evidence of probable participation of state agents in approximately 600 other disappearance cases'.[109]

Between January and September 2013, the CNDH received over 860 complaints of torture or cruel or inhuman treatment at the hands of federal officials.[110] Following his visit to Mexico last year, the UN Special Rapporteur on Torture Juan Méndez stated that 'torture and ill-treatment are generalised in Mexico', and that the government's failure to investigate 'the large number of complaints and testimonies' of such treatment 'is evidence of a disturbing level of impunity'.[111] Similarly, a fact-finding mission of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions conducted in the Spring of 2013 concluded that since the Federal Government's 'war on drugs' began in 2007, 'widespread extrajudicial executions were perpetrated by the security forces as well as the cartels, often without accountability'.[112]

It is in this context that indigenous and agrarian communities in Mexico, and the human rights defenders and NGOs that accompany them, are resisting encroachment of TNCs on their social lands for energy reform projects. In the Isthmus, members of Indigenous communities who have opposed construction of large-scale wind-turbine parks on *ejido* or communal land have frequently faced harassment, threats, and even physical attacks. Nonetheless, with the assistance of NGOs like ProDESC, many have utilised the tools available within the Mexican legal system to demand that these projects adhere to the protections guaranteed by the National Constitution and international treaties to which Mexico is a party.

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[108] Ibid 104, 265.
[109] Ibid 107, 378.
[110] Ibid 104, 268; see also Amnesty International, *Out of Control: Torture and other ill-treatment in Mexico* <http://www.amnestyusa.org/research/reports/out-of-control-torture-and-other-ill-treatment-in-mexico>.
[111] Juan Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Mexico (21 April to 2 May 2014)*, UN Doc A/HRC/28/68/Add.3 (29 December 2014) paras 23, 32.
[112] Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum, Mission to Mexico*, UN Doc A/HRC/26/36/Add.1 (28 April 2014) para 8.

B *Zapotec Communities of Juchitán Resisting Encroachment of TNCs on their Land*

Juchitán, located in Oaxaca State on the southern end of the Isthmus, is an Agrarian community with collectively-held *ejido* lands established by presidential decree of 17 June 1964. The population of Juchitán is largely comprised of Indigenous Zapotec people, who retain their own political, social, cultural, economic, and judicial institutions.

The narrow land bridge of the Isthmus between the Pacific and Atlantic Oceans is a virtual wind tunnel that makes the area very attractive for wind-energy projects.[113] TNCs have already constructed at least twenty wind-turbine parks in the region,[114] and the Mexican Minister of Energy, Pedro Joaquín Coldwell, announced plans earlier this year for private investment of $US 14 billion into wind-energy infrastructure in the next four years.[115]None of these projects were implemented with prior consultation or consent of the impacted communities.

For the last several years, ProDESC has been assisting Zapotec communities in Juchitán to demand that their basic human rights are respected as two Spanish TNCs, Bií Hioxo ('BH') and Eólico del Sur ('ES'), attempt to move forward with construction of new wind-turbine farms on their land. To do this, ProDESC has developed a unique multipronged strategy, called 'integral defence', consisting of (1) organising and outreach to empower local communities impacted by energy projects, which after ten years of experience, ProDESC considers to be the key element for successful campaigns; (2) legal action within the Mexican judicial system designed to press federal and state authorities to respect the human rights protections guaranteed under the *Mexican Constitution* and international law; (3) documentation of human rights violations; (4) political engagement and policy advocacy; (5) coordination and coalition-work with

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[113] See *Los parques eólicos en Oaxaca: Preocupaciones sobre las violaciones de derechos humanos en el estado* [Wind-Energy Parks in Oaxaca, Worries about human rights violations in the state] (Peace Brigades International, Mexico Project) 1 <http://www.pbi-mexico.org/fileadmin/user_files/projects/mexico/files/PBI_Publications/1403BriefingEolicosPBI.pdf>.
[114] See *Asociación Mexicana de Energía Eólica* [Mexican Wind Energy Association], *Capacidad Instalada de Energía Eólica en México* [Installed Wind-Energy Capacity in Mexico] <http://digitalcommons.wcl.american.edu/hrbrief/vol20/iss1/2/>; 'En 2016, Oaxaca tendrá 23 parques eólicos: Cué [In 2016, Oaxaca will have 23 wind energy parks: Cué]', *Noticiasnet.MX* (online), 22 January 2015 <http://digitalcommons.wcl.american.edu/hrbrief/vol20/iss1/2/>.
[115] Sonia Corona and David Marcial Pérez, 'Las eólicas españolas invertirán 9.000 millones de dólares en México' [Spanish wind-energy companies will invest $US 9 billion in Mexico], *El País,* 13 January 2015.

organisational allies in Mexico and abroad; (6) communication and engagement with media; and (7) strategic corporate research.[116]

1 *BH*

BH wind-energy park was built on the *ejido* land of Juchitán de Zaragoza. In 2013, community members reported that they began to notice the appearance of unknown individuals on their property.[117] According to interviews with indigenous community leaders conducted by ProDESC, when these community members attempted to ascertain the identities of these individuals, the trespassers physically attacked them.[118] As a result of this confrontation, the community learned that the attackers were BH employees who were on their land to develop a wind-turbine park.[119] Federal and state authorities had been collaborating with BH for several years to design and implement the energy development without making any attempt to inform or consult with the local Zapotec community.[120]

Once they learned of the project, community leaders made several attempts to enter into a dialogue with BH representatives regarding the use of their land, but BH refused them.[121] Community leaders also expressed their opposition to what they viewed as BH's unlawful invasion of their property to federal, state, and municipal authorities.[122] They made clear in these communications that they were never informed of the existence or potential impact of the project, much less engaged in prior, informed, and

[116] 'Metodología para el diseño e implementación de estrategías para el fortalecimiento social, la exibilidad, defensa y justiciabilidad de los derechos económicos, sociales y culturales' [Methodology for the design and implementation of strategies for social empowerment, enforceability, defence, and justiciability of economic, social and cultural rights] (ProDESC). In ProDESC's methodology, the seven prongs are carried out in a manner that is (1) interdisciplinary (2) strategic and impactful, meaning that the ultimate goal is not only to resolve a particular case, but to address the underlying issues that gave rise to the case (3) respectful of diversity of identities and backgrounds and (4) pedagogical, promoting the education and development of both human rights defenders and the communities in which they work. Objectives of the integral defence framework are: (1) clarification of the underlying facts (2) identification and sanction of those responsible for human rights violations (3) full compensation for any damages suffered (4) to develop measures to ensure that problems do not repeat themselves and (5) to promote the awareness of and commitment to the idea that human rights are the responsibility of all.

[117] 'Caso Comunidad Indígena Zapoteca de Juchitán, Oaxaca: Defensa del derecho a la tierra, territorio y bienes naturales; a la consulta y al consentimiento libre, previo e informado' [Case of the Indigenous Zapotec Community of Juchitán, Oaxaca: Defence of the right to the land, territory and natural resources to consultation and to free, prior and informed consent] (Case Summary, ProDESC) <http://www.prodesc.org.mx/?p=3182> [author's trans].

[118] Ibid.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid.

free consultation as required under international agreements that Mexico has ratified and endorsed.[123] Nonetheless, the project proceeded, and BH attempted to legitimise its occupation and use of the land by entering into contracts to rent individual parcels.[124] In so doing, BH ignored the collective ownership structure of *ejido* lands, which rendered their rental contracts invalid.

On 1 October 2013, members of the Zapotec community of Juchitán, represented by ProDESC attorneys, filed a writ of *amparo* in Oaxaca state court making two demands: first, an immediate halt in construction of the wind-energy park; and second, a rescission of the government authorisations granted to BH for the project.[125] The assigned judge denied the first request, and ProDESC appealed the interlocutory order.[126] The Thirteenth Circuit Administrative Court sitting in Oaxaca de Juárez, Oaxaca affirmed the lower court order denying the request for immediate suspension of the project on the ground that the complainants did not provide adequate proof of *ejido* membership.[127] The state court has yet to resolve the underlying request regarding permitting for the project.

ProDESC's challenge to BH's development plans is premised on the argument that the Zapotec community of Juchitán was denied its right to fully-informed and voluntary consultation and consent prior to the implementation of an energy project on its land.[128] This right is guaranteed under international law recognised by Mexico, such as the Convention, the Declaration, and the Pact, and given constitutional authority through the 2011 Human Rights Amendments. BH's claims to priority use of the land for electricity generation and transmission activities under the energy reform secondary laws must be subordinated to the international human rights protections provided in the National Constitution. Moreover, as collective owners of the *ejidal* lands on which BH built the wind-turbine park, all of the members of the Zapotec community of Juchitán are harmed by the loss of their traditional territories.

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[123] Ibid.
[124] Ibid.
[125] Ibid 3.
[126] Ibid; *Tribunal Colegiado del Décimo Tercer Circuito en materia Administrativa* [Thirteenth Circuit Court for Civil and Administrative Matters] 45/2014, 15 August 2014 [author's trans].
[127] See *Tribunal Colegiado del Décimo Tercer Circuito en materia* Administrativa [Thirteenth Circuit Court for Civil and Administrative Matters] 45/2014, 15 August 2014, 30–6 [author's trans].
[128] Ibid.

The courts' response to the underlying question of whether BH and the Mexican Government denied Indigenous communities in Juchitán their right to meaningful consultation and free, prior, and informed consent will likely have repercussions for all of the wind energy projects in the region. If the courts agree with ProDESC that the Federal Constitution and international law obligated the Mexican Government to consult with local communities before allowing BH to proceed with its project, the same logic would also presumably apply to the 20 other wind-turbine parks on the Isthmus that were built without a consultation process.

In the meantime, ProDESC's focus on the right to effective and fully-informed consultation with respect to development of energy projects on indigenous land seems to have gained significant traction. One sign of this is the Mexican Government's decision to initiate a consultation process in Juchitán in anticipation of another wind-turbine park development in the area. While Mexican authorities have not acknowledged that their decision to consult with the community resulted from the legal challenges launched against Bií Hioxo, the timing of the announcement of the consultation soon after ProDESC filed its *amparo* against BH is telling.

2 *ES*

ES is seeking to develop a new wind-turbine park in the municipalities of El Espinal and Juchitán, Oaxaca, very close to the site of the BH project.[129] Unlike in the case of BH, however, the Mexican Government announced that it was initiating a consultation process with the local Zapotec community that it touted as a first of its kind, and a model for development projects instituted under the energy reform.[130]

On 3 November 2014, the first phase of a five-stage consultative process began. The five successive phases were referred to as: (1) Prior Agreements [Acuerdos Previos]; (2) Informative [Informativa]; (3) Deliberative [Deliberativa]; (4) Consultative

[129] See 'Caso Comunidad Indígena Zapoteca de Juchitán, Oaxaca: Defensa del derecho a la consulta y al consentimiento libre, previo e informado [Case of the Indigenous Zapotect Community of Juchitán, Oaxaca: Defense of the right to consultation and free, prior and informed consent]' (Case Summary, ProDESC) <http://www.prodesc.org.mx/?p=3072> [author's trans].
[130] Ibid; Pedro Matías, 'Buscan amparo contra proyectos eólicos en Oaxaca' [*Amparo* against wind-energy projects in Oaxaca is sought]', *Proceso* (Mexico City), 27 April 2015; Silvia Garduño, 'Denuncian anomalías en consulta indígena' [Anomalies in Indigenous Consultation are denounced], *Reforma* (Mexico City), 27 April 2015.

[Consultativa]; and finally (5) Execution and follow-up.[131] In anticipation of the consultation, ProDESC, along with several other NGOs, formed an Observation Mission to ensure that the process adhered to the principles of free, informed, and prior consultation and consent, as established in the Convention, the Declaration, and the Pact.[132] As the Mexican Government itself claimed that the Consultation would provide a model for development projects going forward, the NGOs comprising the Observation Mission believed that it was critical to ensure that it be carried out in strict compliance with the highest international standards. To date, representatives of the Observation Mission have been present at every session of the Consultation.

Participants in the Consultation faced threats and intimidation from the very beginning of the process.[133] On 4 and 5 November, representatives of a local community organisation called the Popular Assembly of the People of Juchitán ('APPJ') were subjected to a variety of hostile acts, including death threats, in the vicinity of the Consultation venue.[134] On 6 November, the Observation Mission issued a bulletin expressing its serious concerns with the lack of adequate security for community members participating in the Consultation, placing into question whether it could be considered a free and voluntary process.[135]

This bulletin was quickly followed by an Observation Mission Report detailing problems in the process that had already become evident in the first week of the Consultation.[136] Among those were: (1) the lack of adequate information provided to community participants in a process that was supposed to be 'fully informed'; (2) the failure to provide Spanish-Zapotec interpretation by certified interpreters for all sessions; (3) a lack of clear decision-making mechanisms, which caused a hostile environment in many sessions as groups with conflicting interests clamoured to be taken into account; (4) demonstrated bias on the part of moderators in favour of municipal authorities, even to

[131] See ProDESC, above n 129, 2.
[132] Ibid. The other NGOs that formed part of the Observation Mission were the Project on Organizing, Development, Education, and Research ('PODER') and the Comité de Defensa Integral de Derechos Humanos Gobixha ('Codigo DH').
[133] Ibid.
[134] 'APPJ' is based on the Spanish acronym; See ibid.
[135] Ibid.
[136] See 'Reporte de la "Misión de Observación" de la primera semana de sesiones de la Consulta para la implementación de un proyecto Eólico en Juchitán, Oaxaca [Report of the 'Observation Mission' on the first week of sessions of the Consultation for the implementation of a wind-energy project in Juchitán, Oaxaca]' (ProDESC, PODER, Código DH) [author's trans].

the point of yelling at participants who raised sensitive topics; and (5) the persistence of security threats against community members who were critical of the project.[137]

Despite the problems identified by the Observation Mission, the first phase of the process continued for six sessions, at which representatives of federal, state, and municipal government were present.[138] The closing session occurred on 2 December 2014, at which community members presented a number of proposals for changes to the Protocol, the guiding document for the process that had not been made available to many participants even after the Consultation began.[139] None of those proposals were ever publicly discussed or decided upon.[140] The first phase of the Consultation was called to a close without any formal or written agreement with representatives of the Zapotec community.[141]

The second phase of the Consultation began the following day with the Technical Committee presenting a series of topics that were to be covered at a series of seven meetings in subsequent months. These topics were: (1) System of generation and distribution of electricity in Mexico; (2) Determination of electricity rates by consumption and cost of production; (3) General presentation of the project promoted by ES; (4) Environmental impacts and mitigation methods; (5) Health impacts of the wind-energy parks; and (6) Impacts on culture and archaeological research.[142] Community members were not provided any opportunity to put forward the topics that they believed were most important to ensure that their interests were taken into account.[143]

As the thematic meetings proceeded, the Observation Mission became aware of new acts of aggression against participating community members.[144] In one instance, an APPJ member reported that, at the close of the 3 December session, after he and others had been shouted down and insulted when they expressed doubts regarding information

[137] Ibid.
[138] Ibid 3.
[139] See 'Segundo Reporte de la Misión de Observación sobre el proceso de Consulta Indígena para la implementación de un proyecto eólico en Juchitán, Oaxaca [Second Report of the Observation Mission about the Consultation Process with the Indigenous Community for the implementation of a wind-energy project in Juchitán, Oaxaca]' (ProDESC, PODER, Código DH) 2–3 [author's trans].
[140] Ibid.
[141] Ibid.
[142] Ibid 3.
[143] Ibid 7–8.
[144] See ProDESC, above n 129, 3.

about the project provided by the Federal Government, an unknown car followed him as he drove several APPJ members home.[145] After he arrived back at his house, he noticed the car that had been following him earlier parked outside for several minutes.[146] The following morning, he saw two individuals on a motorcycle with their faces covered pass in front of his house three times.[147]

Another APPJ member reported that minutes after arriving home after the 3 December session, she heard several gunshots fired outside.[148] She called the police, but none arrived.[149] All of these incidents were reported in a letter dated 4 December 2014 to Victoria Lucia Tauli-Corpuz, the United Nations Special Rapporteur for the Rights of Indigenous Peoples.[150]

On 23 February 2014, the Observation Mission presented its Second Report on the Consultation, covering the time period from the close of the first phase through to the first three sessions of the second phase.[151] The Report reaffirmed and expanded upon the numerous concerns that the Observation Mission raised in its First Report. In particular, the Report documented at least twenty security incidents that continued to threaten the free and voluntary nature of the process.[152] Most of those incidents were directed against members of the APPJ and other representatives of the local Zapotec community.[153]

These security incidents included threatening telephone calls and text messages demanding that community members cease their participation in the process; surveillance and acts of intimidation at people's homes; and verbal aggression and threats.[154] The most serious of these occurred on 14 November 2014, when an APPJ member was threatened by an armed assailant at the Consultation venue at the end of a

[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] See Letter from ProDESC to Victoria Lucia Tauli-Corpuz, UN Special Rapporteur for the Rights of Indigenous Peoples, 4 December 2014.
[149] Ibid.
[150] Ibid.
[151] See 'Segundo Reporte de la Misión de Observación sobre el proceso de Consulta Indígena para la implementación de un proyecto eólico en Juchitán, Oaxaca' [Second Report of the Observation Mission about the Consultation Process with the Indigenous Community for the implementation of a wind-energy project in Juchitán, Oaxaca] (ProDESC, PODER, Código DH) 2–3 [author's trans].
[152] Ibid 4–6.
[153] Ibid.
[154] Ibid.

session.[155] Five criminal complaints were filed with state authorities based on these incidents.[156]

On 18 December 2014, a representative of the federal environmental authority participating in the Consultation received a verbal threat from an unidentified individual dressed in black.[157] Although members of the Technical Committee promised at the time to announce the occurrence of the threat at the next Consultation session, it was never raised publicly.[158] At the session the following day, a person took the microphone and made a threat in the Zapotec language to a small group of people gathered in front of him.[159] Some participants alerted the moderator that they did not feel safe expressing their opinions in the hostile environment created by these threats.[160] Although moderators on a few occasions asked that those present refrain from such behaviour, this was insufficient to halt the verbal confrontation and jeering that predominated at most of the sessions.[161]

Besides the security threats, the Second Report of the Observation Mission highlighted numerous procedural flaws, including: (1) lack of transparency in providing information about the project to affected community members; (2) failure to conduct the proceedings in a way that was culturally adequate for indigenous participants; (3) a lack of clear and fair decision-making mechanisms that included real input from impacted communities; and (4) the inappropriate and undue involvement of ES itself in the process.[162]

Moreover, the Observation Mission openly questioned whether the Consultation could meet the 'prior' requirement when a representative of SEMARNAT, the federal environmental agency, revealed in the first session of the Informative phase that the environmental impact assessment that ES submitted had already been approved.[163] Having federal agency sign off on key environmental requirements for the project before the Consultation even began was evidence that authorities were treating the process as

[155] Ibid 4–5.
[156] Ibid 5.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid 6.
[162] Ibid 6–15.
[163] Ibid 16.

a rubber stamp on a predetermined outcome, with participation of indigenous communities providing an illusion of legitimacy. Despite these and many other failings detailed by the Observation Mission, the second phase of the Consultation was called to an end on 20 April 2015.[164]

On 24 April, after making the determination that the process had become too compromised to continue with any assurance that international human rights standards would be respected, ProDESC attorneys filed a writ of *amparo* in the state court of Oaxaca on behalf of members of the Zapotec community of Juchitán.[165] The *amparo* demanded a halt to the Consultation due to the grave flaws highlighted in the two Reports of the Observation Mission. These flaws made clear that Mexican authorities failed to meet their obligation, established in international law and incorporated into the National Constitution, to consult with local Zapotec communities regarding development of a wind-turbine park on their land in a free, informed, and prior process.

VI CONCLUSION

The 2011 Human Rights Amendments to the *Mexican Constitution* were a major step forward in ensuring that the Mexican Government complies with its human rights commitments under international law, especially with respect to treatment of indigenous and agrarian communities. The secondary laws enacted under the recent Energy Reform, which purport to place the use of land for hydrocarbons exploration and energy generation above any other use of the land, cannot take precedence over human rights obligations that are incorporated into the Constitution itself as a result of the 2011 Human Rights Amendments.

ProDESC and organisations like it have had important successes working through the Mexican legal system to ensure that long-recognised communal land rights are not infringed upon without prior, informed, and free consultation and consent, as guaranteed by the Convention, the Declaration, and the Pact. Although some of these cases may ultimately make their way to international human rights tribunals, such as the Inter-American Commission for Human Rights, it is critical to first utilise the legal

[164] See 'Caso Comunidad Indígena Zapoteca de Juchitán, Oaxaca', above n 129, 3.
[165] See, eg, Pedro Matías, 'Buscan amparo contra proyectos eólicos en Oaxaca' [*Amparo* against wind-energy projects in Oaxaca is sought] *Proceso* (Mexico City), 27 April 2015; Silvia Garduño, 'Denuncian anomalías en consulta indígena' [Anomalies in Indigenous Consultation are denounced] *Reforma* (Mexico City), 27 April 2015.

mechanisms that are available within the national system to push for adherence to international law that protects the most marginalised and politically-powerless members of Mexican society.

The Consultation with the Indigenous communities of Juchitán in connection with ES´s proposed wind-energy park was a vital test of how the Mexican Government will approach its international human rights obligations in the wake of the energy reform. Unfortunately, as the work of the Observation Mission demonstrates, the Government authorities that were responsible for this Consultation fell far short of passing. To be sure, Mexico´s commitment to the human rights of its citizens appears clearly and beautifully in the words of the Federal Constitution, particularly in the 2011 Human Rights Amendments, and the various international treaties that the nation has ratified and signed. Words on the page mean little, however, if they are not carried out in practice. In working with ProDESC to challenge the Consultation through the *amparo* process, the Zapotec communities of the Isthmus are demanding that their Government make real the human rights obligations that it has committed to on paper. If they are successful, indigenous communities throughout Mexico faced with the prospect of energy reform projects on their traditional lands will be one significant step closer to achieving a meaningful say in determining their own destinies.

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THE ISSUE OF MEDICINAL CANNABIS IN CONTEMPORARY AUSTRALIA

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The primary aim of this paper is to enhance the quality of debate and assist interested parties to consider relevant contemporary issues concerning the reintroduction into Australia of cannabis for medicinal purposes: it thereby builds on our previous work in which we outlined the medical case.[1] *A secondary aim is to discuss some of the major areas where strong differences in opinion may currently be obstructing efforts to reform cannabis laws in Australia. It will be clear to the reader that the authors favour the case for legalising the use of cannabis for medicinal purposes by regulation and control, analogous to the means used for other clinically-useful drugs open to non-therapeutic uses.*

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[1] Laurence E Mather et al, '(Re)introducing medicinal cannabis' (2013) 199 *The Medical Journal of Australia* 759.

CONTENTS

I INTRODUCTION

'Drugs' or 'medicines ' are chemical substances that are ingested essentially to extend our life or improve the way we feel, typically as part of the treatment plan for a medically recognised condition. They usually do this by altering or regulating some or other normal or deranged physiological function. Not many generations ago, drugs or medicines were mainly prepared as mixtures, tinctures, and elixirs from natural sources, typically as extracts from plants or animal parts. Some were pre-prepared proprietary preparations and others were prepared by the pharmacist from non-proprietary formulae. Today, the vast majority are pure chemicals (synthetic or derived from natural products), developed by evidential research, supplied in proprietary ready-to-use forms, and rarely prepared by pharmacists. A great many mixtures, tinctures, and elixirs from natural sources are now sold as proprietary preparations under the catch-all name of 'complementary medicines', although medical claims for these are not allowed to be made, and supporting evidential research may be sparse.

Cannabis, in its various forms, comes from a plant. It is among many substances that have been declared illegal by most governments following international treaties that aim to reduce the availability of specified drugs in order to protect members of society from

their actual or perceived harms. Most substances are therapeutic drugs, or derivatives thereof, that are used non-therapeutically, allegedly as 'recreational' or pleasure-giving mood altering substances, with various degrees of habituating or addicting liability. While legal drugs may be used by people outside of their approved therapeutic uses, the supply of those drugs is closely controlled. In Australia, cannabis use is illegal,[2] including for treatment of recognised medical conditions; but, despite vigorous efforts to control supply, it remains relatively easy to obtain.[3]

The chemical quality of legal pharmaceutical drugs, such as paracetamol, is carefully regulated by suppliers in accordance with government agencies: in Australia, this is the Therapeutic Goods Administration (TGA). As a plant, cannabis does not sit comfortably with Australia's regulatory model, and this presents a basis for objection to its use by many people who might otherwise concede that it has some therapeutic value. Like other plants, cannabis contains several hundred chemical substances that regulate the plant's growth and sustenance. Many of these substances demonstrate activity in relevant pharmacological models, including some for which the pharmacological properties of cannabis are recognised.

Moreover, these substances occur in varying concentrations depending on the strain of the plant, its conditions of growth, harvesting, storage, and processing.[4] Thus 'cannabis' cannot be regarded as a particular drug,[5] and this creates difficulties with Australian and international standards for the regulation of pharmaceutical products. Recognising the unusual characteristics of cannabis and the recent rapid increase in scientific knowledge

[2] At present, the only cannabis product registered on the Australian Register of Therapeutic Goods (ARTG) is a proprietary cannabis plant extract with the US Approved Name (USAN) of nabiximols and the trade name of Sativex®. See Department of Health, Australian Government, *Medicinal Cannabis* <http://www.health.gov.au/internet/main/publishing.nsf/Content/MC14-007515-medicinal-cannabis>. The New South Wales (NSW) government has announced that it 'has committed clinical trials to further explore the use of cannabis and/or cannabis products…' but the legal framework for such trials has not yet been made public. See also Department of Health, New South Wales, *Clinical Trials: Medical Use of Cannabis* <http://www.health.nsw.gov.au/cannabis/Documents/fs-cannabis-trials.pdf>.

[3] Natasha Sindicich and Lucy Burns, 'Australian Trends in Ecstasy and Related Drug Markets 2013: Findings from the Ecstasy and Related Drugs Reporting System (EDRS)' (Australian Drug Trends Series No 118, National Drug and Alcohol Research Centre, University of New South Wales, 2015) 101–102.

[4] David J Potter, 'A review of the cultivation and processing of cannabis (Cannabis sativa L.) for production of prescription medicines in the UK' (2014) 6 *Drug Testing and Analysis* 31.

[5] See A Hazekamp and J T Fischedick, 'Cannabis – from cultivar to chemovar' (2012) 4 *Drug Testing and Analysis* 660; Wendy Swift et al, 'Analysis of Cannabis Seizures in NSW, Australia: Cannabis Potency and Cannabinoid Profile' (2013) 8 *Plos One* e70052.

about it, some countries (most notably the Netherlands),[6] have created an 'Office of Medicinal Cannabis' separate from their main regulatory body, in order to work through these difficult issues.

II THE BEGINNINGS OF MEDICINAL CANNABIS

Cannabis is an ancient herbaceous plant: its botanical name derives from the Latin for hemp. Various preparations from cannabis foliage and florets have been used for medicinal, dietary, textile fibre-making, religious, spiritual, and recreational purposes, for millennia. Although it is not believed to be a native, cannabis seeds were brought to Australia with the First Fleet to assist with providing for the voracious needs of the Royal Navy for sailcloth and rope. To these ends, the 'climate and soil' of Australia were proclaimed early in colonial history to be 'admirably adapted to the growth of hemp', indeed, so much so that the hemp plant 'was [in 1845] growing wild on the banks' of the Upper Hunter River.[7]

In Australia, as in most Western countries, a variety of proprietary and pharmacopoeial preparations of cannabis were available from early Victorian times. The introduction of cannabis into Western medicine is attributed to Dr W B O'Shaughnessy, Assistant-Surgeon and Professor of Chemistry in the Medical College of Calcutta, who described its botanical and physical characteristics and folkloric medicinal use in October 1838.[8] He also described his own observations in human patients that included successful symptomatic treatment in cases of pain arising from acute and chronic rheumatism, of paroxysms from hydrophobia (rabies), diarrhoea from cholera, muscular spasms from tetanus, and infantile convulsions (epilepsy). O'Shaughnessy wrote a remarkably comprehensive report, and an account of it by 'Dr Neligan' was picked up by at least one Australian newspaper describing the medicinal benefits of cannabis, along with the prescient remark that it 'may be used as a substitute for opium, in cases for which that drug may be unsuited, from idiosyncrasy or any other cause; and also that it will

[6] CIBG Ministerie van Volksgezondheid, Welzijn en Sport: The Office of Medicinal Cannabis. See CIBG Broadcast, *Informatieclip BMC English* (27 March 2012) YouTube <http://youtu.be/hE60il2pI_k>.
[7] Robin Goodfellow, 'Hemp', *Hawkesbury Courier and Agricultural and General Advertiser* (Windsor), 3 April 1845, 1.
[8] W B O'Shaughnessy, 'On the Preparations of the Indian Hemp, or Gunjah (*Cannabis indica*); Their Effects on the Animal System in Health, and Their Utility in the Treatment of Tetanus and Other Convulsive Diseases' (Speech delivered at the Medical College of Calcutta, October 1839) <http://www.druglibrary.org/schaffer/history/e1850/gunjah.htm>.

occasionally succeed in aborting, sometimes in completely removing pain, where this agent totally fails us'.[9] With such wide-ranging and salutary pharmacological properties, it is not surprising that cannabis, in one form or another, had, by the mid-19th century, become part of the medical armamentarium of many societies.

As cannabis became adopted into the *materia medica* of Western medicine, it was formally described in national pharmacopoeial monographs, including those of Great Britain, the source of Australian standards for drugs and medicines. The British Pharmaceutical Codex (BPC) of 1934, for example, described the physical appearance of the plant and its active ingredient-enriched flowering tops, its action and uses, dosages of different forms, and recipes for making 'extract of cannabis' and 'tincture of cannabis'. Numerous folkloric preparations also abounded.[10]

III THE DEMISE OF MEDICINAL CANNABIS

In Australia and elsewhere, cannabis was legally used medicinally well into the 20th century. However, its demise began in the United States from about 1914 with several recognisable influences:[11] racial prejudice against (minority) Mexican immigrants in the southern and western states (who referred to it as marijuana), the Bureau of Prohibition, headed by Harry J Anslinger, a bureaucratic desire to justify its continued existence, and the assumption that cannabis (presumed to be an addictive drug) would substitute alcohol at a time of the national prohibition of alcohol.

Additionally, it was claimed by the Egyptian delegation at the Geneva Conventions on Opium and Other Drugs of 1925 that cannabis was as dangerous as opium and should therefore be subject to the same international controls and restrictions (although a subcommittee of that Conference reported that its use should be limited to medical and scientific purposes). No formal evidence was produced and conference delegates had not been briefed about cannabis. The only objections came from Britain and other colonial powers. They did not dispute the claim, but they did want to avoid a

[9] 'Indian Hemp', *The Perth Gazette and Western Australian Journal* (Western Australia), 15 November 1845, 3.
[10] Ethan B Russo 'History of Cannabis and its Preparations in Saga, Science, and Sobriquet' (2007) 4 *Chemistry & Biodiversity* 1614.
[11] Richard J Bonnie and Charles H Whitebread II, 'The Forbidden Fruit and the Tree of Knowledge: An Enquiry into the Legal History of American Marijuana Prohibition' (1970) 56 *Virginia Law Review* 1010.

commitment to eliminating its use in their Asian and African territories.[12] The passage of the *Marihuana Tax Act* in the United States on 1 October 1937 effectively prohibited the medicinal use of cannabis there, despite protests from the American Medical Association.[13] The anti-cannabis *Reefer Madness*, cum 'sex-drug' propaganda,[14] soon spread to Australia, and resulted in the ban of cannabis importation.[15]

The last appearance of cannabis in the BPC, from which it could be legally prescribed as a medicine in Australia, was in 1949, before disappearing in 1971. Its monograph stated that '[c]annabis is too unreliable in action to be of value in therapeutics as a cerebral sedative or narcotic…'.[16] This statement contained the nucleus of the scientific argument for the demise of cannabis pharmacotherapy,[17] and was reflected in many other countries. Nonetheless, medicinal cannabis was not sorely missed, as it was anticipated that most of its uses, in those optimistic times of a burgeoning pharmaceutical industry, would be replaced by more effective medicines.

It is commonly believed that the demise of medicinal cannabis in Australia resulted from Australia signing and ratifying the 1961 United Nations *Single Convention on Narcotic Drugs* (the Convention). But the medicinal use of cannabis was not precluded as a necessary outcome of ratifying this convention. The Preamble of the *Single Convention* proclaims that:

> The Parties, [c]oncerned with the health and welfare of mankind, [r]ecognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes…[18]

[12] Robert Kendell, 'Cannabis condemned: the proscription of Indian hemp' (2003) 98 *Addiction* 143, 151.
[13] David F Musto, *The American Disease: Origins of Narcotic Control* (Oxford University Press, 2nd ed, 1987) 210–222.
[14] See, eg, *Reefer Madness* (Directed by Louis J Gasnier, G and H Production, 1938).
[15] 'Accomplishing the Impossible: Drug Habit Spreads In U.S.A.', *The Adelaide Chronicle* (Adelaide), 6 June 1946, 12; 'War on the Drug Traffic', *Sydney Morning Herald* (Sydney), 28 May 1954, 14; 'Marihuana Under Import Ban', *Sydney Morning Herald* (Sydney), 19 February 1947, 1.
[16] The Council of the Pharmaceutical Society of Great Britain, *The British Pharmaceutical Codex* (Pharmaceutical Press, 1949). See also Laurence E Mather, 'Medicinal Cannabis—Hoax or Hope?' (2001) 26 *Regional Anaesthesia and Pain Medicine* 484.
[17] Ibid.
[18] *Single Convention on Narcotic Drugs,* opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

The Preamble then sets the scenario for a control regime concerned with the 'serious evil' of 'addiction to narcotic drugs'.[19] Article 2, Part 5 states that:

> The drugs in Schedule IV shall also be included in Schedule I and subject to all measures of control applicable to drugs in the latter Schedule, and in addition thereto:
>
> a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and
>
> b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.[20]

Several points are pertinent. First, 'cannabis and cannabis resin' is (surprisingly) included in Schedule IV, among a list of 17 drugs of which all others are opioids (mostly chemical relatives of fentanyl, itself a highly potent synthetic opioid analgesic agent in widespread clinical use), an entirely different chemical and pharmacological class of drug.[21] Second, this reads that if a Party to the Convention (ie a country) only has to prohibit cannabis if it decides that 'the prevailing conditions...render [prohibition] the most appropriate means of protecting the public health and welfare'.[22] Surely this can only mean that countries that do not believe that prohibition of cannabis is the most appropriate means of protecting the public health and welfare do not have to prohibit the drug, including for medicinal use. Third, the Single and other Conventions do not define 'medical' or 'scientific'. However, the Convention stipulated that '[t]he use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41', which, nevertheless, included the

[19] Ibid.
[20] Ibid art 2(5).
[21] Ibid Schedule IV.
[22] Ibid art 2(5).

right to a signatory party to permit '[t]he use of cannabis, cannabis resin, extracts and tinctures of cannabis for non-medical purposes'.[23]

IV WHAT IS MEDINICAL CANNABIS?

Medicinal botanicals are typically complex mixtures of natural chemicals, sometimes lacking a distinct (or recognisable) active principal, and with substantial prior human use. In 1964, the chemical structure of the main active psychotropic ingredient of cannabis, delta-9 tetrahydrocannabinol (THC), was described (in research that was not legal at the time).[24] Within three decades, approximately 100 similar and related substances had been identified, along with hundreds of other substances found in cannabis, many of which contribute to the relevant pharmacological activity attributed to cannabis, both salutary and otherwise.[25] Moreover, during this time, research on the bodies' own array of 'chemical messengers'[26] now included endocannabinoids, substances that are mimicked by various botanical cannabis constituents.[27] From this research, a vast array of synthetic and semisynthetic molecules, only some of which are directly or chemically related to the natural phytocannabinoids, were prepared as part of the scientific investigation of cannabis pharmacology,[28] but only a small number of these were eventually clinically-approved as medicines.

Nonetheless, a familiar pharmacological sequence was recurring: a history of empirical use of plant derived medicine, scientific experimentation with analogous (phyto)chemical molecules and their analogues, and finally the discovery of the presence and functioning of the body's own system with which those plant-derived molecules were interacting. This is remarkably similar to that of opium and the

[23] Ibid art 49(1)–(2).
[24] Y Gaoni and R Mechoulam, 'Isolation, Structure and Partial Synthesis of an Active Constituent of Hashish' (1964) 86 *Journal of the American Chemical Society* 1646.
[25] G Appendino, G Chianese and O Taglialatela-Scafati, 'Cannabinoids: Occurrence and Medicinal Chemistry' (2011) 18 *Current Medicinal Chemistry* 1085.
[26] These are diverse chemical molecules that cause changes in the functioning of nervous pathways that control body functions such as the beat of the heart and responses to injury.
[27] The term 'cannabinoid' refers to the family of substances, regardless of their chemical structures and whether they are natural product or synthetic, that bind to the biological receptors to thereby reproduce various of the pharmacological effects demonstrated by extracts of Cannabis sativa. The analogy is 'opioid' referring to morphine-like substances from opium. See also Raphael Mechoulam and Linda A Parker, 'The Endocannabinoid System and the Brain' (2013) 64 *Annual Review of Psychology* 21.
[28] Jenny L Wiley, Julie A Marusich and John W Huffman, 'Moving around the molecule: relationship between chemical structure and in vivo activity of synthetic cannabinoids' (2014) 97 *Life Sciences* 55.

endogenous opioid system described a generation earlier.[29] But, unlike opium, cannabis had already been removed from the pharmacopoeia, and thus from legal medicinal use — for non-scientific reasons — long before its science was understood.

Botanical cannabis is a complex mixture of phytocannabinoids and other natural product substances. As presently interpreted, 'medicinal cannabis' is an umbrella term used to designate a botanical product harvested from genetically identical cannabis plant clones that meets the reproducibility standards of a product sold for medicinal use; that is, accurately labelled material of known provenance, having reproducible active principal composition, quality of batch consistency, and being free of contaminants such as heavy metals, fungus and pesticides.[30] This contrasts with the cannabis of unknown provenance that is commonly sold on the black market. Indeed, it has been reported that the consistency of THC-related phytocannabinoids extracted from a cannabis plant is equivalent to what some drug regulators would accept for synthetic drugs.[31]

The glandular trichomes on the cannabis flower are the richest source of the phytocannabinoids, but their concentration and ratio may vary according to the cultivar (notably, the strain), environmental growing conditions, and storage of the plant and plant products.[32] This thereby reinforces the need for regulation and control. Some detractors of 'medicinal cannabis' argue that the presently available cannabinoids obviate further need for botanical cannabis,[33] but there is no valid reason for this assertion.

The concentration and ratio of phytocannabinoids (and, probably, of certain non-cannabinoid ingredients) also play an important role in the pharmacological effects of medicinal cannabis with continually evolving evidence that different compositions can be preferably attuned to different treatments.[34] Additionally, contemporary research

[29] L E Mather, 'Opioids: A Pharmacologist's Delight!' (1995) 22 *Clinical and Experimental Pharmacology and Physiology* 833.
[30] Justin Thomas Fischedick et al, 'Metabolic fingerprinting of Cannabis sativa L., cannabinoids and terpenoids for chemotaxonomic and drug standardization purposes' (2010) 71 *Phytochemistry* 2058.
[31] Geoffrey Guy in S M Crowther, L A Reynolds and E M Tansey (eds), *The Medicalization of Cannabis* (Wellcome Witnesses to Twentieth Century Medicine, 2010) vol 40, 34.
[32] Potter, above n 4, 31.
[33] Drug Free Australia, *Drug Free Australia's position on Medical Marijuana/Cannabis* (July 2014) <http://www.drugfree.org.au/fileadmin/library/Medical_Marijuana/DFA-PositionOnMedicalMarijuana-2014.pdf>.
[34] Hazekamp and Fischedick, above n 5, 660.

suggests that the mixture of ingredients of cannabis may have greater therapeutic advantage than any of the principal ingredients alone, often referred to as the 'entourage' effect.[35]

Medicinal cannabis is used in many forms, but only a few are available in ready-to-use preparations. Powdered dried plant material has traditionally been smoked, but can be consumed in other ways, especially via inhalation from a personal vaporiser (a device used to heat the material to release the active ingredients as a vapour), and this has the advantage of giving the user greater control over the effects. Other forms may be swallowed like the majority of medicines, for example, from an oil extract, tablets, capsules, "tea", alcohol based "tincture", or included in home-baked goods, typically "cookies". One particular proprietary cannabis preparation, usually referred to by its proprietary name of Sativex® (or its US Approved Name (USAN) of nabiximols), has received considerable attention in the lay press and elsewhere as it has been used in many research studies sponsored by its originating company.[36] Sativex® is botanical cannabis extract from selective strains, thereby being enriched in THC and cannabidiol (CBD), and is sprayed into the lining of the mouth ('oromucosal spray') from where some of the dose becomes absorbed whilst some is swallowed.[37]

V THE RESURGENCE OF MEDICINAL CANNABIS

By the 1990s, an international movement of patients and their advocate groups, health professionals and scientific experts, were questioning the illegal status of cannabis as a medicine, claiming that cannabis has significant medical benefits. Further, it was being claimed that cannabis is preferred to, or is more acceptable than, various conventional medications introduced for treatment of certain conditions, and it was widely acknowledged to be less harmful when consumed 'recreationally' than alcohol and tobacco, which were not subject to legal penalties for their use. By the late 1990s, the debate over medicinal cannabis was raised to another level when prestigious scientific

[35] Ethan B Russo, 'Taming THC: Potential Cannabis Synergy and Phytocannabinoid-Terpenoid Entourage Effects' (2011) 163 *British Journal of Pharmacology* 1344.
[36] Geoffrey W Guy and Colin G Stott, 'The development of Sativex® — a natural cannabis-based medicine' in R Mechoulam (ed), *Cannabinoids as Therapeutics* (Birkhäuser Basel, 2005) 231.
[37] Ethan Russo and Geoffrey W Guy, 'A tale of two cannabinoids: The therapeutic rationale for combining tetrahydrocannabinol and cannabidiol' (2015) 66 *Medical Hypotheses* 234; Stott et al, 'A phase I study to assess the single and multiple dose pharmacokinetics of THC/CBD oromucosal spray' (2013) 69 *European Journal of Clinical Pharmacology* 1135.

bodies in the United States[38] and Great Britain[39] published favourable reviews of the existing evidence. These independently agreed that cannabis appeared to be of value in the treatment of certain medical conditions (Table 1), although concluding that further rigorous research was needed to assess the true therapeutic benefits.

TABLE 1: INDICATIONS FOR CANNABINOID PHARMACOTHERAPY

Agreed uses for cannabinoid pharmacotherapy (from various recent inquiries):

- control of nausea/vomiting (eg from cancer chemotherapy);
- appetite stimulation (eg in patients with HIV-related or cancer-related wasting syndrome;
- control of muscle spasticity (eg from multiple sclerosis or spinal cord injury);
- pain management (especially of neuropathic origin); and
- anti-convulsant effects (eg from epilepsy).

Historically recognised uses for cannabinoid pharmacotherapy (from historical publications):

- management of pain of migraine;
- management of painful cramps of dysmenorrhoea;
- glaucoma treatment (temporary relief); and
- bronchodilation (associated with asthma treatment).

Emerging uses for cannabinoid pharmacotherapy (from current research literature):

- antitumorigenic and other direct anticancer treatments; and
- treatment of post-traumatic stress syndrome.

In 1999, New South Wales (NSW) Premier Carr announced the formation of a Working Party on the Use of Cannabis for Medical Purposes, which went on to endorse the uses given in Table 1. The Party made 24 medical, scientific, legal, and political recommendations, including that a trial be set up to explore how to institute a legal mechanism for patients to obtain and use cannabis medicinally. In May 2003, Premier

[38] See Janet E Joy, Stanley J Watson Jr and John A Benson Jr (eds), *Marijuana and Medicine: Assessing the Science Base* (National Academy Press, 1999).
[39] See Select Committee on Science and Technology, *Science and Technology – Ninth Report,* House of Lords Paper No 151, Session 1997–98 (1998); Select Committee on Science and Technology, *Therapeutic Uses of Cannabis,* House of Lords Paper No 50, Session 2000-01 (2001).

Carr outlined key elements of the plan, including the formation of an Office of Medicinal Cannabis under the auspices of the NSW Department of Health, and stated that a draft exposure Bill would be introduced at the earliest opportunity.

Although the Carr government continued to affirm its support for the project, no further developments occurred.[40] In fact, no additional significant governmental activity in Australia occurred until 2012 when a NSW Legislative Council inquiry into medicinal cannabis was announced. Following public hearings in March 2013, the multi-party inquiry unanimously recommended (in May 2013), the medicinal use of cannabis along with proposals for making it available to selected patients.[41] In November 2013, the NSW government rejected all but one recommendation.

Between the NSW 2000 and 2013 reports, much of the largely anecdotal evidence for the usefulness of cannabis had been supplanted by robust evidence reported in peer-reviewed scholarly and professional journals. This evidence continues to accrue, a significant portion of it derived from studies using Sativex®. Concurrently, the lay media and the internet has become a vast repository of anecdotal evidence about medicinal uses of cannabis in various forms. For several decades, almost insurmountable barriers to medicinal cannabis research included obtaining funding, gaining ethics approval and sourcing lawful medicinal cannabis that could be used in studies. This form of publication bias is rarely acknowledged.

Over the past several years, a number of companies in Australia, both locally-established and overseas-partnered, including some now listed on the Australian Stock Exchange, are joining an emergent list of legal providers of cannabis-derived and related products in anticipation of changed governmental standpoints on cannabis. The scope, which can partially be gauged from submissions made to the Australian Senate in conjunction with the Regulator of Medicinal Cannabis Bill 2014,[42] includes medicinal and industrial uses of cannabis products for use within Australia and overseas, as well as ancillary technology for administration of cannabis in approved clinical trials.

[40] See Rowena Johns, 'Medical Cannabis Programs: A Review of Selected Jurisdictions' (Briefing Paper 10/04, Parliamentary Library, New South Wales, 2004).
[41] See New South Wales Parliament, 'The use of cannabis for medicinal purposes' (Report, No 27, Legislative Council, General Purpose Standing Committee No 4, 15 May 2013).
[42] Senate Standing Committee on Legal and Constitutional Affairs, *Submissions* (2014) Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Medicinal_Cannabis_Bill/Submissions>.

Such commercial interests add to the mainly enthusiast-based list that operates with various degrees of legal approval. Nonetheless, mainstream pharmaceutical companies generally eschew natural products unless they can find and prepare from the natural source a novel pharmacological principal that allows intellectual property and a potential commercial opportunity to be secured. Notwithstanding, myriad patents have been granted to individuals and/or organisations for cannabinoid-related substances, methodologies, preparations, formulations, and medicinal uses, although there are presently few proprietary cannabinoid preparations in clinical use.

VI THE ISSUE FROM A HEALTH PERSPECTIVE

Two of the main matters that are repeatedly raised from a health perspective are the therapeutic efficacy of medicinal cannabis and the possible adverse effects. A number of medicines in current use (including some having Prescription Benefits Scheme (PBS) listing) demonstrate less impressive evidence for therapeutic efficacy and safety than cannabis, even allowing for inconsistencies in the cannabis product studied. This is not to say that any cannabis preparation is free from adverse effects — no medication is — but rigorous studies generally report that the side effects of medicinal cannabis are minimal and acceptable.[43] Adverse effects must be weighed against the untreated symptoms of the condition or the adverse effects of other medicines used to treat the condition.[44]

Nor do we argue that medicinal cannabis use will always be beneficial — again, no medication is. As with any therapeutic product, it may not be effective, even when used where indicated. The Australian Register of Therapeutic Goods (ARTG) presently lists one cannabis product, Sativex® for only a single condition — muscle spasticity in multiple sclerosis. Off-label prescribing remains possible, but a recent (widely criticised) paper published in the British Medical Journal (curiously) cautioned that doctors 'should avoid taking this medicolegal responsibility.'[45]

[43] Tongtong Wang et al, 'Adverse effects of medical cannabinoids: a systematic review' (2008) 178 *Canadian Medical Association Journal* 1669.
[44] Philip Robson, 'Abuse potential and psychoactive effects of δ-9-tetrahydrocannabinol and cannabidiol oromucosal spray (Sativex), a new cannabinoid medicine' (2011) 10 *Expert Opinion on Drug Safety* 675.
[45] Michael Farrell, Rachelle Buchbinder and Wayne Hall 'Should doctors prescribe cannabinoids?' (2014) 348 *British Medical Journal* 33.

VII MEDICINAL CANNABIS POLICY REFORM

Many major community and industry organisations support the legalisation of medical cannabis, arguing that it is safe and effective. Some medical bodies are sceptical of the evidence for the therapeutic benefits of cannabis, and are concerned about the prospect of prescribing an unfamiliar product.[46] However, because medicinal cannabis is not yet legally available in Australia, many people seeking relief (for themselves or their family) purchase cannabis from the black market despite inevitable risks arising from the lack of regulation. As cannabis use remains illegal and all cannabis use is treated the same under law (ie no distinctions are made between medicinal and non-medicinal use), people using cannabis for therapeutic gain may face legal sanctions. They may also be reluctant to share this information with their healthcare professionals, compromising the therapeutic relationship by withholding it. Early attempts by the NSW government to preclude the risk of legal sanctions for patients and carers do not appear to have solved this problem.

All Australian states and territories now have drug–driving legislation enabling roadside testing for THC, methamphetamine and 'ecstasy' (a street name for methylenedioxymethamphetamine or MDMA). The presence of detectable quantities of one or more of these drugs constitutes an offence. No evidence of impairment is required. It is not clear at this stage how patients lawfully using medicinal cannabis will be dealt with once the lawful use of medicinal cannabis is permitted in Australia.

A key issue for policy makers is the possibility of its 'recreational' or non-medical use, and the need to ensure that there is a sufficient difference between the classifications of cannabis for medicinal purposes versus 'recreational' purposes. The recreational aspects of cannabis mean that there is the potential for drug misuse if the policy does not suitably target the appropriate medicinal administration and regulation of its distribution. While some believe the legalisation of medical use could implicitly condone

[46] Australian Medical Association, *AMA Position Statement: Cannabis and Health* (2014) <https://ama.com.au/sites/default/files/documents/AMA_position_statement_cannabis_use_and_health_2014.pdf>; See also New South Wales Parliament, above n 41; Senate Standing Committee on Legal and Constitutional Affairs, above n 42.

and increase recreational use, others have suggested that its medical status may decrease recreational interest in the drug.[47]

A review tested this hypothesis in 2015, collating data on adolescent cannabis use in the USA over a 24-year period. The researchers found that implementation of medical cannabis laws did not increase recreational cannabis use, although the states that implemented the laws tended to have higher rates of recreational use than those states that did not implement laws.[48] A successful policy will reconcile the differences in recreational and medical use in order to ensure that the community understands the need for medical prescription and expertise when consuming the drug. There are many potentially positive flow-on effects in the research community following the legalisation of medical cannabis. Whereas a blanket ban can prevent researchers from attempting to evaluate its medicinal use,[49] there is substantial and increasing international research pertaining to the medicinal use of cannabis where government policy is more lenient.

Another key issue for cannabis policy reform is securing a legal supply. This can cause contradictions in a country's policy if cannabis is illegal outside of a medical framework or if state and federal laws sit at odds with more localised policy initiatives. Having contradictory policy can cause confusion in police interpretation and leave some people (such as medical practitioners in the case of US reform) vulnerable to persecution through policy loopholes. In the Netherlands, outside the medical framework, the production and supply of cannabis is illegal, while the retail sale is not illegal within a controlled licensed "coffee shop" arrangement.[50]

This has created a 'back door problem', where the supply side of the policy is at odds with the legalised retail policy, creating internal contradictions.[51] In Colorado, a state licensing system was established for the production and supply of cannabis to outlets in

[47] Deborah S Hasin et al, 'Medical marijuana laws and adolescent marijuana use in the USA from 1991 to 2014: results from annual, repeated cross-sectional surveys' (2015) 2 *The Lancet Psychiatry* 601.
[48] Ibid.
[49] L E Mather, A D Wodak and W G Notcutt, 'Re: Should doctors prescribe cannabinoids?' (2014) 348 *British Medical Journal*.
[50] The International Association for Cannabinoid Medicines website lists the legal positions of various countries, amongst other information. For a legal overview of The Netherlands, see C Sandvos, *The Netherlands* (20 March 2014) International Association for Cannabinoid Medicines <http://cannabis-med.org/index.php?tpl=page&id=235&lng=en&sid=1b35fdd1438521c70b7a145c6cf33ffb>.
[51] EMCDDA, 'A cannabis reader: global issues and local experiences' (Monograph Vol 1, European Monitoring Centre for Drugs and Drug Addiction, 2008).

order to overcome the difficulties in 'legal supply'.[52] These are both examples of legal supply for recreational use that can be adapted for medicinal supply. Arguably the best approach to overcoming policy loopholes associated with medicinal supply is demonstrated in Uruguay, where a national, rather than state law was passed to regulate the sale and production of cannabis.[53]

Medicinal cannabis has been debated in Australia recently as some jurisdictions have considered the increasing evidence for its efficacy and safety. Within the last few years, the ACT, Tasmanian, Victorian and Queensland governments have embarked on courses regarding the legal patient access of medical cannabis. During 2014, two draft Bills were tabled in the NSW Parliament to commence lawful use of medicinal cannabis and/or give *de facto* permission to patients and their carers to possess small quantities for medicinal purposes. These Bills were shelved when, in December 2014, Premier Baird announced the establishment of an expert panel to oversee the conduct of three government supported projects to evaluate cannabis pharmacotherapy in (i) improving the quality of life in adults with terminal illness; (ii) treatment of refractory nausea and vomiting following cancer chemotherapy; and (iii) treatment of intractable epilepsy of childhood.[54]

Additionally, the Commonwealth Parliament has before it the Regulator of Medicinal Cannabis Bill 2014 — a Bill to create a nation-wide framework for regulation and control of cannabis and its preparations for medicinal purposes, with provisions for states and territories to cede their requirements for the regulation of cannabis to the Commonwealth. On 12 February 2015, the Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry.[55] Not unexpectedly, like previous inquiries, submissions ranged from a few sentences of personal testimony to many pages of referenced research.[56] This included outright support, especially from patients and/or their carers, overall support from experts based on the evidence,

[52] John Hudak 'Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization' (2015) 65 *Case Western Reserve Law Review* 649.
[53] EMCDDA, 'Perspectives on Drugs: Models for the legal supply of cannabis: recent developments' (Report, European Monitoring Centre for Drugs and Drug Addiction, 2014).
[54] Department of Health, New South Wales, *Clinical Trials: Medical Use of Cannabis* <http://www.health.nsw.gov.au/cannabis/Documents/fs-cannabis-trials.pdf>.
[55] Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Regulator of Medicinal Cannabis Bill 2014* (2014).
[56] Senate Standing Committee on Legal and Constitutional Affairs, above n 42.

tentative support or opposition mainly from professional peak bodies expressing concerns that cannabis is not a pure regulated drug and expressing wariness over the reported adverse effects (often accompanied by claims that there is not enough evidence, or that the evidence is weak, or that there are already sufficient drugs that cater for the pharmacotherapy afforded by cannabis).[57]

Submissions also voiced outright opposition based on the reported adverse effects to individuals and society from the evils of the illicit drug market.[58] Such diversity indicates a need for policy reform to reconcile the differences in public opinion in the policy selection and implementation phases of the policy cycle. For this to occur, implementation issues around the legal supply and separation of the 'recreational use debate' must be well considered within any implementation plan or consultation strategy.

The multiparty unanimous report, consisting of six recommendations, was brought down on 11 August 2015. Overall, the committee supported the access of medical patients to cannabis products, the establishment of mechanisms to evaluate scientific/medical evidence about cannabis, and the establishment of a national regulatory framework for cannabis products concordant with existing frameworks and treaty obligations. This structure shares elements of the Dutch model, in which the legal production and supply of medicinal cannabis to pharmacies, universities and research institutes is the responsibility of the government Office for Medicinal Cannabis (OMC) within the Dutch Ministry of Health. The OMC works with contracted growers-suppliers to devise preferred cannabis blends for appropriate medical conditions, maintain quality assurance, and ultimately distribute to pharmacies along with advice to pharmacists who dispense to patients upon medical prescriptions.[59] The model is commendable and it is hoped that Australian legislation will reflect many of its elements. However, as of September 2015, no amendments had been proposed and a timeline for further presentation had not been planned.

[57] Ibid.
[58] Ibid.
[59] Cannabis Bureau, *What is the Office of Medicinal Cannabis?* <https://www.cannabisbureau.nl/english>.

VIII ISSUES FOR GOVERNMENT POLICY MAKERS

The primary issue is no longer the supportive evidence — that is more than adequate — it is supply. The NSW 2013 inquiry recommended that (restricted amounts of) raw cannabis or cannabis-based products be made available under prescription. The 2015 Senate inquiry called for submissions concerning a Bill to establish:

> a Regulator of Medicinal Cannabis to be responsible for formulating rules and monitoring compliance with those rules for licensing the production, manufacture, supply, use, experimental use and import and export of medicinal cannabis; and provides for a national system to regulate the cultivation, production and use of medicinal cannabis products, and related activities such as research. [60]

A federal approach is clearly preferred to separate state and territory approaches, but at this stage, the Bill would permit only opt-in agreements. The issue of supply thus remains unclear and confused. For example, the NSW Minister for Health was reported to have said that the (government sponsored) cannabis trials would not involve the use of 'crude cannabis' which has 'serious potential ill-health effects… this is about looking at derivatives of cannabis that can be useful in treating these conditions'.[61] It is not clear from this what was meant by use of the term 'derivatives'— was it a misunderstood reference to Sativex®, a botanical cannabis preparation?

We regard Sativex® as an appropriate medicine but are concerned by the high cost and the consequent risk that many patients will obtain their medication from illegal sources, a significant problem in Canada several years ago. Our other concern with Sativex® derives, somewhat paradoxically, from its virtue in being a well-regulated preparation as to the concentrations of its two main phytocannabinoid ingredients (THC and CBD). As previously mentioned, research suggests patients with different conditions may fare better with a range of offerings with phytocannabinoid content in different ratios, as occurs in the Netherlands.

Community support for medicinal cannabis is very strong and has been for some years. The 2013 National Drug Strategy Household Survey found that approximately two thirds

[60] Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Regulator of Medicinal Cannabis Bill 2014* (2014).
[61] Nicole Hasham, 'States to join NSW medical marijuana trials', *Sydney Morning Herald* (online), 19 April 2015 <http://www.smh.com.au/nsw/states-to-join-nsw-medical-marijuana-trials-20150418-1mnwbq.html>.

of Australians aged over 14 years support a change in legislation permitting the use of cannabis in a medical setting.[62] This figure has remained relatively constant since 2007,[63] showing that, in Australia, there has been widespread public support over the past six years.

Currently, 23 US states and Washington DC legally permit medicinal cannabis. Seven countries — the Netherlands, Italy, Canada, Chile, the Czech Republic, France and Israel — provide medicinal grade cannabis while continuing to prohibit the recreational use of cannabis. Each has introduced a level of state-regulation, although these regulations vary. Cannabis cultivation in Canada is illegal unless a personal use production license or a designated-person production license is issued by the government through the Medical Marihuana Access Regulation Programme, under which one plant may be grown at a time (thereby avoiding supply contradictions).[64] This allows access to the raw botanical form of the cannabis plant, as does the Chilean, Czech, and Israeli models of medicinal cannabis. Various other countries such as Belgium, New Zealand, and Spain have laws to permit its medical use under special conditions.

IX CONCLUSION

There is adequate evidence to consider cannabis and/or its preparations as reasonable second-line medications for a variety of chronic medical conditions, and not just terminal illnesses. At the same time, there are many misconceptions about the substance, as well as the evidence put forward in the political, legal, medical, and societal discourse. Some have been addressed in the preceding narrative and are summarised in Table 2 below.

[62] Australian Institute of Health and Welfare, 'National Drug Strategy Household Survey detailed report 2013' (Report, Drug Statistics Series No 28, AIHW, 25 November 2014).
[63] Australian Institute of Health and Welfare, '2010 National Drug Strategy Household Survey report', (Report, Drug Statistics Series No 25, AIHW, 27 July 2011).
[64] Health Canada, 'Statement: Medical Marihuana Access Regulations Update' (Media Statement, 28 March 2014) <http://www.hc-sc.gc.ca/dhp-mps/marihuana/access-access-eng.php>.

TABLE 2: SOME COMMON MISCONCEPTIONS ABOUT MEDICINAL CANNABIS

- *What is needed, as is the case for any medications, is strong evidence and not only anecdotal stories.* It is hard to reconcile this view with more than a hundred published and mostly favourable randomised controlled trials.[65]
- *At present there is no comprehensive evidence to address questions such as who may benefit from medicinal cannabis and derivatives.* There is already sufficient evidence for pharmacotherapy for a range of conditions (Table 1), with considerable agreement among different reviewers of the literature.
- *Any benefits accruing to medical users of cannabis will occur at the expense of increases in non-medical cannabis use and related risks and harms. In US states, medical cannabis schemes have been used as a "Trojan horse" for the legalisation of recreational cannabis use.* There is broad concern that sanctioning the medicinal use of cannabis might 'send the wrong message' and lead to in an increase in recreational cannabis use among adolescents. There are no data to justify this concern.[66]
- *Condoning the use of inhaled cannabis through smoking would also be a retrograde step in terms of efforts to reduce and prevent smoking.* For most adults, inhalation of cannabis vapour is a feasible and preferable alternative to smoking. Some patients may insist on smoking cannabis and their doctors will have to accept that.[67]
- *There are now much more effective drugs available.* Even if cannabis is only used as a second line treatment, when conventional medicines prove ineffective or have unacceptable side effects, it would still provide a worthwhile benefit.
- *Cannabis is curative.* There is insufficient present evidence to confirm or deny curative properties of cannabis.[68]

[65] Frango Grotenhermen and Kirsten Müller-Vahl, 'The Therapeutic Potential of Cannabis and Cannabinoids' (2012) 109 *Deutsches Ärzteblatt International* 495.
[66] Karen O'Keefe et al, 'Marijuana Use By Young People: The Impact of State Medical Marijuana Laws' (Report, Marijuana Policy Project, June 2011); S D Lynne-Landsman, M D Livingston and A C Wagenaar, 'Effects of State Medical Marijuana Laws on Adolescent Marijuana Use' (2013) 103 *American Journal of Public Health* 1500; Esther K Choo et al, 'The impact of state medical marijuana legislation on adolescent marijuana use' (2014) 55 *Journal of Adolescent Health* 160.
[67] Mark A Ware et al, 'Smoked cannabis for chronic neuropathic pain: a randomized controlled trial' (2010) 182 *Canadian Medical Association Journal* 1.
[68] C J Fowler, 'Delta9-Tetrahydrocannabinol and Cannabidiol as Potential Curative Agents for Cancer: A Critical Examination of the Preclinical Literature' (2015) 97 *Clinical Pharmacology & Therapeutics* 587.

The use of medicinal cannabis should be lawful with neither patients nor their carers at risk of legal sanctions or requiring police discretion. The Dutch model is commendable, involving regulation of the quality of medicinal cannabis and providing it to patients via medical prescription and pharmacy dispensing at an affordable price. A federal approach is preferable to piecemeal state and territory frameworks. Cannabis medications should be legally available for research, as well as available and affordable to patients throughout Australia. The more restricted the system for medicinal cannabis, the higher the proportion using unregulated and black market supplies and vice versa. Although any new system in Australia is likely to start cautiously, and therefore with many restrictions, a more liberal system will reduce the number of patients using unregulated supplies.

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AUSTRALIA'S POWER TO DETAIN: A FOREIGN NATIONAL'S PLANNED REMOVAL OPERATION TO A THIRD COUNTRY

DR MEGUMI OGAWA*

The removal operation of a detainee by the Australian Department of Immigration is surrounded by secrecy. This article considers a document revealing the Department's intention to detain a Japanese national in Thailand during transit to the national's home destination, Japan. The Japanese national in question is the author of this article, thereby presenting a first-hand account of her experience. The article discusses the legal issues arising from this situation, namely, the power of Australian Government officials to detain a foreign national in another country in the process of their removal from Australia. In doing so, it examines the relevance of various statutory provisions, common law principles, and bilateral agreements. Although the author's planned removal did not eventuate, this article highlights the existence of a legal issue and calls for urgent law reform.

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I INTRODUCTION

On 4 September 2014, following the tabling in the Federal Parliament by the Commonwealth Attorney-General under s 46 of the *Australian Human Rights Commission Act 1986* (Cth), the Australian Human Rights Commission published a report in which the President of the Commission, Professor Gillian Triggs, found that the Department of Immigration had arbitrarily detained an overseas student in an attempt to remove her from Australia.[1] The overseas student in question is the author of this article and, as a result, possesses a number of documents that reveal certain practices concerning the removal of detainees from Australia by the Department of Immigration. The removal or deportation of a foreign national, whether ordered under s 198 of the *Migration Act 1958* (Cth) or not, is often surrounded by secrecy. The Australian Government can refuse to release documents that disclose the process of deportation by arguing that releasing the documents would 'have a substantial adverse effect on the proper and efficient conduct of the operation' of the agency, pursuant to s 47E of the

[1] Australian Human Rights Commission, 'President reports on Ogawa v Commonwealth (DIAC) [2014] AusHRC 69' (Media Release, 4 September 2014) <https://www.humanrights.gov.au/news/media-releases/president-reports-ogawa-v-commonwealth-diac-2013-aushrc-69>; see also Australian Human Rights Commission, 'Ogawa v Commonwealth (Department of Immigration and Citizenship') [2014] AusHRC 69' (Report into Arbitrary Detention, 27 February 2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/2013%20AusHRC%2069%20Ogawa%20v%20Cth%20%28DIAC%29_Web.pdf>.

Freedom of Information Act 1982 (Cth). Consequently, there are few documents concerning the operation of removal or deportation publicly available. One of the objects of this article is to place one such document in the public domain. As will be seen, the document raises a legal issue, namely the power of Australian Government officials to detain a person in another country. The primary aim of this article is to draw attention to this legal issue.

II THE FOI DOCUMENT

The Freedom Of Information ('FOI') document was obtained by the author of this article while being held in the Villawood Immigration Detention Centre pending removal in 2006. The fairly complex background to the detention was explained in the Federal Magistrates Court judgment of *Ogawa v Minister for Immigration*.[2] However, for the purpose of this article, it suffices to say that I came to Australia with a valid visa but the Department of Immigration — as soon as I won an interlocutory proceeding in the Federal Court against the University of Melbourne — suddenly started alleging that my visa had expired a long time earlier. I contested the issue. However, the Department of Immigration insisted that: i) I was an unlawful non-citizen;[3] and ii) an unlawful non-citizen must be detained and removed;[4] and so I ended up being detained.

While in detention, I made an FOI application and swiftly received a pile of documents in the detention centre before the Department of Immigration had to abort the planned removal because I managed to successfully apply for another visa.[5] This means that the intended operation of the Department of Immigration, which the FOI document illustrates, did not eventuate in the end. Nevertheless, the document provides us with an idea of the intended removal operation by the Department of Immigration.

The FOI document is an email starting with the designation of the sender, an officer of the Department of Immigration, and the time stamp of the email:

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[2] [2006] FMCA 1039.
[3] See the *Migration Act 1958* (Cth) ss 13, 14.
[4] Ibid ss 189, 198.
[5] For further details of my relevant migration history, see Australian Human Rights Commission, 'Ogawa v Commonwealth (Department of Immigration and Citizenship') [2014] AusHRC 69' (Report into Arbitrary Detention, 27 February 2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/2013%20AusHRC%2069%20Ogawa%20v%20Cth%20%28DIAC%29_Web.pdf>.

> Vivienne EIlis/NSW/IMMI/AU
>
> 18/07/2006 12:07 PM

Next to these are the recipient and the subject line of the email. It appears that the recipient was either: a) an officer of the Department of Foreign Affairs and Trade; or b) an officer of some agency of the Australian Government, including the Department of Immigration working in an Australian Embassy (presumably in Thailand).

> To: Neil Faithfull/People/DFATL@DFATL
> cc
> bcc
> Subject Escorted Removal of Megumi OGAWA Japanese citiz on 25//7/06 [SEC=UNCLASSIFIED]'

Below these is the classification of the email. It states:

> Protective mark UNCLASSIFIED
> UNCLASSIFIED

In the body of the email, four parts were redacted for various reasons. These parts will be indicated in this article as [redacted].

> Hi Neil
>
> [redacted] As you may be aware I am scheduled to be the lead escort in the removal of a Japanese female from VIDC to Japan next week. There is every possibility this removal may not go ahead as this woman is a law graduate and is likely to lodge injunctions to prevent her removal. However, she has upset a few of the top brass in NatO& they want her out so I am planning as if it will still go ahead. Karen Kinman will assist me & we have a cast of thousands, three NSW Police (2 x female, 1x male) also a medical escort. Ogawa has psychological issues but is not on any medication. She does not want to remain in Australia but I think it's the whole Japanese pride thing. She keeps saying removal is not an option to her. She has published her Thesis but has issues with the University of Melbourne who will not allow her to present it for some reason and she has personal litigation with them not due to be heard until later this year.
>
> What I am writing to you for is we will be transiting through Bangkok, (l'll paste a copy of the flight itinerary below), Arriving in Bangkok at 06.35 hrs on 26 July and flying out at 11.20 hrs 26 July. Tony has told me about the cells available in the airport but also advised me that they would not be a suitable holding place for a female. However, he has suggested that there is a holding type room which would be more suitable for us to wait until departure time. [redacted]
> [redacted]
> As you can see we will only spend one night in Japan (due to the high cost of accommodation etc. there) and will fly back into Bangkok on Thursday 27 until Sunday.
> [redacted]
> I still have the same departmental mobile phone, the number is [redacted]

> Well I best close I am still waiting to hear if the Minister has signed off on Ogawa's s351 request.
>
> Take care.
>
> I look forwad [sic] to hearing from you and hopefully meeting up next week.
>
> Love Viv.

From this FOI document it appears that when there is a transit in the course of removal of a foreign national by the Department of Immigration, the Department officers detain a person who has just been removed from Australia in the transit country.

III THE QUESTION: COULD I BE LEGALLY DETAINED IN A THIRD COUNTRY?

The question which immediately came to my mind when I saw the email was whether it would be lawful for the Australian Government, via its officials of the Department of Immigration, to detain me in a cell or a holding room after leaving Australia.

This question involves two distinct issues:

1. Is there any law that confers power on the Department of Immigration (of the Commonwealth of Australia) to lock up a person (namely me) in Thailand?
2. If there is some law that confers power onto the Department of Immigration to lock up a person in Thailand, am I (a Japanese national) required to observe that law in Thailand?

If both issues are answered in the negative, a further question follows (at least to my mind), that is, whether or not I could seek assistance from the Thai police alleging that I had been kidnapped and unlawfully imprisoned. However, it is plain that the last question falls within the exclusive jurisdiction of Thai law and so I will not consider it in this article.

IV THE CONSIDERATIONS: WHAT LAW CONFERS THE POWER TO DETAIN IN A THIRD COUNTRY?

A Statutory Law

My attempted removal by the Department of Immigration was supposed to have been based on s 198 of the *Migration Act 1958* (Cth) which requires 'an officer' to 'remove as soon as reasonably practicable an unlawful non-citizen'.[6] The provision appears to confer the power to 'remove' a certain person from Australia but it does not appear to confer the power to 'detain' any person outside Australia. There appears to be no other provision in the *Migration Act 1958* (Cth) which is concerned with the removal stipulated under s 198 (nor with a deportation under s 200 of the *Act*).

If the *Migration Act 1958* (Cth) does not confer power on the Department of Immigration to detain me outside Australia, and since I did not agree to be detained in Thailand (or be removed from Australia in the first place), some other law allowing the Department of Immigration to detain me outside Australia would have been needed unless the airport in Thailand was subject to Australian jurisdiction. Thailand is a sovereign nation with its own law and therefore the latter does not seem to be a possibility. This means that I should be able to find some law that gives the Department of Immigration or perhaps the NSW Police (who were called in to accompany my case officer from the Department of Immigration and myself) legal authority to do so.

One of the possibilities might be some kind of law relating to prisoner transfer. The Commonwealth had and has in place the *Extradition Act 1988* (Cth) and the *International Transfer of Prisoners Act 1997* (Cth). However, the *Extradition Act 1988* (Cth) is concerned with the transfer of a person whom either Australia requested another country to transfer to Australia or where Australia has been requested by another country to transfer to the country because of an alleged or convicted offence. Removal under s 198 of the *Migration Act 1957* (Cth) does not involve any country other than Australia and has nothing to do with a criminal offence. Therefore, the *Extradition Act 1988* (Cth) is unlikely to be applicable to a removal under the *Migration Act 1958* (Cth). The *International Transfer of Prisoners Act 1997* (Cth) is concerned with the transfer of a prisoner serving a sentence of imprisonment in Australia to their own country to serve

[6] *Migration Act 1958* (Cth) s 198.

out their remaining sentence or with an Australian prisoner serving a sentence in another country to serve out their remaining sentence in Australia. Again, removal under s 198 of the *Migration Act 1958* (Cth) is not a transfer of custody of a person to another country and does not involve any dealing with a criminal offence. Therefore, the *International Transfer of Prisoners Act 1997* (Cth) is also unlikely to be relevant to the planned removal operation by the Department of Immigration.

Interestingly, both the *Extradition Act 1988* (Cth) and the *International Transfer of Prisoners Act 1997* (Cth) set out a similar provision giving authority to an escort officer to transport a prisoner in custody outside Australia.[7] For example, s 26(1) of the *Extradition Act 1988* (Cth) provides:

> A surrender warrant or a temporary surrender warrant in relation to a person (in this subsection called the *eligible person*) shall: … (e) authorise the escort officer to transport the eligible person in custody out of Australia to a place in the extradition country for the purpose of surrendering the eligible person to a person appointed by the extradition country to receive the eligible person.[8]

These provisions suggest that even though an agreement exists between Australia and another country to send a person in Australia's custody to that country, and a provision of an Act allows the Australian Government to send a person in Australia's custody to that country, power or authority is not automatically conferred on an escort officer to keep the person in custody outside Australia.

B Common Law

Should this analysis be correct, with no provision in Commonwealth legislation allowing detention by an Australian Government officer overseas, there should be a common law principle making detention by an Australian Government officer overseas lawful. This could be the reason why the NSW Police Force were called in for my removal operation. However, enforcement of the *Migration Act 1958* (Cth) is not vested in the States under the *Migration Act 1957* (Cth) or, as far as I am aware, under any other Commonwealth Act. Therefore, unless there is some common law principle concurrently existing with

[7] *Extradition Act 1988* (Cth) s 26; *International Transfer of Prisoners Act 1997* (Cth) s 22.
[8] *Extradition Act 1988* (Cth) s 26 (emphasis in original).

the *Migration Act 1958* (Cth) to remove a person from Australia upon the expiry of the person's visa, there appears to be no room to consider State police power to transport a person overseas. I have not come across such a common law principle.

As my legal research has brought forth no existing provisions or common law principles conferring the power to detain overseas, it appears Australian Government officers do not have the power or authority to undertake the course of action outlined in the FOI document during transit in Thailand. In light of this conclusion, I do not need to address the second legal question of whether or not I, as a Japanese national, am required to respect such power or authority exercised by the Australian Government. In the event that power or authority *was* conferred on Australian Government officials to detain me under some Australian law, there would be no connection between Australian law and myself once I was removed from Australia. Obviously, I would have to abide by Thai law while in Thailand, not Australian law.

C Further Investigation: A Bilateral Agreement?

Even if Australian Government officials have no power to detain a person in Thailand, Thai authorities have such power. In this regard, a search revealed that the German Government, for example, established bilateral agreements with transit countries regarding co-operation for deportation at airports.[9] I made an enquiry to the Consulate-General of Thailand in Australia and received a prompt reply from an official informing me that he was not aware of any agreement between the Thai Government and the Australian Government to cooperate in an operation by the Australian Government to deport a third country's national through Thailand. Since the Thai Government does not involve itself in a removal operation by the Australian Government of a national of a third country, the planned (though aborted) detention of myself in Thailand by Australian Government officials could not have been based on lawful power or authority.

[9] Axel Kreienbrink, 'Voluntary and Forced Return of Third Country Nationals from Germany: Research Study 2006 in the Framework of the European Migration Network' (Research Study, Bundesamtfür Migration und Flüchtlinge, 30 April 2007) 93.

IV THE FINAL PRESUMPTION

It does not seem uncommon for the Australian Government to virtually exercise a power of detention while removing a foreign national. A direct flight from Australia to the country of the foreign national certainly has the same effect as the continuing detention of the foreign national by Australian Government officials outside Australia. However, if such a direct flight cannot be arranged, the legality under Australian law of the acts of Australian officials surely comes to the fore.

Another document I was given by the Department of Immigration while I was detained in the Villawood Immigration Detention Centre was a list of airlines that did not accept a passenger from the Villawood Immigration Detention Centre. The list included Japan Airlines and Qantas Airways and therefore a transit was necessary. The Department of Immigration apparently considered for some reason that it had to keep detaining me even after removing me from Australia to Thailand. This was the origin of the problematic issue of Australian Government officials' (possibly illegal) exercise of a power of overseas detention in Thailand.

Finally, one might be intrigued by the fact revealed by the FOI document that the Australian Government officials planned to board a plane from Thailand to Tokyo, Japan with me notwithstanding that the flight was a non-stop direct flight. In other words, I would not be able to jump off the plane regardless of the presence of the Australian Government officials. It is unknown whether the Australian Government officials' keen exercise of their power of detention of a foreign national outside Australia has any relevance to the country of origin of the removed foreign national; that is, the final destination of the removal travel operation.

In any event, urgent law reform appears to be required either to prevent Australian Government officials from detaining a foreign national in a third country when removing him or her under the *Migration Act 1958* (Cth), or to confer power or authority on Australian Government officials to detain a foreign national in a third country when removing him or her under the latter Act.

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BEYOND BURQAS, BOMBS, AND BOGEYMEN: AUSTRALIAN MUSLIMS AND THE MEDIA

TASNEEM CHOPRA*

This article draws upon the personal and broader experience of living as an Australian Muslim in a climate of Islamophobia perpetuated by media and politics. From the personal context to the sociological drivers of stereotypes, media trends and rhetoric from politicians, this article examines multiple angles from which anti-Muslim discourse has often become codified patriotism. The impact of Islamophobia in terms of violence exacted on Australian Muslims is examined as a consequence of this. This article concludes that State culpability needs to be recognised, in order for appropriate responsibility to be taken to remedy the consequences of demonisation. Further, journalists who fuel hate speech with irresponsible and biased reporting must be held accountable. A recommendation is made for Australian Muslims to be given a platform in mainstream media in order to regularly convey their experiences, expressing an authentic narrative to counter the manufactured one.

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> Wrong information always shown by the media
> Negative images is the main criteria
> Infecting the young minds faster than bacteria
> Kids wanna act like what they see in the cinema.[1]

A surge in racist ideology gaining traction in Western political discourse has triggered a spate of movements premised on aggressive patriotism in recent years. Central to its growth has been a shared apprehension about Muslim migration to the West and specifically the intersections of Islam and Western values. The effect of political gravitas that locates Muslims as "bogeymen" has culminated in a condition of Islamophobia — the rejection of and discrimination against Muslims.[2] Political momentum in Australia has occurred in tandem with media reportage that continues to reinforce an alleged clash of civilisations via divisive language, policy, and attitude. The media acting as a vehicle for such sentiments blurs the line between reportage and political agenda. This has produced dire consequences for Australian Muslims who must endure the collateral damage.

Several years ago, as the Chair of the Australian Muslim Women's Centre for Human Rights, I was being interviewed for a community newspaper in relation to the escalation of federal anti-terror legislation. I explained how these laws may further isolate women who experience a sense of over-surveillance by the State, forcing them to retreat further from accessing welfare and settlement services.

A photographer then arrived seemingly agitated about taking the perfect picture for the story. She zoomed in for an extraordinary number of close-ups, well in excess of the single frame needed. Feeling uncomfortable, I motioned to wrap up when she blurted out 'could you lift up your head scarf that's hanging around your neck and drape it across your face, just showing your eyes?' I was momentarily dumbstruck. Here I was attempting to represent the issue of Muslim women's disempowerment, only to have the visuals for my narrative fetishised by the media. I declined her suggestion upon realising the insidious impact of oriental stereotyping of Islam, Muslims, and Muslim women rooted in the

[1] *Where is the love*? (The Black Eyed Peas, A&M Records/will.i.am Music Group, 2003) 3:13–3:24.
[2] Fernando Bravo López, 'Towards a definition of Islamophobia: approximations of the earliest twentieth century' (2010) 34(4) *Ethnic and Racial Studies* 56, 57.

mindset of mainstream media. This was an early incident marking my foray into Islamophobia — a hostile view of Muslims and Islam bent on fearful dogma.

How we see difference is framed in schemas or patterns of understanding "the other" is informed by our family, education, media, and life experiences. The combined effect of these factors contribute to how we shape and perceive the "Muslim other". These elements feed bias and misconceptions which give legitimacy to a swathe of rhetoric upon which Islamophobia relies.

While stereotypes have been found to assist us in making sense of groups of people in society, there is a tendency towards unconscious bias in which seemingly innocuous perceptions are underlined by discrimination.[3] These perceptions become prejudices when left unchallenged with a counter view. Even worse, these unchecked prejudices become legitimised movements of bigotry that hide behind "free speech". Such language borders on vilification and intent to harm, foraying into criminality. Examples include the Australian Defence League's attacks on Islamic groups over the past two years,[4] and a Queensland woman who was charged over online hate attacks against an Australian Muslim woman.[5]

For Muslims in the West, facts on the ground speak to a political expediency of an "us and them" dichotomy fed by media and, in particular, tabloid media rhetoric which thrives on stereotypic assessments. With the current Islamophobic climate, there has been an extraordinary amount of airtime allocated to Muslim related stories. In recent months, the opening news items on mainstream media outlets increasingly relate to incidents or political developments overseas and locally, that either covertly or overtly pertain to Muslims. These have included Islamic State, Charlie Hebdo, *American Sniper*, Iraq, Afghanistan, Syria, Palestine, Sharia, Halal Certification, refugees, burqas, mosque banning, and forced marriage. The hype is relentless.

[3] Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes* (13 June 2012) Psychology Today <https://www.psychologytoday.com/articles/199805/where-bias-begins-the-truth-about-stereotypes>.
[4] Sean Rubinsztein-Dunlop, 'Tensions between Australian Defence League and Muslim community reach violent new heights', *ABC News* (online), 5 January 2015 <http://www.abc.net.au/news/2014-04-21/anti-islam-hate-campaign-raises-tensions-to-violent-new-heights/5402526>.
[5] Kim Stephens, 'Ipswich woman charged over Muslim hate attacks online', *The Brisbane Times* (online), 18 February 2015 <http://www.brisbanetimes.com.au/queensland/ipswich-woman-charged-over-muslim-hate-attacks-online-20150217-13hamf.html>.

Across Australia's population of almost 24 million, approximately 50 per cent of citizens have one or both parents born overseas. This represents a significant culturally and linguistically diverse cohort. Sadly, a reflection of this diversity is severely lacking in mass media representations. For the almost 400 000 Muslims in this country, the depictions of them are largely negative and based on stereotypical perceptions of the Muslim "bogeyman". Research proves that the relationship between global events and domestic politics impacts strongly on the way Muslims and Islam are received by the media.[6]

Film archives have long provided ample material feeding into the Islamophobic narrative. In an in-depth study of over 900 Hollywood films, Reel Bad Arabs revealed that only 5 per cent of films depicted Arabs and Muslims in positive roles.[7] For the remaining 95 per cent, images and storylines were a testimony to xenophobia replete with clichés and distortions of people representing one or more characteristics including ignorant, violent, misogynistic, power hungry, corrupt, fanatical, or uncivilised men with complete charge over their subservient, oppressed women.

These archives in addition to the loaded media coverage at large, particularly since 9/11, have contributed significantly to a climate of fear surrounding Muslims. All too often, this material has informed both political language and policy direction of leadership, while the reverse relationship of politics informing theatre is just as evident. This has been the experience for Muslims in the West, felt both within Australia and beyond. A UK survey by charity group, *Islamic Relief* in 2014 revealed that the words people most associated with Muslims were 'terror, terrorism, and terrorist'.[8] Many Australian Muslims also tend to be brushed with a monolithic identity. Stereotypes and loaded words used by the media including 'Islamist', 'extremist', 'radical', and 'fundamentalist', to name but a few popular descriptors, do little to stem the tide of bias.

According to Mehdi Hasan, British Muslim citizens have been subjected to espionage, stop and search warrants, stripping of citizenship privileges, control orders, and detention

[6] Shahram Akbarzadeh and Bianca Smith, 'The Representation of Islam and Muslims in the Media: (The Age and Herald Sun newspapers)' (Report, School of Political and Social Inquiry, Monash University, November 2005).
[7] Jack G Shaheen 'Reel Bad Arabs: How Hollywood Vilifies a People' (2003) 588 *The Annals of the American Academy of Political and Social Science* 171.
[8] Evan Bartlett, 'These are the words Britons most associate with Muslims and Islam', *The Independent UK* (online), 15 June 2015 <http://i100.independent.co.uk/article/these-are-the-words-britons-most-associate-with-muslims-and-islam--Zyw7T0IwWg>.

without trial.[9] These stresses have been appended with a sense of condemnation and demonisation such that Muslims feel 'helpless, despondent, tired, worried, exasperated [and] anxious.'[10] British Prime Minister David Cameron notes that Britain's Muslim communities 'quietly condone [an ideology threatening their] common culture.'[11] Clearly, the culpability placed on persons who have no control over the actions of those acting outside the parameters of Islam is unreasonable. When such dogma emerges from the highest political office it lends tremendous weight to Islamophobes who feel justified in persecuting the perceived "enemy within". In the same vein, language used by Former Prime Minister Tony Abbott suggesting that the 'Death Cult'[12] are coming to get us, plays squarely into a fearful rhetoric that magnifies the reality of the threat far beyond reason. This entrenches a cultural divide between Muslims and the mainstream, feeding a belief that national security is the single greatest issue for Australia over and above any other issue of social, economic, and environmental concern.

For Australian Muslims who witness this rhetoric, often sensationalised and strewn with fear, the subliminal impact is high. Loaded language and imagery become tools for mainstream audiences who buy into the belief that there is no distinction between an atrocity committed overseas by a terrorist of Muslim faith, and the Australian Muslims living among them. In the UK, following the attacks of 7/7, the impact has been such that British novelist, Martin Amis, remarked 'the Muslim community will have to suffer until it gets its house in order… Discriminatory stuff, until it hurts the whole community.'[13]

Anecdotes of vilification against Muslims and Islamophobia represent a more recent evolution of how Islam is, at times, seen in this country. Assuredly, you will rarely, if at all, hear about success stories of a Muslim doctor, lawyer, activist, or academic in spite of them undertaking critical work for society. Within the media industry there are prominent and successful Muslims such as *MasterChef* cooks, *Amazing Race* contestants, journalists, authors, and news anchors. However, recognition is sparse and when the

[9] Mehdi Hasan, 'Life for British Muslims since 7/7- abuse, suspicion and constant apologies', *The Guardian* (online), 6 July 2015 <http://www.theguardian.com/commentisfree/2015/jul/05/british-muslims-7-july-london-bombings>.
[10] Ibid.
[11] Ibid.
[12] Eric Tlozek, 'Tony Abbott says Islamic State 'coming after us' after spate of terror attacks overseas' *ABC News* (online), 27 June 2015 <http://www.abc.net.au/news/2015-06-27/abbott-condemns-spate-of-terror-attacks/6577786>.
[13] Hasan, above n 9.

acknowledgement is made, it is condescending for it is frequently couched in terms of their success being a normative exception.

Muslims are forging an uphill battle against the odds to be integrated. Minorities are being commanded to 'learn English or bugger off. Blend in, or butt out, stop being confronting, but also stop retreating, come forward, but only so far. By perpetually redefining parameters of what constitutes acceptable integration levels for "the other," the discourse has become farcical. Tragically, this farce becomes a source of anxiety when Australian born Muslim children express pride in being Australian but hesitancy in revealing their faith in case they lose friends. This is the ugly side of nationalism that undermines freedom of religion and beliefs supposedly upheld by the *Constitution*.[14]

To compound matters, stereotypes happen in tandem with questioning Australian Muslims' loyalty, demanding they condemn atrocities that actually have no connection to the core tenet of Islam. The subsequent vilification of communities has been justified by the belief that our Government endorses such actions. During an address on national security in June 2015, former Prime Minister Tony Abbott said 'I've often heard western leaders describe Islam as a religion of peace. I wish more Muslim leaders would say that more often, and mean it.'[15] Condemnations are made, ignored, then demanded again. A press release from over 90 institutions and over 60 Australian Muslim leaders criticised the failure of the Former Prime Minister's Office to acknowledge efforts in condemning violence.[16] A simple *Google* search of 'Muslims condemning ISIS' in mid-2015 revealed 6 140 000 sites. A secondary search of 'Muslims condemning terrorism' yielded 10 500 000 sites. At a cursory glance, it is evident that condemnations are being made both domestically and internationally but they continue to be ignored in deference to political expedience.

[14] Australian Human Rights Commission, 'Freedom of Religion and Belief' (Human Rights Brief No 3, 2006).
[15] Shalailah Medhora, 'Tony Abbott urges Muslim groups to "get with the program" and condemn extremism', *The Guardian Australia* (online), 24 February 2015 <http://www.theguardian.com/australia-news/2015/feb/24/tony-abbott-urges-muslim-groups-to-get-with-the-program-and-condemn-extremism>.
[16] *Muslim Community Rejects Abbott Government's Demonisation and Condemns Moves to Silence Legitimate Critique* (19 February 2015) Islam in Australia <http://islaminaustralia.com/2015/02/19/muslim-community-rejects-abbott-governments-demonisation-and-condemns-moves-to-silence-legitimate-criticisms/>.

While counter-terrorism and border security rhetoric imbued with Islamophobia targets the idealised Muslim male in society, it is largely the Muslim women and children in our community who manifest the consequences of bigotry and vilification, as victims of hate crimes. According to the Islamophobia Register, abusive incidents to date include verbal abuse, rocks thrown at homes, coffee thrown through car windows, scarves pulled, women shoved to the ground, and physical assault on public transport.[17] In the last 12 months in Sydney alone, there are Muslim women who have been threatened with rape, beheading, and death by right wing extremist groups all in the name of "keeping Australia safe."

The experiences of Muslim women are vital to the Islamophobia debate because they represent a portion of society that is too often misrepresented. Predictably, much of Muslim women's airtime is consumed by either explaining the hijab, burqa, or advocating a woman's right to wear it. In effect, the presumed oppressiveness of head coverings has become a national obsession, reducing Muslim women to clothing ambassadors. Consequently, this allows men or non-Muslim feminists to monopolise the debate surrounding other issues affecting Muslim Australians. This compromises the authentic voice of Muslim women and oppresses them in ways Islam never has.[18]

As a Cross Cultural Consultant I am constantly exposed to environments that bring into question the how and why of cultural variance in our society. Specifically, the discussion about Islam and Muslims in Australia is frequently requested, likely owing to existing assumptions and apprehensions. In our current political climate, an escalation in the curiosity about all things Islam has been surpassed only by the vilification of these very things. Such attitudes have required an enormous investment of goodwill from a community that is continuously required to assert its "Australian-ness" at a time when, as a Muslim in this country, you are presumed 'guilty while practising.'[19]

I suggest there is a hierarchical framework the media employs when covering Muslim-related crime**.** To illustrate, when an Anglo Saxon Australian male commits a crime and it is reported in mainstream news the ethnicity, racial background, or faith of the offender

[17] *Islamophobia Register Australia*, Islamaphobia Register Australia <http://www.islamophobia.com.au/>.
[18] Susan Carland, 'Islamophobia, fear of loss of freedom, and the Muslim woman' (2011) 22(4) *Islam and Christian-Muslim Relations* 469.
[19] Gabriel Faimau, 'The Conflictual Model of Analysis in Studies on the Media Representation of Islam and Muslims: A Critical Review' (2015) 9(5) *Sociology Compass* 321, 335.

is almost never bought into question. This is logical given that these factors are not pertinent to the motivation or circumstances of the crime. However, if the same crime is carried out by an Arab or Muslim, one or both of these issues features in the description of the offender, as if being of Middle Eastern appearance were a factor integral to a crime. Equally, if a suspect is African or Indigenous, these descriptors are highlighted, denoting a causal link between crime and ethnicity. This double standard continues to plague tabloid media in particular, contributing to unfair stereotypical views of these communities while white rapists, murderers, and drug smugglers remain immune.

When the crime in question is an act of terror or perceived terror there is again a formulaic response to framing these stories so that they align with an "efficient" interpretation of facts. Namely, only Muslim and Arabs can be terrorists. White offenders, it seems, cannot be. To illustrate, a Cairns woman in April 2015 was arrested for allegedly planning an attack on HMAS barracks in Portsmith. Not only was this premeditated attack on a naval base barely covered by mainstream news outlets, the charges laid against the Anglo Saxon female suspect were 'intent to cause harm'.[20]

Further, when young white offenders commit such acts, the media calls in psychologists and behavioural analysts to review the person's life history, family issues, and educational record, thus availing the suspect to a degree of humanising reserved only for the privileged majority. When Dylann Roof was arrested in June this year, it was pointed out that:

> The media is unsure about what constitutes terrorism only when white people are the perpetrators. White men with guns are "lone wolves" or "mentally ill" or depraved criminals. Brown men with bombs are very obviously "terrorists".[21]

When seeking an explanation for the downing of the *Germanwings* Flight 9525, Dr Binoy Kampmark highlighted that the issue of terrorism was evaded. Instead, the pilot's

[20] Shannon Power, 'A woman who recently moved to Cairns was allegedly planning to blow up the Cairns Navy base', *The Cairns Post* (online), 13 April 2015 <http://www.cairnspost.com.au/news/cairns/a-woman-who-recently-moved-to-cairns-was-allegedly-planning-to-blow-up-the-cairns-navy-base/story-fnpqrsxl-1227301288580>.

[21] Sean Illing, 'We must call him a terrorist: Dylann Roof, Fox News and the truth about why language matters' *Salon* (online), 22 June 2015 <http://www.salon.com/2015/06/21/we_must_call_him_a_terrorist_dylann_roof_fox_news_and_the_truth_about_why_language_matters/>.

character profile was rapidly psychologised — it was a 'case of mental illness and concealed depression.'[22] He went on to explain:

> If the individual had sported a capacious beard, a dark countenance, and a few other culturally cosmetic additions, that would have made for a different set of observations. The uncomfortable reality about designations matter for what, effectively, is the same outcome. Prosecutors in this case were quick to dispel suggestions of a terrorist cause, excluding any political or religious motive.[23]

Conversely, when a Muslim commits an act of violence, only terrorism experts are called in. In the aftermath of Man Haron Monis's infamous siege at Sydney's *Lindt Café* in December 2014, media pundits:

> Could not wait to throw him into the global whirlpool of terrorist indulgence – a 'lone wolf' feeding on the teat [sic] of Islamic fundamentalism. There was an abundance of evidence suggesting mental unhinging and plain old depression, but that did not stop the terrorist punditry from finding what they wanted to see: coherent ideology in absurdist tragedy.[24]

Such is the lament for Muslim actors in the public sphere who are perpetually viewed through a lens of "outsider" or "invader". It follows that any associated ramifications of his or her behaviour are shaped by the stereotypes that come with being the "Muslim Other".

Interestingly, Dean Obeidallah points out that an FBI study revealed that of all the terrorism offences committed on home soil between 1980 and 2005, 94 per cent of offenders were non-Muslim.[25] Incidents where perpetrators were Caucasian include Virginia Tech (2007, 32 dead), Aurora Theatre (2012, 12 dead), Sandy Hook (2012, 27 dead), Washington D.C. (2013, 13 dead), Charleston (2015, 9 dead). None of these events were classified as a terrorist attack despite evidence of deliberation and the political

[22] Binoy Kampmark, *Germanwings Flight 9525: Depression, Motivation and the Language of Terrorism* (29 March 2015) Global Research <http://www.globalresearch.ca/germanwings-flight-9525-depression-motivation-and-the-language-of-terrorism/5439312>.
[23] Ibid.
[24] Ibid.
[25] Dean Obeidallah, 'Are All Terrorists Muslims? It's Not Even Close', *The Daily Beast* (online), 14 January 2015 <http://www.thedailybeast.com/articles/2015/01/14/are-all-terrorists-muslims-it-s-not-even-close.html>.

motivations underpinning some of these incidents.[26]Reality speaks to over surveillance, securitisation, and profiling of Muslim communities while acts of violence conducted by mainstream perpetrators, motivated by political agendas, continue to be reported with comparative impunity.

Such political distinctions afforded to one ethnic group over another are not lost on Muslims in the West. The selective application of the term 'terrorism' to Muslim and Arab perpetrators in the face of overwhelming evidence to the contrary smacks of injustice and what can only be perceived as an Islamophobic agenda. Put simply, it sells.

In the public discourse, automatic assumptions suggest that terrorism equals Islam, equals fear, equals Muslim, equals asylum seekers, equals illegal, equals stop the boats, equals Shariah law, equals reclaim Australia, equals ratings, equals votes. This skewed logic, repeated often enough with impunity by leaders, has spawned a movement of right wing extremism in this country whose creed of dogmatic patriotism is affirmed by political conjecture.[27]

Resolving this dilemma requires an urgent engagement with media and political leadership — the correlation between their poor handling and exploitation of these positions of power are evident. Conversations about journalistic and political values are integral to shifting the status quo of Islamophobic stereotypes. There is a dire need to close the gap between the grassroots lived realities of Australian Muslims and the covertly Islamophobic propaganda that comes from national leadership. At the very least, this calls for scrutiny of language that is loaded and leads to instant demonisation. Lazy journalism that resorts to using fear-inducing images of armed men and burqa-clad women for any Muslim related story — as if it symbolises Australia's Muslim population — must also be called out. These stereotypes have as much merit as Fred Nile representing the face of progressive Christianity.

Australian Muslims have earned the right to question divisive language, scare tactics, and call out the grassroots implications of hate campaigns that place women and children at

[26] Los Angeles Times Staff, 'Deadliest U.S. mass shootings 1984-2015', *Los Angeles Times* (online), 18 June 2015 <http://timelines.latimes.com/deadliest-shooting-rampages/>.
[27] Adrian Cherney and Kristina Murphy, 'Being a "suspect community" in a post 9/11 world – The impact of the war on terror on Muslim communities in Australia' (2015) *Australia & New Zealand Journal of Criminology.*

the receiving end of brutal behaviours that are triggered by point scoring politics and ratings-driven tabloids. Such behaviour is an affront to a nation's collective intelligence. It undermines the integrity of a fair and judicial system of governance in which government is responsible for protecting all citizens with equality. Sadly, too many Muslims in this climate feel like second-class citizens in their own country. This country knows better than to play the national security card in order to fan the flames of racial vilification. How about balance? How about context? The relentless victim blaming, demonisation, and demands to perpetually re-assert one's "Australian-ness" are exhausting. However, complacency is not an option when the cost at a social justice level is so high.

A cyclical pattern of media-feeding-politics-feeding-media has sustained a manufactured reality serving a higher agenda. However, irrespective of whose agenda is being served, endless Islamophobic reportage ensures an experience of daily hostilities for Australian Muslims. In addition, the media's racialising and pathologising of the Muslim actor compared to the humanising assessment of their mainstream counterpart is disingenuous at best and vilification at worst. Ultimately, the effects of Islamophobic coverage through media are intensely damaging. The implementation of state-funded remedial efforts such as psychosocial counselling and re-engagement strategies with Muslim communities is required. Further, culpability must be mandated for journalists and media pundits who create impetus for Islamophobic acts of aggression. The buck must stop with sub-editors and shock jocks whose domain in tabloid media has demonstrated a consistent link to right wing groups manifesting Islamophobic vitriol and violence.

That history is written by the winners means context and nuance have become negotiable commodities. For Australian Muslims, there are few things more disempowering than to be constantly spoken about but never spoken to. In order for the State to circumvent the costs associated with remedial efforts, a more balanced approach to media analysis, which gives Australian Muslims a platform to participate and narrate their experiences, is necessary. So too is a genuine grassroots engagement from government with Australian Muslims, including women and youth leaders. Perhaps it is time to invert a reality in which the criticised Muslim becomes the critical one.

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THE SILENT ENEMY: CURRENT PRACTICES FOR HEALTHCARE PROFESSIONALS IN THE IDENTIFICATION AND REPORTING OF PSYCHOLOGICAL HARM IN CASES OF DOMESTIC VIOLENCE

MATTHEW RAJ* & ELLIE MCKAY**

Awareness and recognition of domestic violence in Australia is increasing. In 2014, the Victorian Government appointed Fiona Richardson as the first Minister for the Prevention of Family Violence and Australian domestic violence campaigner Rosie Batty, whose 11-year-old son Luke was killed by her husband, was named 2015 Australian of the Year. Also, a Special Taskforce chaired by Former Governor-General Quentin Bryce has been formed to conduct an extensive review of domestic violence in Queensland and legislative reforms have been implemented that adopt a broader concept and definition of domestic violence which include psychological harm. Despite these developments, the ability of healthcare professionals to detect domestic violence – a pre-requisite to the proper functioning of these laws in practice – is limited in various ways. This article provides an overview of existing legislation that proscribes domestic violence and explores current methods used by practitioners to detect domestic violence. It then examines the duty of HCPs to report instances of domestic violence and explores the methodology behind early warning detection for victims experiencing acute or chronic psychological harm. Finally, the article explores the implications of recent legislative amendments and difficulties faced by HCPs. It then discusses adaptive methods to assist HCPs in practice to ultimately prevent domestic violence.

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CONTENTS

I INTRODUCTION

Violence against women is a significant issue facing the Australian community. It knows no bounds and is indiscriminate to geographical location, social class, age, religious, or cultural background.[1] In Australia, the life-time prevalence of experiencing physical violence for women is one in three, and almost one in five women experience sexual violence.[2] Psychological abuse is experienced by approximately 40 per cent of women in their lifetime.[3] Former Governor-General Dame Quentin Bryce has described recent statistics relating to domestic violence as 'deeply disturbing'[4] and has referred to the offence as 'the most grave human rights issue in the world'.[5] With such an increase in awareness concerning the rise of domestic violence, it is important to identify adaptive methods to prevent instances of abuse, specifically, early detection and intervention. Healthcare professionals ('HCPs') are at the front line, capable of identifying and

[1] The National Council to Reduce Violence against Women and their Children, 'Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009-2021' (Background Paper, The National Council to Reduce Violence against Women and their Children, 2009) 9.
[2] Ibid.
[3] Jenny Mouzos and Toni Makkai, Australian Institute of Criminology, *Women's Experiences of Male Violence – Findings from the Australian Component of the International Violence Against Women Survey (IVAWS),* Research and Public Policy Series No 56 (2004).
[4] Dan Conifer, 'Domestic Violence: "Deeply Disturbing" Statistics a Concern for all Society, Dame Quentin Bryce Says', *ABC News* (online), 6 April 2015 <http://www.abc.net.au/news/2015-04-06/domestic-violence-deeply-disturbing-statistics-dame-quentin-bryc/6372814>.
[5] Editorial, 'Making Real Change on Domestic Violence', *The Age* (online), 7 December 2014 <http://www.theage.com.au/comment/the-age-editorial/making-real-change-on-domestic-violence-20141207-1226k1.html>.

managing those experiencing family violence.[6] The prevalence of intimate partner abuse among women seeking healthcare is higher than in the general population.[7] In Australia, approximately eight per cent of patients attending primary care have experienced partner violence in the past 12 months.[8] 'Victims'[9] of partner violence frequently present to health services for a variety of related health concerns and are more likely to be admitted to hospital than non-abused women.[10] Between 2002 and 2003, the cost to the Australian community for this healthcare was $8.1 billion, namely for pain, suffering, and premature mortality.[11]

The following outlines existing methods deployed by HCPs to detect domestic violence among victims seeking healthcare and examines the impact that legislative reforms have caused. It also explores the current legislative duties of HCPs to report instances of domestic violence, in addition to policy implications of broad methods to detect, such as mandatory screening. The object of this paper is to create a lens through which the reader can appreciate the importance of including psychological and/or emotional harm in the definition of domestic violence. It also highlights the significance of HCPs faced with an opportunity to assist victims despite limited training and awareness as to how to effectively screen, manage, advise, and/or report an instance of domestic violence.

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[6] For the purposes of this article, 'healthcare professionals' refers to medical practitioners, nursing, and midwifery staff involved in patient care. In particular, those who work in general practice, the emergency department, and antenatal or psychiatry services. The terms 'healthcare worker', 'healthcare professional', and 'medical practitioner', are used interchangeably.

[7] See Jean Ramsay et al, 'Advocacy Interventions to Reduce or Eliminate Violence and Promote the Physical and Psychological Well-being of Women Who Experience Intimate Partner Abuse (Review)' (2009) 3 *Cochrane Database of Systematic Reviews* 1.

[8] Kelsey Hegarty and Robert Bush, 'Prevalence and Associations of Partner Abuse in Women Attending General Practice: a Cross-Sectional Survey' (2002) 26 *Australian and New Zealand Journal of Public Health* 437, 440.

[9] For the purpose of this article, where the word 'victim' appears, this term does not imply passivity nor, unless otherwise stated, acceptance of one's circumstances, as a casualty. It is recognised that the term 'survivor' is often preferred as it is distinct from 'victim', and the former identifies and displays an individual's resilience and resourcefulness. The word 'victim' is used here to represent those who are currently experiencing and/or have experienced harm, injury or any other detriment as a result of another person's actions, and includes 'survivors'. Also, despite frequent mention to women in this paper due to existing research, it is accepted that both men and women can be victims of domestic abuse.

[10] Ramsay et al, above n 7, 4.

[11] Ibid.

II THE SILENT ENEMY

It is reported that intimate partner violence is responsible for more ill health and premature death in women under the age of 45 than other well-known risk factors including smoking, obesity, high blood pressure, and high cholesterol.[12] Victims of domestic violence attending as healthcare patients may or may not present with an obvious acute injury (for example, suspicious bruising or unexplained physical injury). As a result of protracted victimisation, they may present to primary care with chronic sequelae of health issues. The ongoing psychological stress of intimate partner violence may manifest in non-specific chronic pain syndromes, psychiatric symptomatology, gastrointestinal disturbance, gynaecological disorders, and central nervous system complaints.[13] The most prevalent mental health implications of domestic abuse are depression and post-traumatic stress disorder.[14] Other signs include anxiety, insomnia, self-harm, para-suicide, and social dysfunction.[15] These are common presentations, particularly to general practice, but are three times more likely in abused women.[16] Further, domestic violence is a direct cause of subsequent alcohol and drug abuse.[17]

Alarmingly, it is reported that 30 per cent of intimate partner violence occurs for the first time in pregnancy.[18] Existing violence will often escalate in pregnancy, posing extreme health risks to the mother and the unborn child.[19] Miscarriages and stillbirth are common in women experiencing domestic violence and these women are also over-represented in those seeking termination of pregnancy.[20] The complex and non-specific symptoms can result in significant over-investigation. Healthcare professionals may

[12] Victorian Health Promotion Foundation, 'The Health Cost of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence' (Summary of Findings, 2004) 8.
[13] Ramsay et al, above n 7, 6.
[14] Ibid 4.
[15] Ibid.
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[18] See Gwyneth Lewis and James Drife, *Why Mothers Die: Report from the Confidential Enquiries into Maternal Deaths in the UK 1997-1999 (RCOG Press, 2001)*; Lewis, Gwyneth (ed), the Confidential Enquiry into Maternal and Child Health (CEMACH), 'Saving Mothers' Lives: Reviewing Maternal Deaths to Make Motherhood Safer – 2003-2005' (Research Report No 7, CEMACH, December 2007).
[19] Joanna Cook and Susan Bewley, 'Acknowledging a Persistent Truth: Domestic Violence in Pregnancy' (2008) 101 *Journal of the Royal Society of Medicine* 358, 359.
[20] See TT Wokoma et al, 'A Comparative Study of the Prevalence of Domestic Violence in Women Requesting a Termination of Pregnancy and Those Attending the Antenatal Clinic' (2014) 121 *British Journal of Obstetrics and Gynaecology* 627; Angela Taft, 'Violence in Pregnancy and After Childbirth: Current Knowledge and Issues in Health Care Responses' (Issue Paper No 6, Australian Domestic and Family Violence Clearing House 2002) 6.

misdiagnose these complaints and instigate inappropriate anxiolytic, antidepressant, or potent analgesic medication without being aware of the root cause of symptoms.[21]

A Domestic Violence and the Law

A significant area of law reform has been concerned with the definition of domestic violence. A 2010 report by the Australian Law Reform Commission ('ALRC') provided a core definition of family violence to include state, territory, and federal legislation.[22] As a broad concept, family violence is 'violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes a family member to be fearful'.[23]

As defined by the ALRC, such behaviour incorporates traditional concepts of family violence, including physical violence, sexual assault, stalking, damage to property, and kidnapping or deprivation of liberty.[24] However, the recent addition of economic abuse and emotional or psychological abuse has widened the traditional concept of family violence. Amendments to the *Family Law Act* and territory legislation now incorporate this broad definition.[25]

The ALRC's definition of family violence is a welcomed advancement to understand and identify the endless manifestations of controlling and coercive behaviour inflicted upon victims. It removes the veil of gendered power imbalances within relationships and the notion that a person is permitted to control and discipline their partner. However, the concept of psychological abuse, which has not been comprehensively defined, adds complexity to the detection of harm by HCPs and the ability to manage the health effects in a clinically useful way. When broad detection tools are used to assess the presence of

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[21] National Institute for Health and Care Excellence (UK), *Domestic Violence and Abuse: How Health Services, Social Care and the Organisations They Work with can Respond Effectively: Public Health Guidance No 50* (February 2014) 35 <https://www.nice.org.uk/guidance/ph50>.
[22] Australian Law Reform Commission, *Family Violence–A National Legal Response, Final Report,* Report No 114 (2010).
[23] Ibid, 17.
[24] Ibid.
[25] Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth); *Family Law Act 1975* (Cth) s 4AB; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13; *Crimes (Domestic And Personal Violence) Act 2007* (NSW) s 7; *Domestic and Family Violence Act 2007* (NT), ss 5-6; *Domestic and Family Violence Protection Act 2012* (Qld) s 8; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8; *Family Violence Act 2004* (Tas) s 7; *Family Violence Protection Act 2008* (Vic) s 5; *Restraining Orders Act 1997* (WA) s 6.

intimate partner violence, emotional abuse is most commonly reported.[26] However, emotional abuse may be least recognised by practitioners and victims themselves. There has been little scrutiny on the types of behaviour that could involve emotional or psychological and economic abuse. The ALRC has recommended that state and territory legislation be amended to include specific examples of emotional and psychological abuse but that the list should remain non-exhaustive.[27] Some guidance comes from the Background Paper to the National Council to Reduce Violence against Women and their Children 2009-2021 Time for Action Report.[28] Examples of behaviour include, but are not limited to:

- blaming the victim for all problems in the relationship;
- undermining the victim's self-esteem and self-worth through comparisons with others;
- withdrawing interest and engagement;
- swearing and humiliation in private or public;
- verbal abuse focusing on intelligence, sexuality, body image, or capacity as a parent or spouse;
- controlling money or providing an inadequate "allowance";
- controlling relocation to a place where the victim has no circle of friends or family; and
- denial or misuse of religious beliefs to force the victim into a subordinate role.

Some Australian states have chosen to expressly provide for psychological harm (Queensland, South Australia, and Victoria) and/or emotional harm (Queensland, South Australia, Tasmania, Victoria, and Western Australia) within their respective legislative provisions that proscribe domestic violence. The salient fact is that, broadly, every Australian state and territory presently includes psychological and emotional harm within the confines of their definition of domestic or family violence.

[26] Deborah Loxton et al, 'The Community Composite Abuse Scale: Reliability and Validity of a Measure of Intimate Partner Violence in a Community Survey from the ALSWH' (2013) 2(4) *Journal of Women's Health, Issue & Care* 1.
[27] Australian Law Reform Commission, above n 22, 216.
[28] The National Council to Reduce Violence against Women and their Children, above n 1.

III CURRENT PRACTICES TO DETECT DOMESTIC VIOLENCE

The potential to detect and engage victims of domestic abuse exists across a wide range of medical settings including general practice, the emergency department, perinatal and gynaecological clinics, and psychiatric services. However, the detection of domestic violence in these settings has traditionally been underwhelming and the profession has been criticised for allowing victims to 'fall through the cracks'.[29] Professional barriers include personal discomfort, time constraints, lack of knowledge, and limited referral resources.[30] Victims may have their own barriers to seeking professional help. Indeed, many victims presenting with somatic symptoms are unaware that these are the effect of the psychological stress of domestic violence.[31] They may be in denial of their abusive relationship or believe that only physical harm requires professional involvement and may not seek support for psychological abuse.[32]

Research from Victoria indicates that although women may be the least comfortable to discuss fear of their partner with their doctor compared with other health and lifestyle issues, they do find it acceptable to be asked.[33] Indeed, some abused women are unlikely to spontaneously disclose their experiences unless directly questioned.[34] How acceptable an abused woman finds enquiry into domestic abuse may be influenced by several factors. For example, women who have suffered recent abuse (within the past 12 months) are more likely to find enquiry unacceptable, whereas women who have experienced abuse at some point in their life find enquiry equally acceptable as non-abused women.[35]

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[29] Sheila Sprague et al, 'Barriers to Screening for Intimate Partner Violence' (2012) 52(6) *Women & Health* 587, 589.

[30] See Sheila Sprague et al, 'Barriers to Screening for Intimate Partner Violence' (2012) 52(6) *Women & Health* 587; The Royal Australian College of General Practitioners (RACGP), *Abuse and Violence: Working with our Patients in General Practice (4th ed): RACGP clinical guidelines* (June 2014) <http://www.racgp.org.au/download/Documents/Guidelines/Whitebook/whitebook-4thedn.pdf>.

[31] Gert-Jan Prosman et al, 'Why Abused Women Do Not Seek Professional Help: A Qualitative Study' (2014) 28 *Scandinavian Journal of Caring Science* 3, 9.

[32] Ibid.

[33] Kelsey Hegarty et al, 'Identifying Intimate Partner Violence when Screening for Health and Lifestyle Issues among Women Attending General Practice' (2012) 18(4) *Australian Journal of Primary Health* 327.

[34] Loraine Bacchus et al, 'Women's Perceptions and Experiences of Routine Enquiry for Domestic Violence in a Maternity Service' (2002) 109 *BJOG: an International Journal of Obstetrics and Gynaecology* 9.

[35] Adrian Boyle and Peter Jones, 'the Acceptability of Routine Inquiry about Domestic Violence towards Women: a Survey in Three Healthcare Settings' (2006) 56 *British Journal of General Practice* 258, 260.

The first challenge for HCPs is recognising emotional abuse, this requires a clear understanding of what it may constitute. Current legislation and policy papers provide broad definitions,[36] and some stipulate behavioural examples.[37] It has previously been stated that the key components to distinguish emotionally abusive relationships may be 'isolation from friends, family, and outside resources and demands for subservience'.[38] Given the indeterminate nature of abuse, regard should be had as to whether there ought to be a threshold for behaviour or acts that are serious enough to constitute cruelty. Disagreements exist in most relationships and the odd hurtful comment or emotional distance can occur without any malice or coercion. There is, perhaps notionally at best, however, a point at which actions can generate a destructive power imbalance and fear and become patently abusive.

The authors hypothesise three approaches to determine a threshold of emotional abuse. The first is to assess the frequency of abusive actions. Current research indicates that the frequency of exposure to these acts corresponds with the degree of psychological distress.[39] This initial approach, however, ignores the impact of solitary episodes and the point in time that emotional abuse causes psychological harm remains unclear. An approach that seeks to establish a pattern of pervasive behaviour could serve to undermine the protracted impact on a victim's psychological and physical health. A second approach is to define abuse by an objective set of behaviours. If present, these perpetuating actions would constitute abuse irrespective of the frequency, severity, or effect on the victim. Evidently, this approach is inadequate, as is any attempt to exhaustively list a set of human behaviours. Acts that may appear trivial, objectively, can cause significant distress to an individual. A constellation of ostensibly minor actions on the part of an aggressor is capable of constituting emotional abuse.

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[36] See, eg, *Family Law Act 1975* (Cth) s 4AB.

[37] See The National Council to Reduce Violence against Women and their Children, 'Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009-2021' (Background Paper, The National Council to Reduce Violence against Women and their Children, 2009); Jenny Mouzos and Toni Makkai, 'Women's Experiences of Male Violence –Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

[38] Richard Tolman, 'The Development of a Measure of Psychological Maltreatment of Women by Their Male Partners' (1989) 4(3) *Violence and Victims* 159 in Kelsey Hegarty et al, 'The Composite Abuse Scale: Further Development and Assessment of Reliability and Validity of a Multidimensional Partner Abuse Measure in Clinical Settings' (2005) 20 *Violence and Victims* 529.

[39] See Kelsey Hegarty et al, 'The Composite Abuse Scale: Further Development and Assessment of Reliability and Validity of a Multidimensional Partner Abuse Measure in Clinical Settings' (2005) 20 *Violence and Victims* 529.

Alternatively, an approach that emphasises the subjective experiences of the victim may be considered. This approach does not factor the severity or type of acts, but is concerned with the way that the victim feels. If they feel powerless, emotionally distressed, or controlled, then the perpetrating acts are deemed abusive. This is the approach favoured by professionals working with victims of sexual assault.[40] It may also be in keeping with the ALRC recommendations that definitions of domestic violence 'should not require a person to prove emotional or psychological harm in respect of conduct against the person which, by its nature, could be pursued criminally'.[41] The authors do not renounce a correct methodology as this is for policy makers. Indeed, assessments should involve a combination of relevant considerations. It is clear that a challenge exists in defining psychological abuse in a way that encompasses varying degrees of behaviour and victimisation.

Current debate exists as to whether methods to detect domestic violence should involve a universal screening process, targeted screening, or alternatively, investigation on an index of suspicion basis. This debate has focused mostly on more severe physical abuse, and there exists a current void in research on the utility of screening methods for emotional abuse. A recent Cochrane review analysed 11 randomised controlled trials on the screening of women for domestic abuse in health care settings.[42] In summary, it reported that current evidence does not show an improvement in the health or quality of life for abused women through universal screening.[43] There are various reasons for this conclusion including inadequate downstream referral and intervention pathways.[44]

The World Health Organisation ('WHO') clinical guidelines recommend targeted screening only for women at high risk of domestic violence.[45] By way of a comparative

[40] For example, The Centre Against Sexual Assault (CASA House) in Victoria define sexual assault as '…any sexual behavior that makes a person feel uncomfortable, frightened, or threatened'. See CASA House, *About Sexual Assault: Definitions* (2010) <http://www.casahouse.com.au/index.php?page_id=156>.
[41] Australian Law Reform Commission, above n 22, 17.
[42] Lorna O'Doherty et al, 'Screening Women for Intimate Partner Violence in Healthcare Settings: Abridged Cochrane Systematic Review and Meta-Analysis' (2014) 348 *British Medical Journal* 1.
[43] Ibid.
[44] Ibid.
[45] World Health Organization, *Responding to Intimate Partner Violence and Sexual Violence Against Women: WHO Clinical and Policy Guidelines* (2013) <http://www.who.int/reproductivehealth/publications/violence/9789241548595/en/>; Gene Feder et

analysis, in 2013, the United States Preventative Services Task Force ('USPSTF') recommended universal screening of all women attending health care services.[46] In Australia, there is no policy for universal screening of all women, however, following the WHO approach, NSW Health currently recommends routine screening of high-risk women including women attending antenatal clinics, drug, alcohol, or mental health services.[47] Indeed, there is some compelling research to support the screening of targeted population groups, in particular women attending antennal appointments. Evidence demonstrates that women in this setting find enquiry into domestic violence more acceptable than in other clinical environments.[48] Further, anecdotal accounts suggest that routine questioning of all pregnant women can actually normalise the enquiry process and remove the stigma associated with experiences of domestic violence.[49] Red flags to consider enquiry on an index of suspicion basis may include alcohol and drug use, numerous adverse reproductive outcomes, and the chronic unexplained health complaints discussed previously.[50]

If HCPs were to screen for domestic violence, it is submitted that there would need to be a robust tool available to do this effectively. A 2009 systematic review of 33 studies focused on various existing, developed, and tested domestic violence screening tools.[51] These included the Hurt, Insult, Threaten and Scream ('HITS') tool,[52] the Woman Abuse Screening Tool ('WAST'),[53] the Partner Violence Screen ('PVS'),[54] and the Abuse

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al, 'An Evidence-Based Response to Intimate Partner Violence: WHO Guidelines' (2013) 310(5) *The Journal of the American Medical Association* 479.

[46] US Preventative Services Task Force, *Intimate Partner Violence and Abuse of Elderly and Vulnerable Adults: Screening* (2013) <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/intimate-partner-violence-and-abuse-of-elderly-and-vulnerable-adults-screening#consider>.

[47] Department of Health (NSW), *Policy Directive: Domestic Violence – Identifying and Responding* (2006).

[48] Boyle and Jones, above n 35.

[49] Bacchus et al, above n 34.

[50] World Health Organization, *Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines* (2013) <http://www.who.int/reproductivehealth/publications/violence/9789241548595/en/>.

[51] Rebecca Rabin et al, 'Intimate Partner Violence Screening Tools: A Systematic Review' (2009) 36 *American Journal of Preventive Medicine* 439.

[52] Kevin Sherin et al, 'HITS: A Short Domestic Violence Screening Tool for Use in a Family Practice Setting' (1998) 30 *Family Medicine*, 508.

[53] Judith Brown et al, 'Development of the Woman Abuse Screening Tool for use in Family Practice' (1996) 28(6) *Family Medicine* 422.

[54] Kim Feldhaus et al, 'Accuracy of 3 Brief Screening Questions for Detecting Partner Violence in the Emergency Department' (1997) 277(17) *The Journal of the American Medical Association* 1357.

Assessment Screen ('AAS').[55] The review concluded that these tools had only been validated in small populations and not widespread clinical practice. These existing tools purport to detect present and/or past physical or sexual abuse in addition to a woman's fear of her partner or safety. However, these tools may not be powered to detect less obvious emotional abuse. Some items attempt to address psychological abuse, for example, the WAST tool and the Conflict Tactics Scale[56] include items to measure tension and arguments in relationships. This method of measuring tension, however, has been criticised for its focus on conflict and lack of emphasis on the coercive tactics that underpin emotional abuse.[57] Researchers in Australia have identified these limitations and have developed the Composite Abuse Scale designed to classify women according to the type and severity of abuse and it includes several examples of emotional abuse.[58] The investigators acknowledge that this tool is useful for research purposes, but that it has not been validated for clinical practice.[59]

More research is needed not only to validate screening tools aimed to detect physical and sexual violence, but also to develop and determine the validity of tools to detect less obvious emotional abuse. In any event, screening tools may prove to be inadequate and the detection of emotional and psychological forms of abuse may require a detailed psychosocial history involving discussion of current and past relationships, home dynamics, financial issues, and more intimate matters. Developing a psychosocial history as part of a discussion is evidently more intrusive and may cause discomfort for practitioners with limited training. It is also time consuming which poses a significant practical challenge to busy clinics. Methods that cause discomfort on the part of a practitioner or create a burden on managing time and staff for a clinic may be viewed as collateral to the charge on combatting the prevalence of domestic violence, however, practical considerations are important. Effective methods to identify and address

[55] Steve Weiss et al, 'Development of a Screen for Intimate Partner Violence' (2003) 18(2) *Violence and Victims* 131; LN Moonesinghe et al, 'Development of a Screening Instrument to Detect Physical Abuse and its Use in a Cohort of Pregnancy Women in Sri Lanka' (2004) 16(2) *Asia-Pacific Journal of Public Health* 138.

[56] Murray Straus, 'The Conflict Tactics Scale and its Critics: An Evaluation and New Data on Validity and Reliability' in Murray Straus and Richard Gelles (ed), *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (New Brunswick NJ: Transaction Publishers, 1990) 49.

[57] Hegarty et al, above n 39.

[58] Ibid.

[59] Ibid.

emotional abuse caused by domestic violence must be sought and models that may be put in place should be adaptive long-term.

If detection methods are successful, and domestic violence is reported to a HCP, what can they do? Many professionals are reluctant to ask about domestic violence in the first place in fear of causing more psychological distress for the victim if confronted on the topic.[60] This is particularly the case where the HCPs are not equipped with the knowledge and tools to appropriately manage these cases. Existing skill-sets empower most professionals to conduct a basic risk assessment of the threat of immediate harm to the victim.[61] Where this risk is high, the practitioner may feel more confident to encourage the victim to contact the police, engage in safety planning and specialised domestic violence services, or seek refuge at a shelter. Psychological or emotional harm, however, is a grey area that may challenge professionals in their assessment of threat and safety. The patient may not be at imminent risk of physical injury, yet they may disclose emotional suffering, feelings of being controlled and, by definition, are experiencing domestic abuse. Such situations are precarious and are at the greatest risk of being overlooked.

Recognising that the perpetrating acts are abusive is difficult. In addition, there is a paucity of evidence on the effectiveness of interventions to combat physical and sexual violence and even more limited guidance on appropriate interventions for emotional abuse. A 2009 Cochrane review reported that current global literature provides only equivocal evidence that intense advocacy for victims of domestic violence results in benefits to their physical and psychological wellbeing.[62] Four studies addressed in this review assess emotional abuse, but overall, it was found that advocacy interventions did not significantly reduce the occurrence of this abuse. Similarly, a subsequent randomised controlled trial in Australia found no improvement in a woman's quality of life, safety planning behaviour, or global mental health following brief motivational

[60] The Royal Australian College of General Practitioners (RACGP), *Abuse and Violence: Working with Our Patients in General Practice (4th ed): RACGP Clinical Guidelines* (June 2014) <http://www.racgp.org.au/download/Documents/Guidelines/Whitebook/whitebook-4thedn.pdf>.
[61] Ibid.
[62] Ramsay et al, above n 7.

interviewing by family doctors.[63] Promisingly, this study did report improvement in depressive symptoms.

The complexities of domestic violence across various social and cultural groups also pose additional challenges. HCPs may not feel empowered to comment on or change cultural practices, particularly when a victim believes the behaviour to be "normal". Those suffering domestic violence may not consistently view their experience as deviant or criminal. Practitioners in rural and remote communities may feel particularly powerless to intrude into their patients' wider culture and attitudes towards their partners. Like any medical concern, it is negligent to assume that all victims experience abuse in the same way and will therefore need, and respond to, the same services. Further research is required to examine the longitudinal health effects of emotional abuse and what interventions are most effective to exert agency over their ongoing victimisation.[64]

A The Duty to Report

The communications between HCPs and patients are subject to confidentiality and privacy principles which are protected by legislation[65] and the common law.[66] The ethical duty for a doctor to respect their patients' privacy originates from the Hippocratic Oath,[67] and the current code of ethical practice endorsed by the Australian Medical Association (AMA) advises doctors to:

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[63] Kelsey Hegarty et al, 'Screening and Counselling in the Primary Care Setting for Women who have Experienced Intimate Partner Violence (WEAVE): a Cluster Randomized Controlled Trial' (2013) 382 *The Lancet* 249.

[64] Hegarty et al, above n 39.

[65] See, eg, *Privacy Act 1988* (Cth); *Health Records (Privacy and Access) Act 1997* (ACT) s 6; *Health Administration Act 1982* (NSW) s 22; *Medical Practice Act 1992* (NSW) s 190; *Health Records and Information Privacy Act 2002* (NSW); *Health Act 1937* (Qld) s 100E; *Health Services Act 1991* (Qld) s 62A; *South Australia Health Commission Act 1976* (SA) s 64; *Health Services Act 1988* (Vic) ss 126, 141; *Health Records Act 2001* (Vic).

[66] It has been recognised that the duty of confidentiality exists in contract, see, eg, *Breen v Williams* (1996) 186 CLR 71 Gaudron and McHugh JJ at 102; *Hunter v Mann* [1974] 1 QB 767 Boreham J at 772. In equity, see, eg, *Breen v Williams* (1996) 186 CLR 71, and in the law of negligence, see, eg, *Furness v Fichett* [1958] NZLR 396 at 405.

[67] In relation to confidentiality, the Hippocratic Oath required physicians to swear, 'All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and never reveal'; See Kim Forrester and Debra Griffiths, 'Privacy and confidentiality of patient information' in Kim Forrester and Debra Griffiths (eds), Essentials of Law for Medical Practitioners (Elsevier, 2011) 65, 66.

> Maintain your patient's confidentiality. Exceptions to this must be taken very seriously. They may include where there is a serious risk to the patient or another person, where required by law, where part of approved research, or where there are overwhelming societal interests.[68]

In certain situations, the law requires medical practitioners to breach confidentiality and imposes a duty to report some events to the necessary authorities.[69] Throughout Australia, with the exception of the Northern Territory,[70] there is no duty for a medical practitioner to report domestic abuse to law enforcement (ie police service). Reporting it is recommended, but not mandated, for incidences of physical violence resulting in serious injury, including broken bones, gunshot wounds, or lacerations.[71] Ideally, this would be done collaboratively with the consent of the patient.[72] However, where there is an imminent threat, and the patient is unable to consent due to either disability or intimidation, the medical practitioner's duty to protect the person from harm would transcend their duty of confidentiality.[73]

There is less of an argument for reporting pure psychological abuse and whether a patient's risk of ongoing emotional injury would justify violation of confidentiality principles. Interestingly, the Northern Territory requires mandatory reporting of domestic violence but only for serious instances of harm that threaten the life or safety of the victim. Furthermore, it does not require the reporting of forms of emotional abuse.[74] Arguably, strong adherence to patient confidentiality is important to ensure women feel secure to disclose their abuse and engage support services. There is, however, a legal requirement that child abuse or concern for child safety are reported.[75]

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[68] Australian Medical Association (AMA), *Code of Ethics* (2004).

[69] For example, reporting the presence of alcohol or other illegal substances in the blood of a person after a motor vehicle accident, see, eg, *Road Safety Act 1986* (Vic); *Road Transport (Safety and Traffic Management) Act 1999* (NSW), reporting a person suspected of committing a serious indictable offence, see, eg, *Crimes Act 1900* (NSW) s 316, notification of certain infectious diseases to the relevant department of health, see, eg, *Public Health and Wellbeing Act 2008* (Vic) pt 8 div 3.

[70] *Domestic and Family Violence Act 2014* (NT) s 124A establishes a legal duty for all adults to report incidences of domestic violence.

[71] Department of Health (NSW), *Domestic Violence – Identifying and Responding* (2006).

[72] The Royal Australian College of General Practitioners, above n 60.

[73] Ibid.

[74] *Domestic and Family Violence Act 2014* (NT) s 124A.

[75] *Children and Young People Act 2008* (ACT) s 56(1); *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 27(2); *Care and Protection of Children Act 2007* (NT) s 26(a); *Child Protection Act 1999* (Qld) s 13E(2); *Children's Protection Act 1993* (SA) s 11(1)(a); *Children, Young Persons And Their Families Act*

Most state and territory legislation mandate that medical professionals report to the relevant authorities where, in the course of their work, they have a reasonable belief or suspicion that a child is at risk of harm or in need of protection. [76] Also of note, Western Australia only mandates reporting child sexual abuse and not necessarily other forms of abuse or neglect.[77]

There is increasing evidence reporting the negative impact of exposure to family violence, as a child, to brain and psychosocial development.[78] The child's brain is primed with a heightened vulnerability to stress, pre-disposition to other mental health disorders, and future perpetration or victimisation of domestic violence.[79] Qualified bodies now advise medical professionals that exposure to domestic violence (directly or indirectly) constitutes child abuse and that practitioners should seriously consider their legal obligations to report abuse in these contexts.[80] Indeed, legislation in Northern Territory, Australian Capital Territory, and New South Wales specifically reference that exposure of a child to family violence constitutes significant harm or abuse.[81] Under New South Wales and Northern Territory laws, professionals may be obliged to report these instances.

There is less guidance from legislation regarding a child's exposure to the pure emotional or psychological abuse of a family member. Recent research has demonstrated that exposure to parental psychological distress in the context of domestic violence (independent of physical violence) is associated with the failure of at least one developmental milestone during the first 72 months of a child's life.[82] Of note,

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1997 (Tas) s 4(2); *Children, Youth and Families Act 2005* (Vic) s 184(1); *Children and Community Services Act 2004* (WA) s 124(B).

[76] *Children and Young People Act 2008* (ACT) s 356(1); *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 27(2); *Care and Protection of Children Act 2007* (NT) s 26(a); *Child Protection Act 1999* (Qld) s 13E(2); *Children's Protection Act 1993* (SA) s 11(1)(a); *Children, Young Persons And Their Families Act 1997* (Tas) s 4(2); *Children, Youth and Families Act 2005* (Vic) s 184(1); *Children and Community Services Act 2004* (WA) s 124(B).

[77] *Children and Community Services Act 2004* (WA) s 124(B).

[78] The Royal Australian College of General Practitioners, above n 60.

[79] Ibid.

[80] Ibid.

[81] *Children and Young People Act 2008* (ACT) s 342(d); *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 23(1)(d); *Care and Protection of Children Act 2007* (NT) s 15(2)(c).

[82] Amy Gilbert et al, 'Child Exposure to Parental Violence and Psychological Distress Associated with Delayed Milestones' (2013) 132 *Pediatrics* 1577, 1577.

the *Children and Young People Act 2008* (ACT) defines child abuse to include emotional abuse in the setting of witnessing or being at risk of witnessing the psychological abuse of a family member, where this has or could cause significant harm to their wellbeing or development.[83] However, the Australian Capital Territory only requires the reporting of child sexual abuse or non-accidental physical injury. Other states include emotional and psychological harm in their definition of abuse, if it is detrimental to their wellbeing or physical or psychological development.[84] Exposure to familial psychological abuse may constitute such harm, but this is not explicitly stated in the legislation.[85]

IV POLICY IMPLICATIONS AND THE FUTURE OF DOMESTIC VIOLENCE DETECTION

Recent domestic violence awareness campaigns across Australia have been encouraging. Their success can never truly be measured and the hope that victims are provoked to report crime is a fundamental design of such initiatives. To be sure, this may be the reason why there has been a statistical increase in offending across Australia.[86] Greater steps need to be taken to forensically examine the opportunity for HCPs to manage and assist victims of domestic violence. This is largely due to HCPs rich exposure to the general public set among a health focused and patient caring environment. A financial strain may already exist on medical health departments due to reporting and perhaps future budgets should accurately provide for this increasing responsibility. Mandatory screening and/or reporting may have a deleterious effect on staffed services in addition to wider government departments. Such policies, however, may serve to effectively prevent victimisation and improve the quality of many Australian family homes — a worthwhile pursuit. One supervening consideration to mandatory screening and/or reporting is the erosion of patient-doctor confidence and trust. A patient that is acutely aware of positive duties to report may avoid health professionals or engage in deceptive conduct which would be counterproductive to aiding and supporting victims of domestic violence overcome their experiences.

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[83] *Children and Young People Act 2008* (ACT) s 342(d).

[84] *Child Protection Act 1999* (Qld) s 9; *Children's Protection Act 1993* (SA) s 6(1)(b); *Children, Young Persons And Their Families Act 1997* (Tas) s 3(1)(b); *Children, Youth and Families Act 2005* (Vic) s 162(1)(e)-(f); *Children and Community Services Act 2004* (WA) s 28(1).

[85] *Child Protection Act 1999* (Qld) s 9; *Children's Protection Act 1993* (SA) s 6; *Children, Young Persons And Their Families Act 1997* (Tas) s 3; *Children, Youth and Families Act 2005* (Vic) s 162; *Children and Community Services Act 2004* (WA), s 28(1).

[86] Conifer, above n 4.

Further and improved research is needed to investigate how to effectively detect emotional, psychological, and financial abuse among victims. Owing to their nature and role, HCPs are in a prime position to inform our understanding of domestic abuse in our society. However, there remains a dearth of expert education and training services dedicated to assist detection. Certainly, robust and evaluated training programmes that would promote and enhance HCP confidence and proficiency in the routine enquiry and screening of domestic violence are desirable. Current advances in models to detect domestic abuse and educate medical professionals are focused on past and present violent or sexual perpetrating acts. Existing scales designed to measure and address threat and risk do not adequately screen for emotional, psychological, or financial abuse.

V CONCLUSION

This paper has explored how recent legislative changes have altered the landscape of domestic violence and inevitably placed a responsibility, although perhaps an inadvertent one, on front line HCPs. If psychological and emotional abuse are to be taken seriously there needs to be clear direction on a policy level to guide referral pathways, interventions, and management of psychological abuse. Currently, this does not exist.

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