Dissent.

SILENCE

SYDNEY UNIVERSITY LAW SOCIETY
SOCIAL JUSTICE JOURNAL

2018

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acknowledgement of country

We acknowledge the traditional Aboriginal owners of the land that the University of Sydney is built upon, the Gadical People of the Eora Nation. We are humbled to be on the lands of one of the oldest surviving cultures in existence and acknowledge that this was and always will be Aboriginal Land. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the ongoing fight for meaningful constitutional reform and recognition. We regret that white supremacy has been exercised to justify Indigenous dispossession, colonial rule and violence in the past, and that to this day, the Australian legal and political system still does not provide the Aboriginal people with justice.

08 **Academic's foreword**
PROFESSOR SIMON RICE OAM

10 **If a tree falls in a forest**
INTRODUCTION BY ELAINE DONG

Part One

Where is Australia's #MeToo moment? 14
The impact of Australia's defamation regime on survivors and journalists
WORDS BY VAIDEHI MAHAPATRA

#MeToo 18
REFLECTION BY ELSPETH CRAWFORD

Breaking the silence on consent 20
ESSAY BY ZACHARY O'MEARA

HERstory has its eyes on you 24
CREATIVE WRITING BY CAROL LIN

FOSTA 30
Silencing sex workers, online and beyond
ESSAY BY NINA DILLON BRITTON AND DANIEL REEDE

Beyond powerlessness 34
The trafficked woman as both victim and agent
ESSAY BY FIONA YEH

A rallying cry 38
Domestic violence in Australian law and society
WORDS BY DIANA LAMBERT

Part Two

44 **Public consultations for anti-discrimination law**
Democratic process or political device?
ESSAY BY RHYS CARVOSSO

50 **Policing power**
Whistleblowers and the corporate social licence to operate
ESSAY BY KIN PAN

55 **Protecting our right to privacy**
Moral perspectives on data processing under the GDPR
ESSAY BY NINA MAO

60 **Policing, detention and youth indigenous justice**
Suspect targeting as a form of racial vilification?
WORDS BY KATE ELLIS

64 **The silence of the worker**
Australia's industrial action laws
ESSAY BY LUCAS MOCTEZUMA

69 **Weapon and shield**
Advocating for the twin purposes of vicarious liability
WORDS BY TOM ST JOHN

72 **Rethinking Australia's animal protection regime**
A rights-based approach
ESSAY BY ISOBEL PINO

76 **Granting legal rights to nature**
Reframing environmental consciousness through the courts
ESSAY BY VICTORIA CHEN

81 **The unheard voices of asylum seekers and refugees**
An Australian perspective
ESSAY BY SHOM PRASAD

86 **Suffering to belong**
The silence of migrant workers in 'fair go' Australia
ESSAY BY NICHOLAS BETTS

References 92

Academic's Foreword

PROFESSOR SIMON RICE OAM

Dissent is a journal concerned with social justice, and the theme of this issue — Silence — is a simple and powerful evocation of both a cause and effect of social *in*justice. As the thoughtful and provocative essays here show, the silencing of voices (by law) gives rise to issues of social justice that demand redress, and confronting issues of social justice arise when voices that need to be heard are silenced (by law).

In formulating and giving effect to the vast complexity of law — statutes, regulations, decisions, discretions, codes and so on — that regulates Australia society, there are voices that hold sway, and voices that are silent. What the essays in this issue explore is when and why that is so. You will read here about the people (and things) whose lives or futures are in the hands of others, but who are not addressed or listened to, who are, to different degrees, excluded, marginalised and devalued.

Examining the exploitation of migrant workers, Nicholas Betts considers the "muddled origins of the 'fair go' mythology", which put me in mind of the lost irony of Donald Horne's book title 'The Luck Country'. The muddled idea of a 'fair go', and the glib idea of a genuinely 'lucky country', are given the lie by these dissenting essays. Taken by subject, there is here a damning list of those in our society who are silenced by law, but the essays describe diverse ways by which law does this.

While Kate Ellis can point us to the explicitly intended oppression of young people, particularly indigenous people, by the Suspect-Targeting Management Program, Rhys Carvosso has to analyse closely the almost unseen marginalising of minority voices in an ostensibly democratic law reform consultation process. Between these extremes of explicit and subtle silencing, Lucas Moctezuma describes the slow creep of industrial laws that have, over recent years, silenced the once powerful social justice voice of the workers. Law's silencing effect is apparent too in Vaidehi Mahapatra's account of defamation laws in Australia, compared to the relative freedom that US laws have allowed the #MeToo movement there.

Perhaps unwittingly (but not if the lawmakers listened?) the law can compound existing social exclusion. Nina Dillon Britton and Daniel Reede examine the situation of sex workers, already marginalised by society and then further denied a voice in formulating legislation, ostensibly intended to benefit them but which causes them harm. The courts compound social

exclusion as readily as statute can. Fiona Yeh discusses the effect of court decisions that attempt to 'protect' trafficked women while denying them the possibility of their own agency and Zachary O'Meara describes how the effect of the court decision in *Lazarus* has been to confirm a popular conception that silence or passivity is consent to sexual conduct. Also on courts, Tom St John explains that those in Australia have been reluctant to allow victims a remedy when they seek recourse against powerful institutions, such as employers and religious institutions.

It is notorious that survivors of domestic violence are unheard and unseen, in society as much as in law; Diana Lambert challenges lawyers to take a role in giving voice to those women. She does so with courage, relying on her own lived experience to declare the importance now of being heard. So too Elspeth Crawford, who draws on her lived experience to declare the redemptive power of breaking the imposed silence and claiming control. Increasingly unheard and unseen, as a matter of government policy, are asylum seekers and refugees; Shom Prassad highlights the inadequacy of litigation as a means of breaking the silence around the atrocities faced by refugees and asylum seekers in offshore detention.

At the same time, there are in the essays positive accounts of law and silence: when law promotes an opportunity to be heard, or preserves a desired silence. Kin Pan considers whistleblower protections as an attempt to encourage voices to be heard, but has reservations about the power of a permissive law alone to achieve that, while Nino Mao describes the EU's *General Data Protection Regulation* which is intended, in a way, to allow people to remain 'silent' through preserving their right to privacy.

And there are in the essay adventurous discussions of whether and how law can give voice to those 'things' — not 'people', which is the point — who do not have their own voice. Isobel Pino reminds us we are merely animals (with a voice), and makes a case for assigning personhood to non-human animals so that they too can be 'heard' by law. Victoria Chen is able to point to legislative measures already taken to grant personhood to the environment so that its interests too can be 'heard'.

Finally, because it is different, Carol Lin's literary piece addresses many things, but in the context of the theme I am looking at, I read it is a powerful indictment of Trump's silencing of Hilary Clinton, of women, and of truth. All of which he may have done unlawfully; we don't know.

The essays in this issue of *Dissent* (Silence) are, unsurprisingly, considered and thoughtful, well researched and soundly reasoned. But they are far from dispassionate. The essays express strong views about the oppressive use and effect of law (leavened by some recognition that law can be enabling), and stand for a conviction that the law — and lawyers — must do better to give equal voice to people in the control of their lives. It has been an inspiring pleasure to read and preview them for you.

SIMON RICE

If a tree falls in a forest

INTRODUCTION BY ELAINE DONG

As the great philosophical conundrum goes: *If a tree falls in a forest and no one is around to hear it, does it make a sound?*

The answer, as has been well debated, depends on who you ask. Sound waves, to a physicist, propagate independently of their receiver. The neurologist would argue otherwise — sound is effected by vibrations on an eardrum. The insatiable philosopher would query the very concept of sound as objective fact: if unperceived, does sound even exist?

In the abstract, these answers do not matter so much for us. The real worry is when a tree falls and there is *only* silence. An individual or community that suffers injustice, rarely suffers in isolation — someone else will almost always have knowledge: the perpetrator, the witness, the media and its audience. Silence, therefore, is an insignia of the unknown, of injustices concealed or wilfully ignored. It pre-empts inaction and perpetuates an apathetic and atomised society. So if we are to accept silence as the ordinary state of affairs, how long, then, until we awaken to the horror of the entire forest destroyed?

Regardless of our cultural and vocational differences, we have responsibilities towards one another as members of a collective citizenry. In the social context, the consequences of silence are dire — the injustices that one chooses to ignore come at the expense of another's safety; the cloaking of lies by government institutions violates the trust and security of its own citizens. In each of these scenarios, the interests of all individuals are at risk. If we feel no duty to care for our suffering peers, who will care for us when it is our turn?

This year, it was clear to the editors that sexual harassment and gender-based violence are issues at the forefront of many minds. To encourage an integrated conversation, we have platformed a selection of articles which unpack those issues from legal, sociological, political and personal

standpoints in Part One of the journal. In this section, some writers criticise the operation of an imperfect legal system that fails to appreciate the complexity of trauma and tends to eternalise the identity of survivors as victims. For others, the source of silence is the survivor's own struggle with fear and shame, impelled by the stigma surrounding sexual assault and the psychological hold of their own perpetrators. But each of these writers look ahead — they acknowledge systematic failures and call for action, they break their own silence and retake control. Most importantly, each has been instrumental in keeping the #MeToo conversation going one year on. I especially wish to commend Elspeth and Diana for their strength and bravery in sharing their own experiences with sexual assault and domestic violence.

In Part Two of this journal, the fallen tree takes a multitude of forms. Marginalised communities, including migrant workers, asylum seekers and refugees and Aboriginal youth, are prejudiced on a daily basis by repressive laws and the discriminatory biases of those who enforce them. The voiceless constituents of the natural world — animals and the environment — desperately need us to speak for them in the midst of cruel human practices and anthropogenic climate change. Society as a whole is at risk when powerful governments and corporations breach their social licences, trading off individuals' privacy, consumer rights, and freedom of speech for opaque political and monetary motivations.

In this edition of *Dissent*, a common thread flows through the concerns of our writers — that silence is a verb. It is an act carried out against the vulnerable, whether consciously by decision-makers, or unconsciously through the operation of legal and political systems, demanding accountability and urgent systematic reform. Silence also describes the effect of that act. It is evocative of absence, indifference and loss, and of a society devoid of commonality. In 2018, the world is noisier than ever, but the words we hear are unintelligible. Digitisation has connected us to global resources and communities, but we have never been so divided.

And so silence is also a necessity. If we are to move forward, we need the quietness to listen, think and empathise. When reading this journal, I encourage you to reflect quietly on what our writers have to say, but not let silence fester for too long.

My thanks and congratulations to a wonderful editorial team — Kin, James, Annie, Nina, Samuel and Jeffrey — for their help and dedication in putting together this journal.

ELAINE DONG
Editor-in-Chief

Part One

CONTENT WARNING

This section of the journal contains articles and information about sexual assault, abuse and violence which may be confronting to readers or triggering for survivors.

If you need help, some options for advice and support are listed below.

NSW Victims Services

Call the Victims Access Line on 1800 633 063 or the Aboriginal Contact Line on 1800 019 123
The Victims Access Line is the single entry point for victims of crime in NSW to access information, referrals, support and counselling.

NSW Rape Crisis Centre

Call 1800 424 017 or visit nswrapecrisis.com.au
NSW Rape Crisis is a 24/7 telephone and online counselling service for anyone affected by sexual assault in NSW.

Sexual Assault Counselling Australia

Call 1800 211 028 or visit sexualassaultcounselling.org.au
Sexual Assault Counselling Australia provides counselling, information and referral.

Where is Australia's #MeToo moment?

The impact of Australia's defamation regime on survivors and journalists

VAIDEHI MAHAPATRA

Bachelor of International and
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In 2017, the #MeToo movement shook the United States, encouraging women to come forward with their stories of surviving sexual assault and harassment. The movement demonstrated the power of exposing systemic sexual abuse, bringing down many powerful men who, up until their downfall, seemed untouchable to their victims. Despite the support and interest the movement received in Australia, however, developments in the United States did not lead to a similar movement here. The absence of a #MeToo movement in Australia is primarily attributable to Australia's defamation regime, which poses significant barriers to survivors' disclosures and the ability of journalists to tell survivors' stories. The Australian emphasis on protecting individuals' reputation over the public interest in free speech, coupled with the 'presumption of falsity', acts to silence these important voices.

The Conflicting Functions of Defamation Law and Freedom of Speech Provisions

The historic feud between defamation law and freedom of journalistic expression stems from an inherent tension between the law's desire to both maintain social order and preserve individual autonomy. The Australian legislature and judiciary are burdened with balancing the equally critical and ambitious tasks of protecting citizens' freedom of speech against the 'interest all individuals have in safeguarding or vindicating their reputation'.[1] Prior to 2005, courts also faced the issue of reconciling the inconsistent defamation statutes of the individual states and territories. The Uniform Defamation Acts that came into effect on 1 January 2006 codified these multifarious statutory provisions into acts that are substantially identical across each state jurisdiction.[2] This legislation operates alongside existing common law rules of defamation, which are strongly influenced by the traditional model followed in the United Kingdom.[3]

The central barrier for Australian defendants is the lack of a manifest constitutional protection of individuals' right to free speech, as is afforded by the United States' Constitution's First Amendment, which states that 'Congress shall make no law... abridging the freedom of speech, or of the press,' and explicitly preserves individuals' rights to express their views in the public space.[4] In contrast, Australian courts have repeatedly stressed that the freedom of communication preserved by the Australian Constitution is not of the same general character.[5] Rather, the High Court has identified an implied right to freedom of political communication that operates to constrain legislative and executive power, as opposed to conferring private rights upon individuals.[6] Such nuance reflects how the legislature strives to balance the values of free speech and preserving reputation through more indirect means. Current New South Wales statutory provisions enshrine this balancing act as the intrinsic premise of defamation law itself, by advising against applying the law in a manner that 'place[s] unreasonable limits on freedom of expression'.[7] This distinction is critical to understanding the discrete legal position of defendants in Australian and American jurisdictions.

Plaintiffs are also favoured in Australian law in comparison to the United States due to the differences in requirements that plaintiffs must satisfy to establish the offence of defamation. For a defamation action to succeed in New South Wales, the plaintiff must only prove that the defendant published material to a third party that identifies the plaintiff and contains defamatory imputations.[8] This is subject to the test of whether 'the words tend to lower the plaintiff in the estimation of right-thinking members of society generally', as assessed objectively.[9] Liability for defamation is strict, and does not take into account whether the defendant intended harm or made a mistake.[10] On the other hand, the American model places a substantially greater onus on plaintiffs to prove defamatory conduct.

The Irrelevance of Truth and Presumption of Falsity

Further barriers arise for defendants under the New South Wales approach to defamation law due to the 'truth-not-relevant rule'.[11] This principle is a corollary to the idea that defamation is a tort of strict liability, where plaintiffs do not bear the onus of proving the untruth of the statement in dispute in order to receive damages.[12] Justice Hunt in *Aldridge v John Fairfax & Sons Ltd* extended this rule by asserting that 'there is, simply, no relationship at all between the defamatory nature of an allegation and its truth or falsity'.[13] Although the disputed truth of an imputation is not taken into consideration at the stage of establishing the offence, it is relevant to the defendant's liability when pleading defences.

In contrast, the United States follows a body of common law known as the 'Sullivan rules,' which

also require plaintiffs to first and foremost prove the elements of publication, identification and imputation.[14] However, unlike in Australia, plaintiffs are limited to proving that the material in question bears a false factual allegation, rather than a mere statement of opinion.[15] Furthermore, where the plaintiff is a public official or public figure, they must also prove that the defendant published the defamatory material with 'actual malice',[16] which requires the plaintiff to show that the defendant believed that the content was untrue at the time of publication, or had a 'high degree of awareness' of its 'probable falsity' and published it notwithstanding.[17] The rationale behind this additional hurdle is that public figures 'invite attention and comment' and must be receptive to valid criticism.[18] The Sullivan rules also mandate that plaintiffs establish actual malice with 'convincing clarity,' which is a considerably higher standard of proof than the 'balance of probabilities' required in New South Wales civil jurisdictions.[19]

Of this difference in requirements, the Australian Law Reform Commission has identified that such a low burden on plaintiffs fosters a 'presumption of falsity' that shifts the onus of proving the truth of the material in question to the defendant.[20] In the context of media defamation cases, this limited burden of proof bestows 'a distinct advantage' upon plaintiffs, who are shielded by legal structures that inherently disempower defendants by assuming the falsity of their claims.[21] Defendants may rely on the defence of justification, which protects individuals who can prove that their defamatory imputations are 'substantially true'.[22] In practice, however, defendants who do not plead the defence of justification are prohibited from arguing the validity of their claims and are therefore regarded as admitting the falsity of their material.[23]

Implications of Defamation Law for Survivors of Sexual Assault and Harassment

The unyielding status of defamation law in New South Wales has cultivated a perceived bias towards the plaintiff and led to a public loss of confidence in the ability of the courts to navigate the complex victim-perpetrator paradigm in sexual assault cases. Individuals who publicly decry injustice are a vital feature of a healthy, liberal-democratic system of governance, however, as the 'defamation capital of the world', the legal climate in New South Wales is not conducive to supporting these individuals.[24] Threats of legal suits are commonly exercised as a coercive tool of the powerful to intimidate whistle-blowers, force retractions of criticisms and induce settlements.

Given all the factors weighing in favour of plaintiffs in defamation lawsuits, such actions may be employed by prominent members of the community to deter survivors from coming forward or prevent journalists from reporting their stories, by exhausting their resources and time through expensive and drawn-out litigation. Indeed, the threat of legal proceedings often represents attempts by the powerful to '"privatise" public debate...[by] transform[ing] a public, political dispute into a private, legal adjudication'.[25] Further, defamation law is not exempt from the issue that plagues every legal system: litigation favours the wealthy. In recent years, courts have awarded significant sums to plaintiffs in online defamation cases. In *Rothe v Scott (No. 4)*, for instance, the plaintiff received $150,000 in damages for a Facebook post published by the defendant that insinuated that Rothe was a paedophile in the community.[26]

In the context of sexual assault survivors, lawsuits assume the additional dimensions of sexual assault being incredibly difficult to prove as true and potentially re-traumatising victims by exposing them to processes — such as cross-examination — which challenge their credibility and minimise their experiences.[27] Judith Herman, a psychiatrist specialising in trauma, clearly highlighted this when she wrote in *Violence Against Women* that 'if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law'.[28] In a statement released on Facebook, JooYung Roberts, a South Australian comedian who recently publicly identified himself as the anonymous victim who accused comedian Tom Ballard of sexual assault, denounced Australia's defamation laws for creating this trend. Roberts asserts that that 'if powerful figures are to be held accountable, the onus truly and unfairly is placed on victims to get their stories out there by whatever means are available. That is of course at terrible, terrible risk to themselves.'[29] A legal system that enables perpetrators of sexual violence to penalise their victims for attempting to speak out stifles public discourse and precludes access to support networks, justice and closure.

Finally, the increasing willingness of Australian courts to acknowledge social media as an arena for defamatory conduct creates dangers for survivors seeking to come forward with their stories online (the primary means by which #MeToo flourished). This is particularly dangerous given what Justice Kenneth Martin in *Douglas v McLernon* termed the public's 'lingering misapprehension' that material published online cannot be actionable for defamation.[30] The community's lack of awareness of their rights and responsibilities at law is incredibly dangerous, considering the significant liability they may be subject to and the ability for material to spread online at an unprecedented, and often unintended, scale and pace. The ease with which users may share and republish material online imbues Internet publications with a continuity that exposes individuals to a new liability each time the material is accessed or downloaded.[31]

The Implications of Defamation Law on Journalists

Journalists also face the risk of being accused of defamation, and often engage in self-conscious acts of censorship to avoid liability. This process of what journalist and anti-sexual assault activist Nina Funnell describes as 'sanitising' content demonstrates how the possibility of litigation indirectly 'chills' public discussion by stifling the media. This is noted in *Webb v Fury*, with the judgment stating that defamation laws which manifest actions to silence public debate 'deprive society of the benefit of its collective thinking and ... destroy the free exchange of ideas which is the adhesive of our democracy'.[32] This in turn compromises journalists' public duty to inform the community of events and issues that impinge upon their lives. This creates problems where private avenues for conflict resolution may be inadequate or ineffectual, as victims must pursue external means to drive reform. In doing so, they are inextricably linked to journalists, who are usually the 'only door open' to survivors intending to make public disclosures.[33]

What is particularly concerning is that the general public often does not recognise journalists' risk of defamation and the extent of legal interference in the media publications they consume. Individuals' lack of awareness is attributable to the complexity of defamation law and the exclusionary nature of statutes, which require legal advice to be interpreted and understood.[34] This restricts the public's capacity to enact change, by shifting the 'locus of power' from community members towards legal professionals.[35] Further, a deficit of legal knowledge perpetuates the public's acceptance of information provided by the media as the holistic truth. Such an attitude is problematic, as it widens the gap between the knowledge that journalists wish to impart and the information that they are legally permitted to publish.

However, it must be acknowledged that defamation laws can play an important regulatory function to maintain a standard of professionalism in journalism. In the case of *Wilson v Bauer Media Pty Ltd*, the Victorian Supreme Court found the defendant guilty of publishing articles which contained defamatory imputations of Rebel Wilson as a 'serial liar who...had fabricated almost every aspect of her life'.[36] Justice Dixon held that 'the seriousness of the defamatory imputations makes vindication of particular importance ... Only a substantial sum in damages could convince the public that Ms Wilson is not a dishonest person.'[37] Though the damages awarded were reduced significantly on appeal, this case illustrates the public interest function of defamation law to minimise the wanton denigration of an individual's character through the media.[38] More broadly, however, the ideal balance between this protection of an individual's character and the empowerment of survivors to come forward and share their stories has yet to be reached.

Conclusion

It is unsurprising that the reverberations of the #MeToo movement were felt most strongly in its place of origin (the United States), but a deeper analysis of its underlying factors reveals that the impact of the #MeToo movement in the United States is primarily attributable to a national legal structure that permits victims' disclosures of sexual assault allegations against prominent individuals in the public forum. The 'actual malice' requirement and higher standard of proof stipulated by the American legal system encourages survivors of sexual assault to come forward with truthful allegations.[39] However, while Australian defamation law serves the essential social purpose of protecting reputations and maintaining social order, its scope and reach in Australia is inherently problematic. Upon comparison with the United States' approach to this area of law, it is clear that Australian defendants are unfairly disadvantaged by the low burdens imposed upon plaintiffs, which require neither proof of malicious intent nor any evidence of falsity to be assumed as such. New South Wales' harsh defamation laws marginalise vulnerable community groups, by silencing sexual assault victims and the journalists they engage to report their stories. It is evident that this area of law is overdue for a comprehensive review of its relevance and efficacy in contemporary society, to ensure that it does not harm the very individuals it was created to protect.

#MeToo

ELSPETH CRAWFORD

Juris Doctor II

TRIGGER WARNING: This article contains information about sexual assault and/or violence which may be triggering to survivors.

When I first saw this hashtag appearing on social media my reaction was one I was familiar with. Denial and silence. Even, as ashamed as I now am to admit, mockery. It is easy to dismiss a trending hashtag on social media as a fad. It is more difficult to question why so many women were posting their survivor status for the online world to see.

As the number of women announcing their survivor status increased, I was unable turn a blind eye to the significance of what was happening. For me, this moment had culminated with two years, five psychologists, two psychiatrists and two different diagnoses of mental health conditions under my belt. As I became more aware of my own status, I was able to challenge my denial and gain a better understanding of the psychological significance behind what was happening to me and to hundreds and thousands of other women. As I posted my own #MeToo status, I sent and received heartfelt messages of support and acknowledgement. As these discussions with others continued I noticed similarities in our common experience.

This article is a reflection upon the silence surrounding sexual assaults and I would like to thank all those who opened up to me about their own experiences. I acknowledge their strength and power in breaking their own silence.

Breaking the Silence

In the wake of #MeToo and increasingly open discussions of sexual assault and sexual abuse, a barrage of questions came with it. Why didn't the survivors say something? Why did they not speak up at the time? And why is recalling such an experience so difficult? I questioned my own legitimacy, trapped between my feminist pride and my inability to make sense of my experience. Why *didn't* I say anything? Surely something so pertinent and so clearly damaging would be firmly secured in my own mind alongside a burning need for justice for what had happened to me. I seemed to be gaslighting myself, and yet I found solace in my silence.[1]

As part of my recovery I sought out a psychologist who was experienced in dealing with sexual abuse and trauma. During my first appointment with her I cried for the entire hour. This was the most progress I had made in two years of counselling.

I do not purport to speak for all survivors. I do not tell my story for sympathy. To me sympathy is about as helpful as a chocolate teapot. I ask for acknowledgement because along with so many other survivors, I was silenced by my own shame and fear but more importantly by my perpetrator. The sinister thread that connects survivors of sexual assault and sexual abuse is shame. The behaviour and the actions that violate our bodies were and continue to be normalised by those who committed them. Whether it is done so explicitly or otherwise, we were made to believe that telling anyone would mark us out as disgusting. As weird. Or worse, that no one would believe us. After all, what proof did we have?

Shame wraps poisonous, toxic tendrils around a survivor. My means of coping was to dissociate, grow thicker skin and incidentally become frustratingly self-aware.[2] I am all too conscious that I come across as cold until I am triggered and then I overreact. I do this because I have learnt that not everyone is trustworthy and safe.

Trauma Memories

In order to protect itself and survive, the brain detaches itself from the memories. It splits them up. My psychologist explained to me that normal memories are stored by the brain as linear events. Imagine going to the beach. The brain can recall when you swam in the water, how cold or warm it was, and you remember getting sunburnt. When the brain is subject to a traumatic experience it has techniques of protecting itself. Trauma memories are broken and fragmented into flittering flashbacks and hazy recollections so that you can't remember. To remember is too painful and to move on you must forget. Survivors are left with the mental equivalent of a smashed glass and a minefield of triggers that they may never fully understand. The clean-up is brutal.

The impact on the health of a survivor, particularly their mental health, and consequently to public health, are well acknowledged. A local community health centre reported that 'former sexual abuse victims [are] significantly more likely than non-abused clients to be currently taking psychoactive medication, to have a history of substance addiction, to have been revictimised in an adult relationship, and to have made at least one suicide attempt'.[3]

And yet change is still significantly lacking. My own experience with a local mental health care facility that claims to be trauma-informed played out in reality as a 10mg dosage of diazepam (Valium) when I asked to leave the facility into which I had voluntarily admitted myself. I had spent nine hours in the waiting room of an acute mental health unit. Whilst I appreciate the difficulties that come with dealing with traumatised patients I saw little evidence of an approach that considered the complex reality of trauma.[4]

'Oh Good, We Got Him!' / 'Not All Men'

As the #MeToo movement continued and an increasing number of high profile people spoke out against the behaviour of Harvey Weinstein, I remember hearing a comedy sketch celebrating, "We got him! We got the man doing all the sexual assaults." It perfectly captures the other side to the silence. The silence around recognising the perpetrators. Unfortunately, we did not get 'him' and it's not a creepy guy in a trench coat lurking in the bushes. If we're going to change the conversation around sexual abuse, the biggest challenge is recognising that for every #MeToo status, there is a perpetrator. It may not be 'all men', but it sure is some.

Mine has a wife and a daughter. For other survivors that I have spoken to, theirs have been close friends, family friends and family members. Sons, brothers, boyfriends, husbands. Breaking the silence often means weighing up the confronting reality of outing someone. The internalised fear that you are responsible for your own abuse can so quickly morph into reality if you choose to break your silence. Unsurprisingly, these conversations are not met with open arms and the responsibility of damaging relationships is a burden laid at the feet of the survivor. Not only is this logically absurd, but it will also often cause the survivor to relapse into a state of trauma.

There is no catchall experience nor is there a manual for understanding the myriad of pain, confusion and psychological factors that silence survivors. The existence of #MeToo is easy to shut down through mockery and ignorance. A declaration of 'Me Too', for those who choose to use this statement, is a way of breaking a toxic silence. It is a statement capable of immense power, a power that claims back an experience that has robbed someone of their basic capacity to even comprehend what happened to them. I have never felt so alone as when I was silent. But when I was acknowledged as a survivor, I've never felt more in control.

Breaking the silence on consent

ZACHARY O'MEARA
Juris Doctor II

TRIGGER WARNING: This article contains information about sexual assault and/or violence which may be triggering to survivors.

Introduction

Sexual activity is an important component of human socialisation; when exercised consensually, it contributes greatly to societal cohesion and relationship building. Unfortunately, for some people, their power to control the circumstances of their sexual activity is taken away from them by others. For opportunists and deviants, sexual activity becomes a platform to take advantage of, abuse and assault another person.

Recently, sexual consent has become a topic of contest and controversy. This is made more salient when one recognises the prevalence of sexual assault in in NSW and Australian society: in the NSW criminal justice system, sexual assault matters are more prevalent than most other categories of crime,[1] and according to the Australian Bureau of Statistics' *2016-17 Crime Victimisation Survey*, 31,300 adults in NSW were sexually assaulted in the previous 12 months.[2]

Many cases of sexual assault in Australian courts hinge on whether the intercourse was consensual. This paper focuses on *R v Lazarus* [2017] NSWCCA 279 ('*Lazarus*')[3] as a recent example of the contested nature of sexual assault offences. *Lazarus* exemplified the unnecessarily Herculean effort required by the prosecution and victim to prove the subjective elements of the offence and obtain a successful prosecution. Several questions arise from this: what amounts to consent? Can silence or inaction be apprehended as consent? In the aftermath of *Lazarus*, there have been public calls for legislative reform of the notion of sexual consent and how the criminal system deals with sexual assault cases. This paper will consider several competing proposals for reform of sexual consent laws in New South Wales.

R v Lazarus

On 27 November 2017, after eleven months' imprisonment and five years of court proceedings, the NSW District Court acquitted Luke Lazarus of charges of sexual assault that was alleged to have occurred in 2013, igniting discussion and debate over sexual consent across Australia.[4] The District Court determined that the prosecution failed to prove beyond reasonable doubt that Lazarus had actual knowledge of lack of consent from Saxon Mullins or was reckless in trying to ascertain consent.[5] Ultimately, Tupman DCJ favoured the view that Mr Lazarus had reasonable grounds for believing that Saxon Mullins consented to sexual intercourse.[6]

Tupman DCJ placed significant emphasis upon the verbal and physical cues to Lazarus from Mullins – but were they interpreted correctly? While sexual consent must be expressed circumstantially, the facts appear to suggest that Lazarus did not demonstrate any actions of consideration regarding Mullins' consent. However, most of Mullins' account was discredited due to inconsistencies in the narrative reported to police compared to the narrative presented in court. Mullins' recount of expressing dissent and resistance was not held to be reliable truth in the proceedings.

The Facts and Case History

Mullins and Lazarus met in a Kings Cross nightclub and kissed for a few minutes on the dancefloor. Lazarus then deceived Mullins into following him into a secluded room by misleadingly referring to it as the VIP area, isolating Mullins from her friend and leading her to an alleyway where he performed sexual acts on her. Before Lazarus took Mullins away, CCTV footage showed Mullins pointing inwards to the dancefloor and to her friend.[7] Once outside, the two engaged in consensual kissing. When Lazarus pulled down Mullins' stockings, Mullins immediately pulled them up again.[8] However, the fact that Mullins did not verbally and actively communicate 'stop' in response to Lazarus's actions counted against her — it was perceived as a sign of her consent to Lazarus' actions.[9] Whilst performing sexual intercourse on Mullins, Lazarus interpreted her physical positioning and pressing back upon him as a reaffirmation of consent. Many men continue to interpret interactions with women quite differently from the women themselves, and within the space of thirty minutes, Tupman DCJ ruled that Lazarus reasonably believed that Mullins had consented to this sexual intercourse, resulting in being on all fours and anally penetrated in a Sydney alleyway.[10]

Dissenting View

In the first trial, Huggett J was found guilty of sexually assaulting Mullins – essentially, the prosecution had proved beyond reasonable doubt that Lazarus performed sexual intercourse on Mullins without caring as to whether Mullins was consenting.[11] On appeal, Tupman DCJ reached a conclusion that was the direct opposite to Huggett J's conclusion, finding that Lazarus had a 'genuine and honest' belief that Mullins consented to their interactions.[12] But one thing should be noted — how 'genuine and honest' can an alleged provision of sexual consent be if one party demonstrates reluctance by physical actions (e.g. such as Mullins' pulling up her stockings and pointing to the direction of her friend in the nightclub, informing Lazarus that she is a virgin) or does not express positive verbal consent?

The prosecution argued that Lazarus should have taken reasonable steps to determine conscious consent — that, when it comes to physical or sexual contact, relenting is not consenting. Lazarus repeatedly states that Mullins' 'physicality' and her 'pressing back upon him' was what indicated to him that she wanted to have sex.[13] However, victims participate in sexual intercourse when they don't necessarily consent, as more visceral responses of fear and shock can take over. Lazarus continuously attempted to persuade the Court of Criminal Appeal that the bodily contact between the parties, specifically Mullins' buttock facing towards him, was a positive affirmation of sexual consent. From Mullins' account, she was in shock, frozen and psychologically shut off, in an attempt to block out the experience.[14] Notably, however, a freeze response is not free and voluntary consent as per the laws in NSW.[15] Tupman DCJ's interpretation of section 61HA of the *Crimes Act 1900* (NSW) thus fails to understand Mullins' freeze response and her inability to react to the situation.[16]

The Recklessness of the Accused

In NSW, sexual assault is defined as engaging in sexual intercourse with another person with knowledge of their non-consent.[17] In 2007, legislation was introduced for cases of genuine but distorted consent — that is, where there are no reasonable grounds for believing there is consent, deeming the person affected to have knowledge of lack of consent.[18] To establish criminal liability, the *mens rea* of the accused must constitute a subjective belief that the person knew of non-consent at the time of the offence to establish criminal liability.[19] Section 61HA(3)(b) of the *Crimes Act 1900* (NSW) provides that a person will have the required *mens rea* for the s 61J offence of aggravated sexual assault if the person was reckless as to whether the complainant was consenting.[20] The aim of s 61HA(3)(b) is to encourage individuals to take reasonable steps to ascertain consent, by covering situations where the accused perceives a risk but nevertheless takes it.[21] The notion that Mullins had to clarify that she did not consent to sexual intercourse, and that Lazarus bore less responsibility for establishing that Mullins consented to sex than Mullins herself, should not exist in the modern day. Recklessness is the subjective foresight of the possibility that the other party has not consented to sexual intercourse. Recklessness does not require indifference, but merely awareness of possibility.[22] However, changing this standard to inadvertent recklessness would determine cases based on an objective fault test and would prioritise community welfare over individual autonomy.

Lazarus was objectively reckless in obtaining what he wanted: sex. An objective fault test of recklessness is not currently the law in NSW but, if legislated at the time of the trial, would surely not have resulted in Lazarus' acquittal. All the 'red-flag' moments of physical and verbal hesitation between the two gives rise to a finding of objective precaution and failure to acknowledge this could be seen to justify the *mens rea* element of the offence. The only positive belief that Lazarus had of sexual consent from Mullins was kissing, which is not sufficiently reasonable grounds for such a belief that sexual intercourse would follow, especially in the circumstances. Tupman DCJ overlooked the reasonable steps required to ascertain sexual consent from Saxon Mullins.[23]

Simply because a judge cannot find guilt beyond reasonable doubt does not mean the offender is not morally culpable or that sexual consent was surely given in the circumstances. In *Lazarus*, Tupman DCJ

erred, failing to direct herself that in relation to making a finding of the respondent's knowledge of consent, she had to consider whether there were 'any steps taken by the respondent to ascertain whether the complainant was consenting'.[24]

Reform

As a result of the decision in *Lazarus*, there have been calls from the public, the media, and even Saxon Mullins herself to reform NSW's sexual consent laws. After Mullins' appearance on the ABC's 'Four Corners' program in 2018,[25] the NSW Attorney General, Mark Speakman, ordered a review of NSW's consent laws and sexual assault offences (the 'Review') by the NSW Law Reform Commission ('NSWLRC'), which is currently analysing NSW sexual consent laws and researching alternatives to see what reform, if any, is needed.

The Review's terms of reference state that the NSWLRC must consider:[26]

1. Whether s 61HA should be amended, including how the section could be simplified or modernised;
2. All relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system;
3. Sexual assault research and expert opinion;
4. The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s 61HA; and
5. Any other matters that the NSW Law Reform Commission considers relevant.

So far, the NSWLRC has received a diverse range of suggestions from preliminary submissions.[27] The suggestions can be divided into the following general categories: legislative reform to an affirmative model of consent, reform of the *mens rea* elements of sexual assault, formal education, informal socialisation, procedure regulations and maintaining the status quo.

Consent

Various terminologies — affirmative, communicative and active — have been used for essentially the same 'affirmative model of consent'.[28] The reasoning of Bellew J in *R v Lazarus* [2016] NSWCCA 52 described this model as requiring 'some positive action in ascertaining whether the other person in consenting'.[29] This model is the most favoured by the submissions to the NSWLRC, which further requires the knowing, voluntary and mutual decision by all participants to engage in sexual intercourse.[30] In Tasmania, silence does not amount to consent; it must be communicated and is defined as a 'free argument'.[31] Enacted over 14 years ago, Tasmania's sexual consent laws are the toughest in the country, requiring expressed, conscious, voluntary and ongoing consent to sexual intercourse.[32] In the Tasmanian model, physical and verbal communication is everything, and nothing can be assumed when it comes to consent. It places the onus of proof upon the person who initiated sexual activity to ensure that prospective partners are consenting.

However, the main criticism of the affirmative model revolves around verbal and physical signals about consent (or a lack thereof) being susceptible to misinterpretation and having the judicial process turn into 'he-said-she-said' contests over unclear recollections of verbal or physical signals. These criticisms are valid when one considers the hypothetical of a person who failed to ask for permission, who would, by virtue of the law, be guilty of sexual assault if sexual intercourse followed and the other party later claimed they didn't consent. The Tasmanian model removes the *mens rea* element, relying solely on the *actus reus* of the offence — failure to communicate is enough to establish an absence of sexual consent.

Education

Several submissions to the NSWLRC dispensed with calls for legislative change and focused on formal education about sexual consent, calling for widespread education regarding NSW's consent laws and the intricacies of sexual consent.[33] There needs to be an emphasis on young people having an 'informed and holistic view of sex' and reinforcement throughout a person's scholastic, working and personal life.[34] Education has a role to play in understanding the notion of sexual consent and preventing myths around rape and the responsibility of the victim.[35] Teaching sexual respect, as well as sexual communication, should be paramount. This subsequently would help prevent intimate partner violence among couples.[36]

Legislation

Some submissions consider legislative reform in relation to sexual consent (both of the *Crimes Act* and of changes to the judicial process). A submission that seems to find the right balance between the affirmative consent model and a conservative change to the current laws is the insertion of certain words into section 61HA(3)(d) of the *Crimes Act 1900* (NSW), so it reads: 'including any *physical or verbal* steps taken by the person to ascertain whether the other person consents to the sexual intercourse.'[37] This amendment does not change the *mens rea* and does not shift the evidential burden of proof, but does make the circumstances prior to sexual intercourse more important. It places an obligation on the person wishing to progress social interaction to sexual intercourse to physically and verbally verify the willingness of the other person to do so. It is a well-balanced and realistic approach which gives greater clarity to the current laws surrounding sexual consent.

Alternatives

Other suggestions to the NSWLRC discuss the implementation of specialist courts and procedures to protect victims in their engagement with the criminal justice system.[38] Drawing similarities between the Family Court of Australia and its distinct procedural process and less intimidating manner to ensure security, privacy and safety of the vulnerable, these new courts would be equipped with staff, prosecutors and judicial officers who are educated in relation to identifying the elements of consent, appropriately punishing sexual violence and mitigating trauma for those involved in proceedings.[39] Delay in the criminal justice system is another reason to support the emergence of specialist courts.[40] These reforms could be a positive development — in *Lazarus*, justice was denied to Mullins due to the delay in the proceedings, which were determined to be oppressive to Lazarus.[41] Elimination of delay should be paramount in sexual assault cases to ensure this injustice does not occur again.

Other suggestions argue that legislative changes may not be required. Demurring on legislative reform may facilitate the expansion of restorative justice processes, as has happened in Canada, the United Kingdom, and New Zealand.[42] Restorative justice involves a transition from punitive measures to a process which empowers the victims, enabling them to communicate their harm to the perpetrator face-to-face and focuses on how to address underlying behavioural issues in our society.[43] Shifting from an adversarial to an inquisitorial legal system may lead to a more nuanced understanding of victims' experience of the judicial process and more proactive judges who are informed with better understandings of sexual consent.

No Change

Certain submissions suggest current standards reflect the reasonable views of contemporary society. These submissions turn on the idea that the current legislative framework works well and strikes the right balance for all parties, thus, proposing no legislative change.[44]

Conclusion

Lazarus was a wake-up call for the New South Wales and the broader Australian community in terms of moral discourse and legal standards around consent and sexual assault. The result of *Lazarus* clearly indicates that sexual consent laws no longer reflect and do justice to contemporary circumstances and the changing nature of sex in social interactions. The NSWLRC's review of sexual consent laws presents an opportunity for reform and prevent the injustice faced by Saxon Mullins in *Lazarus*.

However, while education is the best remedy for persistent obsolete gender norms and misinformation about sexual assault, education alone will not satisfy public demands for more substantive reform. Simply put, silence, passivity, relenting, and 'freezing' are all not signs of consent. Consent should be requested rather than interpreted; verbal and physical communication should be paramount. The proposed amendment of section 61HA(3)(d), which specifies the importance of physical and verbal inquiries and affirmations of consent[45] reflects a conservative amendment which reflects an increased responsibility and diligence expected from people who wish to engage in sexual intercourse, with potential for a far-reaching effect in making a positive difference in sexual experiences.

Sexual consent is not simply a 'Yes' or 'No' question, but one of consistent permission or agreement. This should be reflected in the sexual consent laws of NSW. In *Lazarus*, the criminal justice system failed a survivor of sexual assault. The NSWLRC has a chance to change this and make a difference to ensure that no one else goes through the legal ordeal that Saxon Mullins was subjected to — not now, not ever.

HERstory has its eyes on you

CAROL LIN
Bachelor of Arts / Bachelor of Laws I

Letter to the Reader

Dear Reader,

You are standing below a glass ceiling while the cacophony that is Manhattan comes to a screaming halt. Your head is spinning at the possibility of entering a land of equal opportunity, a land where there are no margins. You are attacked by vertigo as words from every language spin deliriously around the room.

I can see you over there in the far-left corner. I love your orange dress, by the way. Orange was the perfect choice. It symbolises harmony, inclusion, diversity, warmth. Every second of yesteryear, today and tomorrow will pour onto my laptop screen. My mom's victory will not be forgotten.

But let me tell you what I wish I'd known, when I was young and dreamed of glory, don't nobody have control, who lives, who dies, who tells your story.[1] So let's let our voices fly free, and sing the songs of joy and sorrow.

Waiting. Counting. Say your final prayers. Cross thy fingers and thy toes.

Yours truly,
Chelsea (The Daughter of Bill and Hillary)

The Contest 2015

Where should I start? Will there be a happy ending? I know I have to write this, everyone else will only write about Him.

HE is in his gold and ivory tower, his Pinnacle of Truth. Words whirl around the tower like a vortex, swimming through His luscious, sticky hair.

SHE knows that this time she can smash the ceiling and rewrite the Dream.

The différance between them is like a Hyperion to a Satyr.[2]

But remember, regardless of the outcome, this will be a HISTORIC ELECTION, picture the meme of what could be the:

1. First Female President
2. First Socialist Jewish President
3. First Fundamentalist Hispanic President
4. First Fascist Oompa-Loompa President

Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood* and sisterhood*.

Death 2016

You and I, we, we are gathered here to witness the ceremonious shattering of the ceiling. Chelsea's mom didn't give her the middle name Victoria for nothing.

We hold these truths to be self-evident, that all men are created equal...and I'm'a compel him to include women in the sequel, work![3]

But the clock strikes thirteen.

My hands come to a standstill, tensely hovering over the keyboard as the power of seething wombs flood the streets of America. You could see the blood coming out of her eyes, blood coming out of her wherever. (Did I really just write that?)

Once again, that glass above remains intact. Once again it is one of those untouchable things for her. We're still waiting for HERstory to be told. I hear her voice being warped, tangled by His long, long tie. The language in my head is begging to be expressed. I stare at the screen waiting for new signifiers to attack me with zeal.

For the 45th time, SHE will disintegrate into the HIStory of the American Dream.

Running mascara paints the battle scars on my face. I feel a pair of rough, large hands bind the corset around my neck tighter, strangling my sentences of elegant locution.

I don't know what to think. Reader, you might find that ironic because I have a PhD in philosophy, in thinking. But the absolute truth is, since 13 a.m., I have felt my freedom of thought slip away, I have lost control of my powers as an equal, I have felt the constant tug of straight, white, Catholic men overriding my mind.

Look at Her, her smile... her look... her way.[4] Why do I sense a masculine voice in my own thoughts?

So we beat on, boats against the current, borne back, ceaselessly into the past.[5]

Politics 2017

Reader, I want you to feel how the world has changed through my words. Re-consider what is real, what is fake, and whether you still want that house with the white picket fence and upward mobility.

This world is a savagely glittering metropolis, wholly empty, a thriving non-culture of absolute truth and alternative facts. Alternative facts.

Alternative. Reader, I don't speak any other languages, but this word has not been heard in English since November 2016. There has been a void of sorts. Certain words, certain phrases have fallen into the void.

Silence: absence or omission of mention, comment, or expressed concern.[6]

@POTUS on Twitter: A little hyperbole never hurts. I play to people's fantasies of something that is the biggest and most spectacular.

Read this half a page of dialogue I recorded from yesterday's White House briefing with Michel Spicer (Spicy) Foucault, and observe what is happening to our voice:

"Ferdinand de Saussure from CNN. How do we decipher the real meaning of his travel ban?"

Spicy: "It's not a ban. We just can't have 5-year-old terrorists and Others stealing our jobs. China is infiltrating our purity. We can't be like those incapable crooked women..."

Saussure: "But the President called it a ban. So is he confused, or are you confused?"

Spicy: "I'M NOT CONFUSED! It's not a ban. 'Ban' derives from what the media is calling this. 'Extreme vetting' is his discourse. It's us exerting our power. Stop telling us what you think it means. The President doesn't want to hear it. The President doesn't care. And don't bring up fake news or alternative facts again, I'm sick of it. Either shut up, or get out!"

Saussure (Aside): "I think it's because those newsrooms badly want to describe reality as it is and fill the gaps and silences, and we have a White House that wants to describe reality as something else."

Reader, can words mean so many different things? I feel that we are very close, yet also too detached, from the truth that women have perpetually tried to express. He is still exterminating perspectives and being hysterical about women. The world must be coming to an end!

Why am I also thinking in hyperboles? Oh dear, His language is seeping into my writing.

> O beautiful for pilgrim feet
> Whose stern impassioned stress
> A thoroughfare of freedom beat
> Across the wilderness![7]

Huffington Post: Some of Trump's supporters have criticized the president for telling blatant falsehoods, alienating longtime international allies, and introducing clumsily made policies that have invited judicial scrutiny. The power of the United States clasped in the hands of a pumpkin.

@POTUS: Inequality is fake news. Thomas Jefferson said all MEN are created equal.

Chapter 3: Welcome to the Divided States of America and its infiltration of truth around the world.

Society 2018

Reader, I realise that core American values are being hidden in offshore truth havens by a select group of men, that is why I can't find words say, that is why the streets are full of muted chatter, that is why I keep being forced to write alternative facts instead of documenting HERstory. It's like the GFC, only we're experiencing a truth debt, not a mortgage debt.

Picture this, Reader:

Trump: "I do have a relationship with P... I don't know Putin. Putin isn't my best friend."

Putin: Hands covering his mouth. Tears streaming down his face.

Marine Le Pen: I am proud to be female Donald Trump, ze detesters of Mooselums and la chinois, so far right that we can no longer tell our left and right. My father never told me what a glass ceiling is, but I have learnt it now, Macron taught me.

Reader, I have become a slave to interpretation. The wrong interpretation. A valued member of the exclusive club, Silencio. Another erasure from History. My words are starting to flutter, I feel them buzzing in the air, but they haven't yet taken off though.

> O Beautiful for patriot dream
> That sees beyond the years
> Thine alabaster cities gleam,
> Undimmed by human tears![8]

Reader, do you even remember what it was like to have your voice heard? Do you remember the nods of agreement as you spoke? Do you remember a time when the rest of the world was not deaf to your noise?

How many times have you read about women in History?

None? That's about right. See, that's what I set out to write.

My voice has been compressed tighter than cubes of garbage. Even as people criticise Him, His voice continues to resonate and expand.

The pressure of a new language is inching my words towards the middle. My heart is filling up, beating with linguistic devices. A faint drumming drills into my eardrum.

> Oh, say does that star-spangled banner yet wave
> O'er the land of the free and the home of the brave?[9]

Reader, I know something that you don't. At Oxford, I learnt about Barthes' theory on the Death of the American Dream. Can you see that the American Dream died, her American Dream was buried, and now, the American Dream returneth to dust?[10]

Together, we will give birth to something revolutionary, something beyond what we are allowed to do. We let Dumpy Trumpy corrupt the Dream and turn it into a nightmare, but we will create a new Dream. One where the best thing a girl can be in this world is not a beautiful little fool.[11] One where every corner of the globe is the centre. Yes we will, yes we can.

Metamorphosis 2019

Let me deconstruct this confronting scene for you, Reader. My friend Jacqueline Lacan sent me this video leaked by Russian hackers. My fingers tango over the keyboards breathlessly recounting the video to you.

This happens to us all too frequently. But we don't say anything, sometimes we choose to remain silent, sometimes we have no choice but to remain silent, sometimes we are paid to remain silent.

You agree it's time for this to happen to a man for once, don't you?

I know I'm being a naughty little Don. Jr., but I need my words to be released from the iron panopticon. I want to tell my story, our story, HERstory.

Reader, relax and enjoy this Lacanian vision. Warning: this vivid literary description may contain harmful and disturbing images for those under the age of fifteen.

HE is staring into a full-length mirror. His fingers slowly work their way down to the firm knot around his protruding gut. A silent crash as his fluffy white Egyptian cotton robe elegantly falls to the ground.

Before the gold-rimmed mirror stands a nude Oompa-Loompa. His eyes narrow and his lips form a distinctive, familiar pout as he examines his body. Rolls of fat and loose skin fold over his rotund middle. He takes a step closer. His gut is a party balloon almost bereft of its helium, sagged and deflated. The area around his bellybutton looks not unlike a C-section scar. She holds his hands up. Not as big as he had thought. Short and sausage-like androgynous fingers. His luscious, fluffy hair bounces energetically.

For there can be no doubt about his sex. The image in the mirror is a child constructed from the outside. All he is a simulacra of images with no certain substance. How is it possible that there is more substance in his words than all of ours combined? How is it possible that everyone listens to his ramblings, and no one listens to our intellect?

Is he a cultural figure, a celebrity, a father, President, misogynist, racist, fascist? No one really knows.

Birth 2020

What do Donald Trump and a pumpkin have in common? They're both orange on the outside, hollow on the inside and should be tossed out in early November.[12]

Once again, you are standing under that glass ceiling. My page begins to swirl with words. Words settle onto the page, metaphors describing the limitations of infinity lie down on the laptop screen, the glitter gun outlines the missing in History, filling it up with powerful homages to all of Her.

You can't believe that the ceiling has not yet been shattered. But let me assure you, hope is rising, slowly, a little slower than the sea level, but nevertheless,

rising.

Her Blackberry, devoid of truths, pings. News: Someone punched a hole in the glass ceiling. Write, type, write, type, there's no time to think. Reader, you must help me erase Him from history like they did to Her.

"I imagine death so much it feels more like a memory,"[13] he moans.

Loudspeaker: "Ladies and gentlemen, I am proud to announce that The Dream has arrived safely into the world at infinity o'clock and she is happy and healthy, as are her proud parents."

For a moment we are left there, face to face for the last time in History with something commensurate to our capacity for wonder.

For the first time in a long time, there is cheering. There is a loud noise that we can hear.

Created under the pressure of victory, the noise is a diamond that has blossomed from the voices trapped in the cubes of garbage.

Will they know what you overcame? Will they know you rewrote the game?[14]

What's that? You can't find the ending to my book? Don't bother looking for one because, SHE has been liberated. Post-feminism has been transcended, occluded, overcome. All HUMANS are created equal!

You have Trumped the blockades. Just know there is hope. All the wombs in the world gave birth to it.

Sing out for liberty and light,
Sing out for freedom and the right.
Sing out for Union and its might,
O patriotic ~~sons~~ daughters.[15]

Let me tell you what I used to know, when I was young and dreamed of glory, you have no control who lives who dies who tells your story. I know that we can win, I know that greatness lies in you, but from here on in, HERstory has its eyes on you.[16]

FOSTA

Silencing sex workers, online and beyond

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At first glance, the controversy surrounding the *Allow States and Victims to Fight Online Sex Trafficking Act*[1] ('FOSTA') recently enacted in the US is difficult to understand. Based on its name alone it appears uncontroversial; FOSTA purports to remove exceptions to liability for website operators for sex trafficking offences. It also received near unanimous, bipartisan support from the Senate on its final vote at a time of incredible political polarisation and legislative inertia on the part of Congress.

Taking FOSTA on face value, however, would be misleading. Little of its substance has anything to do with sex trafficking. Rather, the thrust of the act opens liability for 'promotion of prostitution', greatly expanding federal criminal prostitution offences.[2] Sex workers' groups have been quick to point out that punishing website operators for content they may have little ability to identify or regulate creates strong disincentives for them to allow any sexual content to exist on their platforms, pushing sex workers who use these platforms to find and vet clients into far more risky street work. At the same time, it pushes sex trafficking victims onto the street, where it is far harder for police to identify and rescue them. This paper will look at how FOSTA was able to pass with such little opposition, and the incredible damage the law may reek as a result.

Legal Analysis of FOSTA

FOSTA creates liability for website operators by creating an exception to their immunity from liability for content posted to their platforms where it is found to facilitate sex trafficking or promote prostitution.[3] This section will look at the general immunity for website operators that existed prior to FOSTA's enactment before turning to the Acts effect on this.

What was the scope of immunity for website operators that existed prior to FOSTA's enactment?

Implemented during the Internet's infancy, section 230 the *Communications Decency Act*[4] ('CDA') was intended by Congress to protect nascent tech companies. Though the CDA represented a wider congressional effort to protect children from the dissemination of obscene materials online, criminalizing the knowing dissemination of obscene materials in relatively broad terms, section 230 served to protect website operators from liability for conduct occurring on their platforms. As noted by the Fourth Circuit Court in *Zeran v America Online, Inc*,[5] the section sought to 'remove the disincentives to self-regulation created by' the decision in *Stratton Oakmont, Inc v Prodigy Services Co*.[6] There, the New York Superior Court found that the self-regulation of content negated Prodigy's status as neutral distributor of third-party content, rendering it liable as 'publisher' for the material on its platform. In this context, section 230 was implemented to protect interactive web-platforms from claims that they were publishers of third-party content,[7] and to ensure that tech companies who made good-faith efforts to restrict access or availability to obscene material were not held liable for doing so.[8] In short, it was intended to provide protections in a limited set of circumstances.

Courts have since interpreted section 230 to find that Congress intended a policy of 'broad immunity', where liability would not be found except in cases where website operators specifically 'encouraged' illegal material to be published.[9] Though most case law regarding section 230 concerns claims in defamation, immunity under section 230 has been extended to website operators in federal civil claims and state criminal prosecutions for facilitating sex trafficking.[10]

How does FOSTA affect website operators' liability for content on their platforms?

FOSTA removes section 230's immunity for federal criminal charges, state criminal charges and federal civil claims for conduct constituting sex trafficking.[11] This creates problems due to varying fault elements at the federal and state levels. Though existing federal sex-trafficking offences require one to *knowingly* facilitate sex trafficking,[12] FOSTA also creates a federal offence with a maximum penalty of 25 years imprisonment for 'reckless disregard' as to whether conduct 'contributes to sex trafficking'.[13] Furthermore, the fault elements of state offences for sex trafficking vary widely. Though some states have mens rea requirements in sex trafficking offences, others, such as Alaska, have no mens rea requirement, meaning that one can be charged for sex trafficking offences for unknowingly profiting from or facilitating sex trafficking:[14] a scenario easily foreseeable for a large online advertisement or social media company. The breadth and irregularity of state law, coupled with the lack of clarity as to how courts will construe conduct of 'reckless disregard', creates significant incentives for website operators to heavily regulate sexual content on their platforms to avoid liability.

Finally, though the title of the act pertains to sex trafficking, its substance largely regards prostitution, both due to the removing the exception to liability for existing prostitution offences and through the creation of a new federal offence of promoting the prostitution of another person/persons.[15] The penalty for committing this new offence is a fine or prison term of up to 25 years where more than 5 persons are 'prostituted' and up to 10 years when less than 5 persons are 'prostituted'. Though it is a defence to these new criminal charges that the promotion is targeted at a jurisdiction where prostitution is legal,[16] it may be difficult for defendants to establish content is targeted to an area when it is universally available on the Internet.

FOSTA's Passage Into Law

While FOSTA's name, public promotion[17] and debate in Congress[18] exclusively emphasise its necessity as a response to sex-trafficking, it seems to necessarily involve the criminalising of platforms which promote consensual sex work. The centring of sex trafficking in policy debates about commercial sex is characteristic of recent Federal US policy debates regarding the commercial sex industry. It can be traced back to the unexpected political alliance of radical feminists and Christian Evangelicals which shaped the US's early trafficking legislation.[19] The effect of this framing, however, blurs distinctions between coerced sex trafficking and consensual sex work, marginalises the views of opponents in policy debates and inhibits nuanced policy debate.

The centring of sex trafficking in policy debates can be traced to the late 1980s, as a response to the gradual gains of pro-sex work activists seen in the growing numbers of countries decriminalising sex work.[20] Specifically, in 1988, Laura Lederer, a prominent American radical feminist and co-founder of Women Against Pornography ('WAP') and Take Back the Night, helped fund and organise a conference that defined trafficking as 'globalised prostitution'.[21] This conference urged feminists to shift from the fight against domestic censorship of pornography, which had defined much of American radical feminist activism through the 1980s, to international sex trafficking.[22] This pivot coincided with a shift in focus by

Christian Evangelical organisations throughout the 1990s to human trafficking as a key issue.[23] Despite significant ideological differences between these two groups — particularly on abortion — a powerful, if unexpected, political alliance emerged that was central to the development of, and the 2006 reforms to, the *Trafficking Victims Protection Act of 2000* ('TVPA')[24] — the US's most substantial piece of anti-trafficking legislation. It was the lobbying of these groups that saw the TPVA conflate sex trafficking and consensual sex work, prioritise efforts against sex trafficking over other forms of labour trafficking and expand the scope of the act to include domestic as well as international trafficking.[25] Backed by the radical feminist organisation Coalition Against Trafficking Women ('CATW') founded by Laura Lederer,[26] supported by Evangelical Christian media[27] and formed through a merger of two bills introduced by Republic Christians, FOSTA is clearly part of this political lineage.

Rhetorically, this framing accomplishes three things. Firstly, it side-steps sex work activists' claims that sex work could be and largely is consensual by framing these activists as naïve of the 'actual' experience of sex work for the majority of women globally.[28] The emphasis on sex trafficking marginalises sex work activists as a 'pro-prostitution lobby',[29] which prioritises liberal individualism over issues of *actual* import.[30] Supporters of FOSTA reflect this view. CATW and New York New Abolitionists, for example, explicitly frame all sex work as non-consensual, arguing that society 'legitimi[ses] [victims'] oppression as "work"' and that their missions is to 'make the inherent harm of prostitution visible' in the face of narratives which promote sex work as 'liberation'.[31] It is little wonder that there was essentially no response by Congress to the critiques posed of FOSTA during its hasty passage.

Secondly, horrific representations of sex trafficking frustrate nuanced policy debates and rigorous study of the issue. Sociologist Kamala Kempadoo argues that representations of sex trafficking are often hyperbolic and speculative, failing to reflect the nuanced experiences of sex workers and migrants.[32] As seen in discussions surrounding FOSTA, 'horror tales' of the most shocking examples of victimisation are used to characterise the issue, such as CATW's executive director stating 'This isn't about free speech and it isn't about internet freedom ... It's about Desiree Robinson, murdered at age 16 by a sex buyer who found her on Backpage.'[33] Furthermore, actual empirical evidence of the scope of the sex trafficking is often vague and speculative.[34] FOSTA's supporters claimed that websites made 'millions' from sex trafficking, but either did not reference where these estimates came from[35] or used estimates of all sex work profits — conflating sex work with trafficking once again.[36] A number of scholars of human trafficking have critiqued the estimates of advocacy and government departments that 'many millions' of people are trafficked in the US[37] and globally[38] as lacking empirical support.[39]

As opponents of these measures are marginalised and nuanced policy debate is frustrated, it is little wonder that there was no response to criticisms of the bill by Congress during debate and that there was near universal Congressional support of its passage, with only two of a hundred Senators voting against its passage. This paper now turns to the effects of this approach.

FOSTA's Effects

FOSTA's approach to sex work and sex trafficking is best understood as a 'neo-abolitionist' policy approach to commercial sex. Neo-abolitionism is a new approach to the abolition of commercial sex, which is defined as an attempt to end sex work by criminalising the demand for it as well as other activities that facilitate it as opposed to direct criminalisation.[40] The characteristic model of this approach is the 'Nordic model' of sex work where both buying sex and pimping is punished whilst the seller, at least in theory, is not.[41] Sociologists Eilís Ward and Gillian Wylie argue that this neo-abolitionism is conceptually defined by two ideas. Firstly, it understands sex work as inherently violent towards women; and secondly, it conceives of sex work and sex trafficking as inseparable, both in policy and conceptual terms.[42]

Theoretically, neo-abolitionist approach skirts the primary critique of direct criminalisation of sex work: that it only exaggerates the psychological, physical and economic burdens of sex work by classing workers as criminals.[43] However, as exemplified in FOSTA, neo-abolitionist approaches create many of the same problems of direct criminalisation. Critics argue that the liabilities created for website operators by FOSTA incentivise them to censor any discussion or promotion of sex work.[44] This can be seen already, for example, in Craigslist's removal of its 'Personals' page in the lead up to FOSTA being signed into law.[45] Critics argue this censorship forces sex workers offline where they are less able to vet clients and thus more open to danger, especially vulnerable groups of sex workers such as transgender sex workers.[46] They point to, for example, evidence that the murder rate of sex workers declined significantly due to the existence of Craigslist's 'erotic services' page[47] to support this. Sex workers are particularly vulnerable given prostitution is criminalised throughout US — with the exception of some counties in Nevada — and therefore sex workers soliciting on the street are driven to unpopulated or low-policed areas. Though no Senators or House Representatives that approved the bill have directly engaged with such arguments, its supporters, such as activist Meghan Hatcher, claim that 'screening for potentially violent sex buyers and assurances of safe places do not exist in prostitution. Our primary objective must be to end exploitation and prevent the harm that is inherent to those in the sex trade.'[48] This reflects what Prabha Kotiswaran calls the 'zero-sum game' approach to the issue of sex trafficking: where harm reduction approaches come at the expense of not abolishing sex work entirely, and therefore should be rejected even if the alternative creates more dangerous working conditions for sex workers.[49]

Furthermore, FOSTA's neo-abolitionist approach is open to the criticism that, rather than seeking to address the economic inequalities that often underpin women's choices to enter into sex work, it pursues damaging punitive approaches.[50] In this way, it constitutes what Bernstein terms to be 'carceral feminism' whereby a conservative 'law and order agenda' and state-based punitive responses are offered as the solutions to gendered oppression, rather than redistributive or welfare approaches.[51] This approach treats sex work and sex trafficking in a vacuum, separating it out from exploitative practices and labour abuse in other industries.[52] Failing to understand commercial sex as often related to conditions of poverty and instead resorting to a criminalisation approach overlooks the fact that for many of the women who engage in commercial sex it is primarily an economic issue, with gendered inequality constituting a secondary issue, if one at all.[53] As FOSTA's restrictions threaten sex workers' livelihoods without offering alternatives, many argue that this pushes them further into economic uncertainty.[54] Simplistic, punitive approaches such as FOSTA, though framed as solutions to gendered oppression, leave sex workers with even more constrained choices and less ability to escape any poverty.

Finally, FOSTA has been criticised based on anecdotal evidence that closing online platforms pushes sex trafficking onto the streets where it is harder to find and police.[55] This criticism was expressed by Senator Ron Wyden, one of only two Senators to vote against its passage and the only Senator to express his reasons for voting against it,[56] but was not engaged in Congress debate. There is little comprehensive evidence on the effect of website closures on identifying and policing sex trafficking. It remains, however, deeply concerning that such concerns — which go to the heart of FOSTA's purpose — as to the actual effectiveness of the legislation in protecting victims of sex trafficking were almost entirely overlooked by legislators.

Conclusion

FOSTA clearly undermines sex workers' ability to solicit and vet clients online, pushing workers further into economic insecurity and opening them to greater workplace danger. It is unclear if this is a harm outweighed by any benefits. Though only time will tell whether this will help sex trafficking victims, there is enough evidence to suggest that victims will only be pushed further from the eyes of law enforcement. Fighting sex trafficking is doubtless a noble goal; however, FOSTA represents the way in which the moral panic that surrounds the phenomenon obscures complex policy debate. At its core, FOSTA works not only to silence sex workers online, but contributes to a broader marginalisation of their voices and interests in policy debates that affect them.

Beyond powerlessness

The trafficked woman as both victim and agent

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"Trafficked women are sometimes euphemistically called 'migrant sex workers'."[1]

Why can't they be both?

In Australia, consent exists in the majority of circumstances of trafficking of women for sexual purposes; most women trafficked to Australia have consented to at least one element of their trafficking ––whether it be their migration, their performance of sex work, or both[2] — as part of a legitimate effort to change their life circumstances, but are deceived as to the conditions in which they will work. The myth of the 'real' victim of sex trafficking, who is necessarily a naïve and innocent woman duped or forced into a trafficking arrangement, nonetheless retains its hold on the Australian legal imagination. The agency and diverse experiences of trafficked women are silenced in legal constructions of the 'true' trafficking victim. The notion that 'trafficked women' may at the same time be 'migrant sex workers' seeking independence and economic opportunity has flummoxed judges and legislators alike.

Australian courts have struggled to reconcile a trafficked individual's voluntary entry into a trafficking arrangement at an early stage, with their status as a victim of exploitation who is entitled to legal redress. These Australian legal narratives surrounding sex trafficking reflect and reinforce universalising claims about women and their culture, which have been bolstered by certain feminist agendas in the international arena that have sought rights and recognition on the basis of women's 'universal' experience of victimisation and violence. This paper seeks to offer an alternative legal framework that vindicates the autonomy and decision-making capacity of trafficked women, with the aim of demonstrating that 'to be simultaneously a victim and an agent of one's destiny should not be impossible under the law'.[3]

Progressive on Paper: Australian Anti-Trafficking Legislation

The Australian offences relating to sex trafficking are found in the *Criminal Code 1995* (Cth). Division 270, introduced in 1999, criminalises slavery, sexual servitude and deceptive recruitment for sexual services. In 2005, Australia ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* ('*Trafficking Protocol*').[4] In order to fulfil its obligations to prevent and combat trafficking under the *Trafficking Protocol*, further offences for international and domestic trafficking in persons and debt bondage arrangements were introduced in 2005.[5]

The Australian legislature has increasingly recognised that the diverse experiences of trafficked women do not fit the stereotype of a young and innocent woman kidnapped or deceived by traffickers, and that voluntariness exists in a majority of trafficking arrangements. This reflects the legal irrelevance of victim consent that is set out in the *Trafficking Protocol*.[6] The absence of the victim's consent does not need to be established in prosecutions for Australian trafficking offences, nor can consent of the victim be used in the trafficker's defence.

The Spectre of Consent in the Australian Courtroom

The Australian judiciary has similarly maintained that consent of the victim is irrelevant to the determination of guilt for trafficking offences. Invocation of the victim's consent to a trafficking arrangement has not allowed an offender to escape justice. The court has affirmed that 'consent is not inconsistent with slavery'[7] and 'a volunteer slave... is no less a slave'.[8]

Conflict has arisen, however, between the deemed irrelevance of consent and the weight it is given in the sentencing procedures that are provided in the *Crimes Act 1914* (Cth). Sentences imposed must be 'of a severity appropriate in all the circumstances of the offence' and must take into account 'the personal circumstances of any victim of the offence'.[9] Despite the irrelevance of consent in both national and international anti-trafficking legislation, the discretionary nature of sentencing has enlivened notions of the 'ideal' victim, that is, the passive and unknowing young woman who is abducted and sexually exploited by traffickers against her will. When a trafficked woman deviates from this model by displaying consent to some aspect of her trafficking, her status as a 'legitimate' victim is undermined. This is evident in the way the court has treated victim consent as a mitigating factor in sentencing procedures in *Ho v The Queen* (2011) 219 A Crim R 74 and *R v McIvor* (2010) 12 DCLR (NSW) 91.

Ho v The Queen

In *Ho v The Queen*,[10] it was found that six women who had been recruited from Thailand had voluntarily entered into a contract with the offender to work off an inflated debt of $81,000–$94,000 through sex work, in return for their migration to Australia. Counsel for the offenders argued that the women were properly characterised as 'free spirited entrepreneurs willingly co-operating with the applicants in a business enterprise'.[11] These allegations were rejected by the Court. In what was a clear case of sexual slavery, the women received $5 for each of the services they performed, were required to work 6 days per week and were detained at their residential premises.

In sentencing, Buchanan and Ashley JJA hastened to clarify that the victims' consent did not reduce the seriousness of the offending, and that consenting victims were just as worthy as non-consenting victims.[12] However, their Honours went on to find that although the agreements entered into were harsh, they were freely made.[13] The consent of the victims was a factor that the sentencing judges could, in their discretion, take into account, putting the conduct of the offender 'at the lower rather than the higher end of the scale of the offending'.[14] The offender's original sentence of fourteen years imprisonment was set aside, and he was re-sentenced to eight years imprisonment.[15]

R v McIvor

In *R v McIvor*,[16] Williams DCJ set a higher penalty for offences committed against an 'innocent', unwilling victim. The case concerned Mr McIvor and his wife, Ms Tanuchit's, recruitment of five women from Thailand to work in the couple's Sydney brothel between 2004 and 2006. One of these women, Yoko, came to Australia under the impression that she would only be performing massage work, however, upon her arrival, she had no other choice but to engage in sex work, which she had never done before. Mickey, by contrast, was aware that she would be performing both sex and massage work and had previously worked in the sex industry. In relation to Yoko, on the count of sexual slavery, the offenders were sentenced to four years' imprisonment.[17] In relation to Mickey, the offenders were sentenced to three years' imprisonment.[18] In distinguishing between the sentences Williams DCJ concluded that Yoko's lack of consent to sex work 'must have been a source of additional distress to her'.[19]

Legal Hierarchies of Suffering

In *Ho v The Queen*, the victims were, as acknowledged by the judges themselves, 'not shackled in chains, but shackled in debt, shackled in vulnerability'.[20] They were effectively imprisoned by their dependence upon their traffickers in a foreign environment.[21] In *R v McIvor*, Mickey was, like the other women, detained at the brothel and forced to work every day, and was not permitted to refuse clients even after being physically assaulted by one. The judicial focus on consent deflected attention from these demeaning and exploitative

conditions and the women's consequent status as victims entitled to legal redress. The consenting victim was seen to suffer less harm, although their initial consent did not mean that exploitation and unhappiness did not occur.

Ho v The Queen and *R v McIvor* also raise concerns about discounting the exploitation of victims who have previously worked in the sex industry. Both judgments stressed the prior experience of the victims in the sex industry, although such experience did not reduce the harsh conditions experienced by these victims upon their arrival in Australia. The judges neglected to consider the circumstances of the prior sex work, that is, whether the women were exploited or harmed at that time.[22]

These two cases demonstrate that trafficked women may diverge from unremitting victimisation and display voluntariness in their trafficking, but only at the risk of being viewed as requiring less legal intervention.[23] In these cases, the law could not accommodate the dual capacity of the trafficked woman to be both victim and agent. An exercise of agency only worked to render her victimhood less possible in the eyes of the law.[24] The law allows little space, in its account of those truly deserving of legal recognition and redress, for a trafficked woman that is at all empowered.

Gendered and Racialised Narratives of Victimhood

Ho v The Queen and *R v McIvor* have affirmed that injury and powerlessness are the set terms within which trafficked women make their claims for legal recognition and redress. The judicial construction of the monolithic 'helpless' victim resonates with gendered and racialised notions of victimhood that continue to exist in popular, political and legal discourse. These stereotypical narratives hinder self-identification as a victim of sex trafficking and erase male victims of trafficking. In Parliamentary debates regarding the introduction of new trafficking offences in 2005, Australian legislators echoed the sentiments of the judiciary in characterising trafficking as 'unscrupulous gangs preying on vulnerable women from countries in Eastern Europe and Russia... for use as sex slaves',[25] and trafficked women as 'helpless, afraid and vulnerable'.[26] Both judges and parliamentarians have struggled to recognise that trafficked women are capable of exercising self-determination by choosing to migrate or engage in sex work abroad. Particularly helpless is the non-Western woman, with one member from the House of Representatives stating that 'cultural norms have prepared young women for control and compliance amongst the traffickers'.[27] This resurrects colonial understandings of the tradition-bound non-Western woman who needs rescue from a backwards culture.[28]

The judicial construction of the monolithic 'helpless' victim resonates with gendered and racialised notions of victimhood that continue to exist in popular, political and legal discourse

It is not only state actors that silence the agency of trafficked women. Certain Western feminist discourses have contributed to the image of the trafficked woman as invariably powerless and victimised. In particular, the Coalition Against Trafficking in Woman ('CATW') and other 'sexual slavery' feminists have since the 1990s sought to bring gender and sexuality within the purview of the United Nations and traditional human rights doctrine through a strategic emphasis on violence against women.[29] The female 'victim subject' is essential to this agenda: in particular, the trafficked female 'victim subject,' who represents 'the most egregious form of violence against women imaginable'.[30] CATW has been instrumental in making anti-trafficking a global issue, defining sex work as an inherently exploitative institution of male dominance. In their view, no distinction exists between forced and voluntary migration for sex work, because coercion is always involved. The legacy of CATW's lobbying in the international arena can be seen in the inclusion of 'sexual exploitation' in the international definition of trafficking in the *Trafficking Protocol*.[31] This was preferred over notions of forced labour or servitude that, sex worker activists argued, more accurately reflect the ability of women to consent to sex work.[32]

To advance these particular feminist interests, trafficked women from the Third World are constructed as the *most* victimised of trafficking victims. Referring to Third World sex workers, Kathleen Barry, the founder of CATW, writes:

> 'Sex work' language has been adopted out of despair, not because these women promote prostitution but because it seems impossible to conceive of any other way to treat prostitute women with dignity and respect than though normalising their exploitation.[33]

While the neo-abolitionist feminist agenda views First World sex workers as at least agentic in being complicit in the oppression of women, Third World women are ignorant and incapable of understanding what sex worker rights even involve.[34] They are *eternally* disempowered. This approach silences the subjectivity of women (particularly Third World women, who choose to migrate and to work in the global sex industry), and their possibilities for power and resistance.

An Alternative Legal Framework

The focus on the 'wholly compromised victim' in Australian law and certain feminist agendas serves to produce a view of the woman, and especially the Third World woman, that is far from liberating: she is emaciated, 'not yet a whole or developed person'.[35] The law must better acknowledge that a woman can consciously use a trafficker for the purpose of her own migration and labour. It must shift focus from the 'victim subject' to the 'resistive subject',[36] who may claim legal remedy for exploitation but is not exclusively a victim of violence. Identifying these legal claims as moments of 'resistance' recognises the trafficked woman's agency without invalidating the harms that she may have experienced.[37]

The 'resistive subject' may be centred by the law through the contractual approach that has been proposed by Ramona Vijeyarasa. Vijeyarasa's contractual approach is based on the 'unmet expectations' of the victim who becomes subjected to exploitative and deceptive conditions. As in the case of entry into a labour contract to provide services, the contract is voided if the conditions of work are misrepresented to the employee.[38] By focusing on what women agree to do, the law can validate the agency exercised in trafficking situations by women.[39] While the agreement may have been initially entered into voluntarily, 'this element does not make the individual any less a victim of fraud or deception, or any less entitled to compensation'.[40]

A legal regime that foregrounds the dual agency and victimhood of trafficked women also enables a more detailed consideration of the structural drivers of decision-making. The present criminal law approach is focused on prosecution of individual traffickers; it does not consider the underlying causes of trafficking — including global inequities of capital and labour and gendered poverty[41] — which may compel an individual's decision to enter a trafficking arrangement. These factors pose difficult questions of vitiation of the victim's ability to consent. A contractual analogy — here, specifically, that the victim entered the negotiations with unequal bargaining power[42] — at least opens the door to consider the nuances of decision-making.

This 'resistive subject', in emphasising autonomy, may be seen as threatening to deprive certain camps of Western legal feminism, particularly neo-abolitionist ones, of their traditional foundation from which to make claims for rights and recognition. In contrast, the 'victim subject' provides a universal, un-emancipated subject through whom women can make claims based on a commonality of experience[43] — the helplessness of the Third World trafficking victim being the epitome of violence against women. In doing so, it erases diversity, or merely perceives diversity as aggravating experiences of victimisation.[44] It silences the capacity of women to be other than victims, to choose to move and work, in order to pursue a specific goal that they have rationally devised. As stated by legal scholar Angela Harris, 'bridges between women are built, not found'.[45] Commonality is created through the collective effort and imagination used to recognise differences in the experiences of women, and not solely to be discovered in shared suffering.[46]

Conclusion

Australian courts have demonstrated how a law intended to protect women from exploitation has nonetheless succumbed to a normative script that describes women, particularly Third World women, as powerless. The claim for alternative *legal* approaches to sex trafficking may then be met with scepticism. Australian legal narratives have certainly pointed to the law's inevitable role as a mirror of stable categories of gender and culture, despite the progressive forms that it may take on paper. However, the law is not a mere repository of dominant practices, sustaining existing hierarchies. It is also an active discourse that can contribute to the formation of new beliefs and practices.[47] Law is a significant way of giving meaning to the world, and as long as it holds this position, it cannot be ignored.[48] It can provide an authoritative account of the agency and autonomous decision-making that may be exercised by trafficked women. The law has an important role to play in the social recognition that trafficked women — who are so often seen as 'pliable, foldable, file-awayable, classifiable' — may in fact be 'subjects, lively beings, constructors of vision'.[49]

A rallying cry

Domestic violence in Australian law and society

DIANA LAMBERT

Juris Doctor I

TRIGGER WARNING: This article contains information about domestic violence that may be triggering to survivors.

Every day, eight women are hospitalised due to domestic violence.[1] Every week, one woman dies at the hands of her partner.[2] One in four homicides with female victims are due to domestic violence.[3] I expect you have heard these statistics before; but have you ever considered their implications? Of four of your female friends, one will experience this violence in their lifetime and, chances are, you would not know of it.[4] How many times have you asked your friend, mother, sister: 'has he ever hit you?' Probably never. If they told you that he did, would you believe them?

We learn very early in our legal education that the law is often one step behind society; it is slow to change to reflect shifting social mores. As women, such as Rosie Batty, step forward, and more attention is drawn to domestic violence, we have seen some recent changes in different jurisdictions across Australia.[5] In South Australia, the government considers criminalising certain threatening and abusive behaviours under new domestic violence laws.[6] A number of states have also begun to roll out unpaid domestic leave initiatives.[7]

Sadly, despite these additions, change cannot come soon enough, and there remains a dearth of societal awareness surrounding domestic violence, which has failed to precipitate tangible legal change. Consequently, the law, in its application and enforcement, continues to be inadequate to protect victims, or punish perpetrators.

Counting the Victims

It seems that almost every week a new murder of an Australian woman by her intimate partner is in our headlines.

For Fabiana Palhares, two Apprehended Violence Orders ('AVOs') and home surveillance cameras were not enough to protect her from her former partner Brock Wall. In February 2015, Wall brutally bludgeoned Palhares to death with an axe, while she was 11 months pregnant.[8] In a letter written whilst in custody, Wall expressed no remorse. In 16 years, Brock Wall will be eligible for parole.

Seven years too late, the children of Joy Maree Rowley received vindication from a Coroner's report in Victoria. The report delineated the way that the criminal justice system had failed to protect Ms Rowley from her former partner, who murdered her whilst subject to an AVO, and facing DV charges.[9] Speaking on this tragedy, a government spokesman acknowledged that 'the Victorian Government fully recognises that family violence is our nation's number one law and order issue and needs a new approach to end it.'[10]

These are only a few of the innumerable examples that demonstrate the inadequacy of the criminal justice system that has repeatedly failed so many women – with fatal consequences.

It is crucial, however, to recognise that these cases are only known to the public because they have resulted in homicides. What lies beneath each of these tragedies are the unreported, unacknowledged instances of violence, intimidation, controlling behaviour and stalking that constitute domestic violence. We know these women's names because the consequence of their abuse was death. There are countless unnamed women who suffer domestic violence every day. In most cases, the most reported impact of domestic violence is mental illness.[11] Others are rendered homeless as a result.[12] In 2016, 72,000 women sought homelessness services due to domestic violence. This has to change.

The State of the Law in Australia

Unfortunately, in the current criminal justice system, domestic violence is often treated as a second-class offence. The principal method of legal recourse for a victim seeking protection from a current or former partner is through an AVO.[13] As AVOs are currently dealt with in the civil courts, it creates a widespread perception that domestic violence is not as serious as violence committed in the public sphere.[14] Denouncement of socially unacceptable behaviours, vindication of victims, and protection of society at large are core tenets of the criminal justice system. The current treatment of domestic violence — its victims and perpetrators — in the criminal justice system has failed to apply these cornerstone principles.

Compounding the problem, many Magistrates in NSW courts have reported an aversion to awarding AVOs, oftentimes reserving them for cases with indisputable evidence of physical violence.[15] This emphasis on physical evidence presents yet another impediment for women seeking protection within the law. NSW lawyers are urged to advise their clients to bring evidence of violence to court when filing for an AVO.[16] Without such evidence, it is difficult to satisfy the test laid out for the awarding of an AVO: which provides that a victim must prove reasonable grounds for fear and that fear does, in fact, exist in the victim's mind.[17] While a large number of women suffer physical violence at the hands of their partners, emotional violence is much more prevalent. Unfortunately, emotional scars are extremely difficult to convey to outsiders; they cannot conceivably grasp the unadulterated fear experienced by victims of any domestic violence situation. Finally, even where AVOs are granted this is often little cause for hope: many in the legal profession consider them counter-productive.[18] In fact, there is little evidence of their success in preventing domestic violence.[19]

... emotional scars are extremely difficult to convey to outsiders; they cannot conceivably grasp the unadulterated fear experienced by victims of any domestic violence situation.

Such barriers to protection of domestic violence victims are perhaps unsurprising given 53% of Australians believe that women often bring false claims in custody cases.[20] Sadly, the legal profession is not immune to these beliefs, according to surveys of lawyers reported beliefs.[21] In Family Law, the belief that AVOs are used for tactical advantage is pervasive.[22] This default of disbelief has not abated with time and continues to hinder attempts at reform. It further serves to substantiate the claim that legal change will only be precipitated by a shift in societal norms that acknowledges the victims and real consequences of domestic violence.

The impact of such poor avenues for recourse is clear: very few survivors speak up. Negative past experiences with the justice system are a substantial deterrent for seeking legal action.[23] Of women suffering domestic violence at the hands of their current partner, a mere 17% contact police to initiate legal proceedings.[24] Shame, self-blame, financial insecurity, fear of revenge, and denial are also contributing factors. Women suffering from domestic violence are not empowered to seek assistance, nor are they equipped with the necessary information or resources to do so.[25] This leads 50% to believe they can deal with it themselves, and 36% to believe it is not serious enough to report.[26]

Our Role

One of the primary impediments to tangible change is a lack of understanding of what domestic violence *is*. As future lawyers, it is crucial for us to understand what domestic violence is, and how to recognise it. Domestic violence, intimate partner violence, family violence, or 'domestics' are just some of the terms for what the government defines as 'any behaviour that is violent, threatening, controlling or intended to make you or your family feel scared and unsafe'.[27] Contrary to popular belief, the definition is not confined to merely physical acts,[28] but includes verbal or emotional abuse, stalking and financial abuse. The signs of an abusive relationship do not only consist of bruises and broken bones, but can include jealous accusations, control over outfit choices, public and private humiliation, monitoring location or phones, constant criticism, and threats.[29]

As lawyers, we must be of our own inherent prejudices carried throughout our practice of the law. If we do not believe our friends, sisters or mothers when they tell us of their experiences, how will we be able to appropriately prosecute this form of violence? Such a question demonstrates the intersection of society and culture and the law. Engineering change in the justice system and legal profession must first start with a change in social norms and perceptions about domestic violence.

Silence begets silence. As victims, it takes courage to enter into the legal system with such a personal and harrowing tale. As lawyers, we must be able to provide support and empathy where it is needed most. We must treat domestic violence as we would any other occurrence of violence in the public sphere. As members of society, let us take this same understanding. Let us speak up when we are faced with situations of domestic violence.

If you do not know a woman who has suffered domestic violence, let me introduce myself. For me, violence is a lived experience, one that once formed a daily part of my life. I hope that if I am ever able to break the shackles of my fear, shame and self-blame, I could seek refuge within the criminal justice system. Now, studying to be a lawyer, I hope to help many women like me, to achieve the protection, vindication and justice they deserve.

Part Two

Public consultations for anti-discrimination law

Democratic process or political device?

RHYS CARVOSSO

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The arena of federal anti-discrimination law has been particularly susceptible to political tug-of-war. In the last decade alone, there have been no fewer than five public inquiries into whether Australian anti-discrimination laws impinge on other rights and freedoms. The most recent of these was the Religious Freedoms Review ('Review'), in which a Panel chaired by Phillip Ruddock investigated whether the legislation of marriage equality in late 2017 has impinged on freedom of religion to an impermissible extent. The Panel delivered its final report to the government in May 2018.[1]

It remains to be seen whether the government will publicise the Panel's recommendations or act on them. This article, however, places the Review in the context of previous public consultations on anti-discrimination law. It examines the timing, process and outcome of past consultations, including the latest Review, to determine why anti-discrimination law has been a recurring subject of such processes. Finally, it considers the cumulative effect of consultations on how the public is encouraged to perceive anti-discrimination law.

It will conclude that consultation processes in the field of anti-discrimination law tend to be products of political contingency rather than any democratic sentiment. They are announced at politically opportune moments and their recommendations are readily disregarded. Further, the process of these consultations appears neutral but perpetuates the very power imbalances which anti-discrimination law was intended to rectify. However, because these consultations bear the outward signs of neutrality, the public has been encouraged to view their repeated use to review anti-discrimination protections as evidence that those laws occupy a lower and more precarious position than other laws.

Existing Religious Exemptions to Anti-Discrimination Law

In Australia, anti-discrimination protections are found in an unwieldy lattice of state and federal law. There are four federal Acts relating to race, sex, disability and age,[2] which substantially overlap with the generalist Acts operating in each state and territory.[3] The scope of operation of these federal and state laws is not uniform. Rather, it varies from discrimination in certain contexts, like employment,[4] to discrimination in all areas of 'public life' (itself a slippery term which eludes uniform definition). In structure, however, the state and federal laws are similar in that they prescribe a number of 'protected attributes' and prohibit discrimination in respect of those attributes subject to certain exemptions.

Importantly, two of the four federal Acts contain exemptions for religious bodies.[5] These permit discrimination in respect of what would otherwise be protected attributes. Religious exemptions fall into three categories: (1) specific exemptions for the appointment and training of priests; (2) educational exemptions for religious schools; and (3) general exemptions for everyday religious practice.[6] Only the *Sex Discrimination Act* contains all three categories of exemption,[7] while the *Age Discrimination Act* contains only general exemptions.[8] The general exemptions typically apply if the impugned act conforms to the doctrines, tenets or beliefs of the religion, or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[9]

The Religious Freedoms Review in Context

The Religious Freedoms Review was announced in the context of the legalisation of marriage equality in Australia. Despite the 'unequivocal' results of the federal government's non-binding postal survey, which demonstrated a 61.6% majority in support of marriage equality,[10] religious bodies continued to resist legalisation due to concerns that religious adherents would be at risk of violating anti-discrimination law for merely following the tenets of their faith. One popular scenario which religious bodies used to illustrate their point was that of the religious baker who would be forced to bake cakes for same-sex weddings.[11] The current exemptions in the *Sex Discrimination Act*, it was feared, only attach to religious bodies, thereby exposing private persons and companies to liability if they were to discriminate on the basis of sexual orientation when selling goods or services.[12]

Accordingly, the Review was announced on 27 November 2017, before marriage equality had even become law. Comprised of five senior public figures,[13] its Panel was tasked with examining 'whether Australian law adequately protects the human right to freedom of religion'.[14] The Panel received over 16,000 submissions and delivered its final report to the government on 18 May 2018. The report has neither been released nor acted on since.[15]

The Review was the latest in a steady stream of rights inquiries in Australia over the last decade. Back in 2008, the Rudd government launched the National Human Rights Consultation, which recommended the development of a bill of rights that would include anti-discrimination protections.[16] The government rejected that recommendation,[17] and instead launched a Human Rights Framework which committed to consolidating the five pieces of Commonwealth anti-discrimination legislation into one.[18] The proposal underwent several phases of consultation, first with church leaders and then through a public submission process from September 2011.[19] When the Gillard government announced a draft bill in 2012 that consolidated the federal anti-discrimination laws into one, it underwent another consultation process in the Senate Legal and Constitutional Affairs Committee, which suggested substantial amendments.[20] The bill was ultimately withdrawn by the Gillard government.

Just a year later, in March 2014, the Coalition government tabled a proposal to water down section 18C of the *Racial Discrimination Act*.[21] After 76% of respondents opposed the amendments in the ensuing consultation process,[22] Attorney-General George Brandis instead referred the matter to the Australian Law Reform Commission ('ALRC'), requesting it to identify any Commonwealth provisions that 'unreasonably encroached on traditional rights, freedoms and privileges'.[23] However, the ALRC's final report in March 2016 left the question of whether section 18C had caused 'unjustifiable interferences with freedom of speech' to a subsequent review.[24] As for freedom of religion, it reported:

> There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations.[25]

The Role of Public Consultation in Anti-Discrimination Law

Public consultation has been a regular device of the legislative process in the context of proposed developments to anti-discrimination law. There also appear to be commonalities in the timing, process and outcome of previous consultations. Viewed in that light, the Review is the latest iteration of an observable trend, rather than a bespoke inquiry into current social grievances.

Timing

The timing of a public consultation appears to often coincide with moments when the government is looking to press some broader policy or political cause. For instance, the 2008 Human Right Consultation was announced at a politically charged moment in Australian political history, by a Labor government looking to assert its socially liberal credentials after a decade of conservative rule. Conversely, the Coalition government's decision to call an ALRC Freedoms Inquiry in 2014 could reasonably be interpreted as an attempt to swing the needle back toward 'traditional rights and freedoms' after the failed 2012 Human Rights and Anti-Discrimination Bill.[26]

Anti-discrimination law academic Margaret Thornton describes this as the 'political contingency' of anti-discrimination law. She suggests that the back-and-forth of public consultations reflects the inherent 'ressentiment' of social liberalism: that is, the constant oscillation between social liberalism's two competing forces, freedom and equality.[27] The context and timing of these consultations certainly appears to support that notion. On that view, the major political parties use public consultations to strengthen their electoral appeal, by reshaping the field of anti-discrimination law in order to assert their respective visions of liberalism — a commitment to equality over freedom for the Australian Labor Party, and a commitment to freedom over equality for the Coalition.

This tactic is not a novel one; in fact, academics have observed since the 1980s that the 'setting up of token government machinery for the implementation of legislation' has enabled governments to influence the administration of anti-discrimination law for their own political purposes.[28] For instance, the Fraser government de-funded the Federal Office of Community Relations, constituted under the *Racial Discrimination Act*, despite maintaining the illusion of official support for the office.[29] On Thornton's view, the timing of that decision would seem to reflect Fraser's broader ideological goal to unwind the Whitlam government's drastic lurch away from freedom toward equality.

Further, the use of 'quangos' — quasi-autonomous non-governmental organisations — to administer anti-administration law has strategic advantages. The semi-autonomous status of the quango serves to deflect criticism for controversial policies away from government, even though the government 'retains ultimate control through ministerial supervision of funds and appointments'.[30] This leaves the government 'free to pursue a number of contradictory policies simultaneously'.[31] To the extent that government-appointed review panels bear the same characteristics as quangos — both are semi-autonomous bodies funded and appointed by government, but intended to operate independently and to be perceived as doing so — then the same observations apply.

Viewed in this context, the timing of the latest Review smacks of political expediency. The Review was convened just as marriage equality was to become law, by a government that had previously opposed marriage equality. Having backed itself into a corner by agreeing to implement the result of a plebiscite, the Coalition could no longer openly oppose the legislation once the plebiscite had found in favour of marriage equality. However, it used the device of a public consultation to bolster its own version of social liberalism from a distance. At the same time as it legislated for marriage equality with its official voice, the government delegated the task of reviewing and potentially circumscribing the right of marriage equality to a semi-autonomous review panel over which it had ultimate control.

Process

In theory, consultations should be neutral and independent. Panellists are deliberately chosen to span the political spectrum. Submissions are open to the public for a sufficiently long period. Each submission is read and considered, whether it comes from the poorest individual or the most powerful and wealthy organisation in Australia.

However, despite these neutral elements, public consultations have tended to 'privilege those with a vested interest'.[32] In the context of inquiries into religious freedoms, the literature shows that the voices of the various denominations of the Christian church tend to monopolise the process. Several academics have examined church submissions to past public consultations regarding the balancing of religious freedom and anti-discrimination law,[33] concluding that churches have tended to adopt an obstinate position within their submissions. In their view, church submissions were 'framed with almost no reference to questions of social power, privilege and social exclusion',[34] and used the idea of religious freedom as a 'stalking horse' to maintain their own power and privilege.[35] These submissions also tended to characterise Christian culture as the 'core' Australian culture which the panels were tasked with protecting.

That church submissions outnumber non-religious submissions should not, in and of itself, bear on the integrity of a submission process that is open to all. In any case, to insist on numerical equality between religious and non-religious submissions would be a futile and reductive exercise. But perhaps such heavy church involvement taps into the uneasy tension between state secularism on one hand, and organised religions using their influence to advocate for social policy based on non-secular views.

More concerning, however, is the fact that churches are able to coordinate and use their status in a way that minorities, who stand to lose the most if anti-discrimination protections are watered down, cannot. If the submission process were carried out amongst individuals with the same language ability, legal awareness and sense of civic connection, and with links to cultural associations of equal social cachet, then perhaps it would fairly be described as neutral. But that is not the case. Indeed, minorities — the elderly, disabled, ethnic minorities, and the LGBTI community — face extra barriers to participation for the same reason that they are protected under anti-discrimination law: because they have suffered, and continue to suffer, systemic disadvantage owing to attributes that they did not choose. The Catholic Church, on the other hand, is able to coordinate using its centuries of accumulated wealth, resources and social status.

There is no doubt that minorities are being shut out from making submissions on account of factors other than the intensity of their opinions. To that extent, the current methodology for public submissions is flawed. It readily allows a panel to mistake the existence of structural barriers to participation for an absence of support for an opinion, or conversely, a greater ability to coordinate and leverage social status for a more popular opinion. This calls into serious question whether public consultations are an appropriate or just means of gauging public opinion on social issues. It is certainly arguable that previous consultation processes around freedom of religion in Australia have 'failed the test of both fairness and substantive equality' for these very reasons.[36]

In the same way, the latest Review was ostensibly neutral. Its panellists were diverse, and it accepted over 16000 submissions from individuals and organisations alike. However, the observable elements of the process appear to have fallen foul of the same biases as its predecessors. Of the 16 groups of 'substantially similar' submissions made to the Review, 14 were made in favour of maintaining or extending religious protections. And given the extensive participation of various denominations of Christian churches in past consultations, it also seems reasonable to infer that some of the group submissions were encouraged or even written by church officials. Indeed, some submissions even refer directly to their church.[37]

Perhaps that is to be expected; after all, this is a Religious Freedoms Review, and religious bodies have a vested interest in making their position known. But of course, freedom of religion (in the expansive way that religious bodies would define it) and anti-discrimination protections are mutually exclusive, such that to strengthen one is to weaken the other. Minorities have no less at stake.

Here, as before, there were no special measures adopted to ensure that ethnic minorities or the LGBTI community were able to participate in the Review. Therefore, the same structural barriers to participation presumably did operate. Indeed, in this case, the LGBTI community faced the emotional barrier of having to participate in a public consultation process that might qualify and restrict the very right they had just obtained, after decades of activism. It follows that this Review has likely fallen foul of the same methodological defects that hampered its predecessors.

Outcome

Third, public consultations are not guaranteed to result in change. Indeed, consultations which begin their life as instruments of political contingency appear doomed to end that way, too. For instance, when the 2008 Human Rights Consultation made too bold a recommendation for Kevin Rudd's political appetite — the development of a human rights act — he shelved the recommendation. Moreover, the Coalition's approach to public consultation since 2014 is equally telling. After the Coalition's proposal to weaken section 18C of the *Racial Discrimination Act* was resoundingly opposed in a public consultation, its next move was to request an ALRC Freedoms Inquiry. But if it hoped that the ALRC would reach a convenient conclusion and vindicate the Coalition's policies on watering down anti-discrimination laws, it was mistaken. As for freedom of religion, the ALRC found that 'it is not clear that freedom to manifest religion or belief should extend to refusing to provide, for example, a wedding cake for a same-sex couple', and that 'protecting individuals from discrimination in ordinary trade and commerce seems a proportionate limitation on freedom of religion'. However, that has not deterred the Coalition from disregarding the ALRC's findings and continuing to advocate for that very thing.[38]

In this sense, consultations are both products and victims of political contingency. The very same government that calls for a consultation might be there to rebuff its recommendations down the road — or even pursue the exact opposite course of action. As for the latest Review, it remains to

be seen how the government will treat the Panel's findings. But the recent trend suggests that there is every chance that the government will disregard its recommendations entirely if political expediency dictates that it should. In any case, the government is between a rock and a hard place: the risk of implementing recommendations is that it will be interpreted as an admission that the original law was inadequate, while disregarding them renders the Review redundant.

Consequences

What, then, is the cumulative effect of past consultations on the public perception of anti-discrimination laws? On one view, public consultation is an eminently desirable method for devising social policy. Its subject matter is appropriate, since an ideal social policy is often thought to reflect the prevailing social mores of the constituency. The legislation of marriage equality only after it received majority approval speaks to that majoritarian ethos. Its methodology also appears transparent, inclusive and non-partisan. On this view, the fact that anti-discrimination law has been the subject of numerous consultations is justified, because it is a contentious and imprecise area of law which has rightly been informed by the public's social mores rather than devised in accordance with a partisan political agenda.

However, there is serious reason to doubt that the above premise is even true. After all, despite a veneer of neutrality, most consultation processes around freedom of religion and anti-discrimination protections have perpetuated the very power imbalances that anti-discrimination law was intended to rectify.

But even if it were true, then the way that governments have used public consultations in practice has deprived them of their democratic force. First, there are no transparent guidelines or rules which regulate the announcement of a public consultation or its process. Rather, it appears to be an incident of executive power, exercisable by the Department of the Prime Minister and Cabinet at a whim and governed by convention. The result is that we have no say as to which social policies will be devised through consultation. Second, there is no guarantee that consultations which do occur will result in change. Most recommendations are ignored or rejected. In light of this, the Review and its predecessors ought to be perceived for what they really are: political devices masquerading as neutral rights inquiries.

These problems do not figure to be insurmountable. Perhaps public consultations could only be convened on request from a sufficient number of electors; or rules could be drafted which require the government to ensure that the process is substantively, and not just formally, equal; or the government could be compelled to give reasons for declining to implement a panel's recommendations. Perhaps then, public consultations could fairly be called apolitical. Perhaps then, consultations would be perceived as enhancing the quality of our democracy.

Unfortunately, the cumulative damage to our perceptions of anti-discrimination law may be irreversible, regardless of how consultation processes could be improved. The circumstances in which the latest Review was announced encourage the perception — one that the current government might itself believe — that marriage equality is different to other laws. To require majority approval for a law through a plebiscite, and then once passed, to submit it for further public consultation against the full might and influence of the churches, is to subject a law to a far higher standard of approval than the legislative process was designed to require. The government's tacit implication is that marriage equality occupies a status below that of any other law passed in the ordinary course of its business.

The stream of public consultations into anti-discrimination law has caused a similarly enfeebled view of that area of law in general. We have been encouraged to believe that anti-discrimination protections must meet higher standards to be afforded the weight of law, and that even then, these protections are always subject to review. However, to treat anti-discrimination laws as qualified and precarious is inconsistent with the general tenor of these laws — as corrective instruments to protect those people whose access to justice and claim to equality has already been prejudiced on account of their membership of a certain group. That is a perception which should no longer stand. To the extent that public consultations in their current form encourage that perception, they ought to be drastically reformed or else discontinued.

Policing power

Whistleblowers and the corporate social licence to operate

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The Australian private sector is littered with cases of corporate misconduct that have hurt people in vulnerable positions. In recent times, whistleblowers have uncovered wrongdoing in the Commonwealth Bank of Australia's financial planning and life insurance arms, and have exposed wage theft and fraud at 7-Eleven.[1] Recipients of poor financial advice from Commonwealth Bank advisors suffered serious financial loss and distress.[2] Customers of CommInsure policies who had lodged legitimate claims when diagnosed with serious — even terminal — illnesses were rejected through CommInsure's use of out-of-date medical definitions.[3] 7-Eleven workers were systemically underpaid, with franchisees doctoring payroll records to conceal wrongdoing.[4]

When companies engage in misconduct in violation of their legal or ethical obligations, they breach their social licence to operate. The concept of a corporation's social licence to operate can be traced to the political and philosophical notion of the social contract — under the terms of this licence, corporations must act in accordance with their legal and ethical obligations like natural persons.
Whistleblowers play an important role in policing a corporation's compliance with its social licence by exposing misconduct. In the past, however, whistleblowers have suffered death threats, financial loss, relationship breakdowns, reputational damage and career ruin.[5] Because the fear of such consequences casts a net of silence over prospective whistleblowers, whistleblower protection laws can play an important role in mitigating the costs associated with disclosing corporate misconduct, thereby encouraging more whistleblowers to come forward. However, there are serious questions as to the adequacy of current protections in Australia, even in light of recently proposed reforms.

What Is A Social Licence To Operate?

According to social contract theory, persons who are or have become members of a community are said to have impliedly agreed to subject themselves to laws and ethical rules which are ideally conducive to the creation of a fair and just society in which all members can flourish.[6] Social contract theory has historically been applied to demonstrate that a sovereign's political power is ultimately held on trust for the people who have voluntarily consented to living under the rule of such a sovereign.[7] However, this theory has also been implicitly applied in the private sector, through the idea that each corporation holds a social licence to operate. Under this licence, corporations must behave legally and ethically as members of a society.

That corporations are now expected to operate within their social licence is itself a reflection of the 'rise of the modern corporation'.[8] The largest companies in the world affect the lives of millions of people by creating jobs, supplying critical goods and services, and influencing policy.[9] The most distinctive feature of the modern corporation is its legal personality. A corporation possesses property rights and can enter into contractual arrangements.[10] Its shareholders enjoy limited liability — in other words, a company's debt does not become the personal debt of shareholders.[11] Moreover, its directors and officers enter into agreements acting as the company or its agents.[12] As a result of its legal personality, the corporation has become the ideal vehicle for enterprise and risk-taking.[13]

Historically, debate has surrounded the responsibilities of companies: is a company's sole responsibility to merely increase profits whilst following the law,[14] or does it have additional social obligations like those of natural persons? The limited liability enjoyed by shareholders appears to give them reasons 'not to care how profits are garnered by a corporation or how the value of shares is maintained or enhanced'.[15] Yet, if corporations are granted legal personality, it would be reasonable to believe that they also enter into the social contract and must act in accordance with their social licence to operate — after all, most modern corporations enjoy a power imbalance in relation to the persons that they interact with. However, that corporate power ultimately derives from an implicit agreement by natural persons that corporations should have a separate legal personality.[16]

The Role Of Whistleblowers In Policing Power

Corporate whistleblowers are persons who disclose details of corporate misconduct to organisations that are able to compel the cessation of such misconduct, or forcefully call for its eradication.[17] Given that public enforcement of the law relies on real government resources to investigate and prosecute misconduct, whistleblowers effectively subsidise this enforcement function of government by providing insider information.[18] The importance of whistleblowing is magnified by concerns that 'the detection and conviction rates of corporate crime are too low'.[19] Why is there a low rate of detection and conviction? The complexity of corporate misconduct is one obvious reason; it can involve multiple actors operating within complex organisational structures over long periods of time.[20] Further, the ability of government regulators to detect and prosecute misconduct can be undermined by a lack of resourcing.[21]

Given the important role that whistleblowers play in policing corporate power, it is concerning that most whistleblowers end up being maligned, rather than celebrated (or rewarded). They often face loss of employment, given that the exposure of major fraud can irreparably injure the company (and companies will therefore attempt to prevent this exposure from occurring).[22] Moreover, whistleblowers face a formidable 'social and cultural risk'.[23] The social value of 'teamwork' and the negative perception of 'rats' creates a powerful psychology about how whistleblowers are viewed.[24] The result is that many whistleblowers face social ostracism — a subtle but powerful means by which whistleblowers are silenced. Moreover, it is likely that a whistleblower will have closer professional relationships with corporate wrongdoers, further disincentivising the disclosure of misconduct.[25] The risk of social ostracism also appears to increase where a whistleblower discloses larger cases of corporate misconduct, since larger wrongdoings are more capable of destroying a company and its employees' livelihoods.

The result is that many whistleblowers face social ostracism — a subtle but powerful means by which whistleblowers are silenced.

Social ostracism can also place psychological strain on a whistleblower. As investigations into corporate misconduct can drag out over many years, and as the stigma of being a whistleblower builds, whistleblowers often suffer relationship breakdowns with friends, colleagues and family.[26] When Jeff Morris, a financial planner at the Commonwealth Bank of Australia, uncovered systemic misconduct in the bank's financial planning arm, his anonymity was not protected. He received death threats and lost his job — but it was the decision of his wife to leave Jeff and take their two kids that was most striking.[27] 'My family paid a price as a result of my decision, and in many ways, I had no right to expect my family to pay that price,' he told the *Australian Financial Review*.[28]

Whistleblower Protections

Even if a whistleblower's disclosure compels a corporation to cease engaging in misconduct, the overwhelming disincentives attached to such a disclosure mean that whistleblowers often sacrifice their life prospects to achieve that result.[29] Indeed, the serious reputational, financial and social costs of whistleblowing mean that it is prima facie irrational to do so.[30] Only someone with an unwavering moral conviction and disregard for self-interest would disclose corporate misconduct. However, given that whistleblowers play an important role in ensuring that corporations behave in an ethical and legal manner, there is societal value in protecting whistleblowers. Whistleblower protection laws shift the benefit-cost equation for prospective whistleblowers by making it less costly to reveal unethical or illegal corporate conduct, thereby encouraging more persons to come forward.

Current Regime

In Australia, the main protections for private sector whistleblowers are contained in the *Corporations Act 2001* (Cth) ('*Corporations Act*'), and extend only to breaches of that Act. However, similar protections have been introduced in the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth) and the *Superannuation (Supervision) Act 1993* (Cth) in relation to breaches of banking, insurance and superannuation legislation.[31]

There are five requirements for a whistleblower to be eligible for protection under the *Corporations Act*. First, the person seeking to disclose information about a company must be an officer of the company, an employee of the company, a person who has contracted to supply services or goods to a company, or an employee of such a supplier.[32] Second, the disclosure must be made to: the Australian Securities and Investments Commission; the company's auditor; a director, secretary or senior manager of the company; or a person authorised by the company to receive disclosures of that kind.[33] Third, the discloser must inform the person to whom the disclosure is made of the discloser's name before making the disclosure.[34] Fourth, the discloser must have reasonable grounds to believe that the company has contravened a provision of the *Corporations Act*.[35] Finally, the whistleblower must have disclosed information in 'good faith'.[36]

Whistleblowers who satisfy the above criteria are immune from civil or criminal liability for the disclosure,[37] cannot be subject to the enforcement of contractual or other remedies,[38] possess qualified privilege in respect of their disclosures,[39] can have their employment reinstated if it has been terminated for a disclosure,[40] and have a right to compensation if they have suffered loss.[41] Furthermore, corporations have confidentiality obligations in relation to the disclosed information,[42] and are prohibited from victimising a whistleblower — that is, to cause any detriment to the person or threaten to cause detriment.[43]

Strengthening Protections Through Reform

In response to criticisms of the unduly narrow nature of protections currently afforded in law,[44] the government has introduced the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 ('Bill'). The Bill extends current protections to former employees and contractors, who are curiously not contemplated under the current protections. More importantly, however, the Bill introduces the concept of a 'disclosable matter', which is defined in the Bill as information that a whistleblower has reasonable grounds to suspect:

1) concerns misconduct, or an improper state of affairs or circumstances in relation to a regulated entity (which includes companies and constitutional corporations); or
2) indicates that a regulated entity (or an officer or employee of that entity) has engaged in conduct that:
    a) constitutes an offence against the *Corporations Act*, the *ASIC Act 2001* (Cth), the *Banking Act 1959* (Cth), the *Financial Sector (Collection of Data) Act 2001* (Cth), the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth), the *National Consumer Credit Protection Act 2009* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth), or regulations made under those laws;
    b) constitutes an offence against any other law of the Commonwealth punishable by imprisonment for a period of 12 months or more;
    c) represents a danger to the public or the financial system; or
    d) is prescribed by regulation.[45]

In doing so, the Bill consolidates the protections available in relation to disclosing breaches of banking, insurance and superannuation legislation, and expands the concept of a 'disclosable matter' to includes breaches of any Commonwealth law (punishable by 12 months imprisonment or more) and even misconduct that does not involve unlawful conduct. This proposal reflects the view that all corporate wrongdoing is undesirable — even misconduct that does not amount to a breach of the law. Indeed, just as there is an obligation for corporations to be socially responsible and ethical, there should be a corresponding protection for whistleblowers who disclose violations of ethical norms. While it is difficult, of course, to legislate something as contestable as ethics, the terms 'misconduct', 'improper state of affairs or circumstances' and 'danger to the public or financial system' appear to be useful proxies for socially responsible corporate conduct. The broad nature of these terms also means that whistleblowers need not go through the process of seeking legal advice as to whether a company's actions constitute a breach of a law before being confident as to their eligibility for whistleblower protections.

The Bill also removes the 'good faith' test, which is not only hard to apply but also inconsistent with the policy objective of ensuring that companies comply with their social licence obligations — after all, even if a whistleblower reports a disclosable matter in 'bad faith', that information is equally as useful in prosecuting a corporation that has engaged in misconduct. The requirement for whistleblowers to disclose their identity has also been removed. Given that the fear of social ostracisation — in addition to career destruction and financial ruin — is a serious deterrent to prospective whistleblowers, this is a most significant amendment.

In addition to expanding the class of persons who are eligible for whistleblower protections, the Bill strengthens the anti-retaliation measures that are used to protect these whistleblowers. Currently, the penalty for disclosing a whistleblower's identity or victimising a whistleblower is $4,500 or imprisonment (a penalty that is difficult to enforce against a company).[46] For most corporations, such a small fine is little deterrence for conduct that might enable them to prevent the disclosure of embarrassing information — information that could have a much greater impact on the profitability or value of the company. The Bill increases the maximum penalty to $200,000 for individuals and $1 million for corporations. Moreover, if whistleblowers suffer loss, it is now easier for them to receive compensation as the onus of proof is reversed (so long as the whistleblower shows that there was a reasonable possibility of victimising conduct from others in the company).

Assessing the Reforms and Future Directions

In providing additional protections for whistleblowers, the Bill has the effect of not only encouraging whistleblowers to come forward but also driving cultural change within the Australian private sector. If whistleblowing protections help to ensure that companies comply with their legal and ethical obligations, then the ultimate test for whether the Bill is effective is whether corporate misconduct is being detected and consequently reduced. Given that it is impossible to comprehensively quantify or assess whether corporations are being deterred from committing wrongdoing — the absence of any detections could either reflect a culture of corporate compliance or a failure of government regulators to effectively detect such wrongdoing — the best possible measure for the effectiveness of these laws is whether more whistleblowers do come forward, leading to prosecutions by law enforcement agencies.

That is not to say that the creation of a culture of compliance should not be a legitimate aim of the whistleblower protections. Prima facie, if whistleblowers are more willing to disclose breaches of legal and ethical obligations, then the risk that a corporation's misconduct will be exposed is increased and the incentive for that corporation to operate in a socially responsible manner is amplified. The Bill's focus on driving cultural change is also helped by its requirement for public companies and large proprietary companies to develop whistleblower policies,[47] and its provision for whistleblowers to make emergency disclosures to Parliament or journalists in special circumstances.[48] Journalists have played important roles in exposing misconduct, often acting where there have been failures in the investigative work of companies or regulators. Due to the vested interest of the 'fourth estate' in holding power to account, and the reputational concerns most corporations share, this should further encourage a culture of compliance.

Nonetheless, it is important that the whistleblower protections lead to more disclosures of information about corporate misconduct that ultimately result in successful prosecutions. After all, even if there are significant penalties for corporate misconduct — and in Australia, this is not the case — the risk of

enforcement is a salient factor for the deterrence of such misconduct.[49] If the Bill is unable to realise the potential role of whistleblowers in policing corporate power by failing to adequately incentivise whistleblowers to come forward, then a future direction for whistleblower protections could be to offer monetary rewards.[50] Thus, in addition to receiving the benefit of anti-retaliation provisions, a whistleblower could also be motivated by the prospect of receiving a reward for information that leads to a successful prosecution.

From a cost perspective, the creation of a whistleblower reward scheme would still be an efficient way of policing corporate power. Government regulators require significant resources to detect misconduct and whistleblowers allow regulators to investigate misconduct that would have required serious resources to detect or which otherwise might not have been detected.[51] Other jurisdictions provide successful examples of whistleblower reward systems: for example, the Securities and Exchange Commission (SEC) in the United States of America has run a whistleblower program since 2011, under which eligible whistleblowers are 'entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC and related actions brought by certain other regulatory and law enforcement agencies'.[52] Introduced under the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, the whistleblower program was part of a range of measures taken by the government to improve accountability in the financial system following the 2008 Global Financial Crisis.[53] In the last six years, whistleblower disclosures to the SEC have increased by almost 50 per cent,[54] with subsequent enforcement action leading to penalties of over US$975 million for wrongdoers and approximately $160 million in whistleblower awards to 46 individuals.[55]

In Australia, there has been some reticence to adopt a reward scheme to incentivise whistleblowing. Some persons have argued that it would be morally perverse to pay people to do the right thing.[56] However, if the value and success of whistleblower protection laws is measured on their capacity to detect and deter corporate misconduct, then it is not a material criticism that whistleblowers are paid for their contribution. Such a view is consistent with the use of rewards by the police in their criminal investigations. It is also consistent with the Bill's removal of the 'good faith' requirement for whistleblowers, which is underpinned by a recognition that the focus of whistleblower protection laws is not on the motives of the whistleblower but on the need to police corporate power.

Other persons have rejected the need for a reward scheme, arguing that most whistleblowers are motivated by altruistic rather than monetary reasons.[57] However, this does not mean that a reward scheme would not be valuable — a rational person will ultimately compare the expected utility of a decision with its costs before considering whether to make that decision. The creation of a monetary incentive, by increasing the benefit of a decision to disclose, can only increase the expected utility of all persons in whistleblowing. Thus, a reward scheme would have the positive effect of encouraging all persons to come forward with information about corporate misconduct, including those who are not convinced by altruistic reasons alone to sacrifice themselves for the sake of exposing the next corporate scandal.

Conclusion

All corporations are legal persons operating within a society, with the same obligations to act ethically and legally as natural persons. Unfortunately, however, corporate misconduct remains quite common and arguably difficult to detect. While whistleblowers play an important role in ensuring that corporations comply with their social licence to operate, the costs of whistleblowing seriously disincentivises disclosure for many.

The government's proposed reforms take a meaningful step in improving whistleblower protections — notably, by expanding the scope of disclosable matters and strengthening anti-retaliation measures. However, it remains to be seen whether the government's measures are sufficiently ambitious. Given that law enforcement is the best deterrent of corporate misconduct, further incentives may be required to entice whistleblowers to come forward with the information required to prosecute such misconduct. Under our social contract, it is in the interests of all people that our laws support those individuals who risk their livelihoods to ensure that the modern corporations we all deal with operate firmly within their social licence.

Protecting our right to privacy

Moral perspectives on data processing under the GDPR

NINA MAO

Bachelor of Arts /
Bachelor of Laws V

As we spend more and more of our time online, it is increasingly important to be vigilant about how adequately our rights are protected in the digital sphere. In March this year, the value of Facebook's shares plummeted by $35 billion after it was revealed that data firm Cambridge Analytica harvested data from over 50 million Facebook profiles for political advertising purposes.[1] However, it is not the generation of the data that is the crux of the issue, but users' *control* over it. The anger elicited by the Cambridge Analytica data scandal was not just because user data was being stored. When we sign up for online services, we accept that our personal information will be collected. Rather, we are angry that our data has been manipulated without our knowledge and in ways beyond our control.[2] To this end, our sense of injustice arises from moral foundations whereby the right to privacy necessarily entails active participation in the collection, use, and publication of our personal information.

In response to these concerns, the European Union ('EU') recently introduced the General Data Protection Regulation ('GDPR'),[3] a legislative scheme aimed at enhancing and extending the rights of the data subject over its own personal data.[4] Under article 6(1) of the GDPR, personal data may only be processed on one or more specified grounds, including the freely given and informed consent of the data subject.[5] Taking a normative approach, this essay will evaluate the efficacy of the GDPR's grounds of lawful data processing in protecting users' right to privacy, a right which derives from the moral framework of personal inviolability.

Our Right To Privacy: Establishing a Moral Framework

Intuitively, the idea that our online behaviours are constantly being recorded and interpreted is discomforting. There are times we do not want to be observed.[6] We can trace discussion of a right to privacy back to Warren and Brandeis' 1890 essay on a right to 'be let alone'.[7] According to Warren and Brandeis, each individual has an 'inviolate personality'.[8] This means that the promotion and protection of the 'personality' of the individual should be at the centre of our moral framework. In other words, each individual should have the freedom to choose their own ends, to change themselves, and to have control over if and when their inner 'thoughts, sentiments, and emotions' are published.[9]

Under this model, the right to privacy entails the right to control our personal information. In the modern information age, the breadth of this right expands with the advancement of technology. This warrants more than a right to be left alone or a right to control when our thoughts are published; it includes when and how information about us can be collected, how that personal information can be used, what it can be used for, and the risks that we

are willing to take in relation to that information. More and more, things that we value and are valued by others are 'detached' from ourselves through data use. For instance, where you needed to do your banking in person, you can now do online by using a username and password. Where you had to apply for a mortgage face to face, you can now fill in an online application form with your personal information. This makes your personal information (including your passwords and credit card numbers) vulnerable, because it now exists apart from you and can be stolen or abused by others.[10] In this environment, strong legal safeguards are required to promote the individual's control over their own personal information.

The General Data Protection Regulation

Effective 25 May 2018, the GDPR was introduced by the EU to 'strengthen online privacy rights and boost Europe's digital economy',[11] and to enhance and harmonise legal protections following the 1995 Data Protection Directive.[12] Under the GDPR, individuals with personal information are referred to as 'data subjects', and any data that can be traced back to the data subject is 'personal data'.[13] The GPDR seeks to limit and control personal data 'processing', which is defined extremely broadly to include virtually any interaction with personal data including its collection, recording, organisation, storage, use, dissemination, erasure, and destruction.[14] Those entities that determine the purpose and means of personal data processing are 'data controllers'.[15]

The GDPR not only applies to data controllers within the EU, but also to those outside of the EU who offer goods and services to persons in the EU or monitor the behaviour of persons where such behaviour occurs within the EU.[16] Importantly, the breadth of its reach means that it is likely to have a substantial influence on privacy jurisdictions around the world. Due to the EU's strong market power, entities not directly subject to EU laws are still compelled to comply in order to transact with entities that *are* subject to EU law — this is known as the 'Brussels effect'.[17] The GDPR therefore has profound implications for individuals around the globe and is relevant for Australian businesses servicing EU residents or collecting identifiable data on persons who are only temporarily in the EU. Under the GDPR, data processing is only lawful 'if and to the extent' that it falls under one of the six grounds identified in article 6(1):

Article 6 Lawfulness of processing

(1) Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Consent as a Ground for Lawful Processing

Under article 6(1)(a) of the GDPR, consent is clearly identified as a ground for the lawful processing of data. According to our moral framework, the inviolate personality of the data subject requires the data subject to have real and meaningful control over her personal information. Real and meaningful control may be expressed through consent so long as the consent satisfies two key criteria:

(1) The consent is freely given, or of the data subject's own volition; and

(2) The consent is informed, or the data subject knows what they are consenting to.

Under the GDPR, 'consent' is defined as 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'.[18] While the definition of consent under the GDPR is prima facie consistent with the requirement for a data subject to possess real and meaningful control, it is doubtful whether the GDPR ensures that consent is truly 'freely given' and 'informed' in view of our moral framework.

Freely Given Consent

While the GDPR requires consent to be 'freely given' and addresses power asymmetries when they occur between a data user and the data controller directly, it does not seem to expressly provide for structural power imbalances.

Under recital 43 of the GDPR, data controllers cannot rely on consent as grounds for lawful data processing if there is a 'clear imbalance between the data subject and the controller'.[19] Similar to the vitiating factor of undue influence in contract law, this presumes that consent is automatically vitiated in situations where the other party is in a more powerful position (for example, public authorities or employers). But the ubiquity of digital technology means that many services necessarily involve the processing of personal information; so much of our communication takes place online that it is virtually impossible to participate in society without using some kind of online service either directly or indirectly.[20] For example, the advent of My Health Record — an online repository of patients' health information controlled by the Australian Digital Health Agency — represents another step towards the digitisation of essential services.[21] Aside from recital 43, the fact that opting into My Health Record is promoted as a way to streamline and improve the quality of health services to individuals,[22] means that data subjects are placed in the uncomfortable position of trading off between more efficient medical services and their privacy concerns.

You might argue that consent is effective so long as it is clear to the data subject what her data is being used for and how it is processed. Whether or not she chooses to give consent is entirely her own decision. This is a negative view of freedom, where free choice is simply the absence of any constraint preventing the data subject from making one decision over another. However, this negative view of freedom conflates power asymmetry and information asymmetry. Regardless of how much visibility you have over the data processing operations, this is not necessarily meaningful to you if there is no real choice that satisfies your data concerns. This is a *positive* view of free choice, which recognises that the data subject's freedom must be actively promoted to be effectively discharged. The quality of the options is also relevant.

The GDPR places the onus on the data controller to show that consent is valid,[23] but it is difficult for a data controller to prevent a data subject's consent from being impaired by power asymmetries due to structural sources of compulsion. These structural forces, including the increasing digitisation of services, are larger than any individual data controller. Under these conditions, academics like Zanfir argue that instead of just relying on consent to protect the data subject's control over their personal information, legislatures should focus on regulating the processing of the data and its consequences. For instance, enforcing obligations on data controllers to implement data protection measures such as appointing data protection officers, carrying out data protection impact assessments, and helping data subjects exercise their rights to compensation when their data is wrongfully used.[24] However, our moral framework makes the data subject's control paramount. The problem with Zanfir's framework is that data subjects are only directly involved when something goes wrong. We do not get to choose what limitations are placed on who receives our data or what is done with it. This does not help us promote the data subject's active consent, it only shifts the emphasis from the data subject to the regulator or to remedies after the fact.

Informed Consent

Measures to ensure that a data subject's consent is informed are subject to two opposing forces: the need to simplify privacy notices versus the need to explain complicated data processing procedures and their potential consequences to the data subject. This is known as the 'transparency paradox'.[25] Modern data processing operations and security procedures are often difficult to explain to ordinary data subjects, and the consequences of potential data breaches can be difficult to foresee.[26] For example, while users of Ashley Madison surely were aware of the possibility — however low — of a data breach, it is unlikely that users were fully cognisant of its consequences.[27] There are two main problems with how the GDPR addresses the 'informed' nature of consent. First, the amount of information that must be disclosed to the data subject before their consent is 'valid' is too limited because it does not require disclosure of the risks

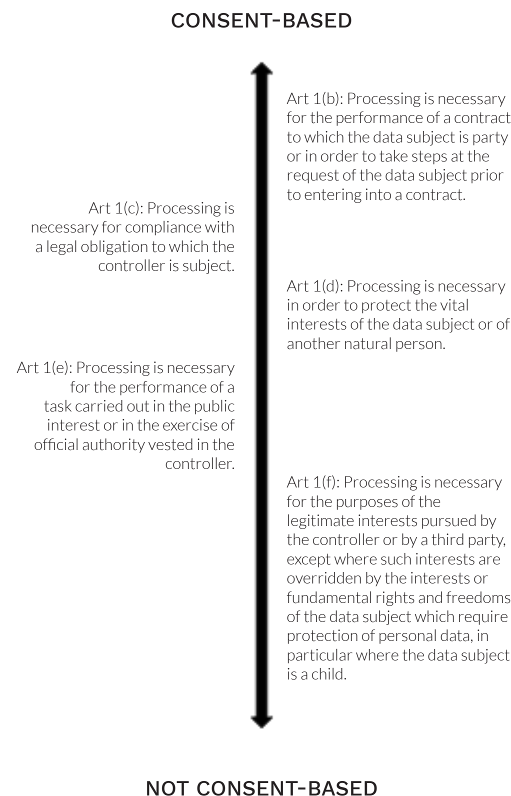
or consequences of data processing. Second, the GDPR requires the data controller to disclose information about data processing information to the data subject, but does not require the data subject to have consented to this information.

The GDPR imposes minimal requirements on how much information must be disclosed to the data subject before they can validly consent. One type of information that is necessary to render consent properly informed is the consequences or ramifications of data processing. But the GDPR and its related instruments fail to obligate data controllers to disclose the risks of data processing. A noticeable trend in the GDPR and related materials is that the level of disclosure required of data controllers is lighter in binding instruments and heavier in 'soft law' instruments. Article 6(1)(a) provides that that the data subject must have given consent to 'the processing ... for one or more specific purposes', and article 7 requires requests for consent to be 'presented in ... an intelligible and easily accessible form, using clear and plain language'.[28] Recital 42 further clarifies that for consent to be informed, the data subject must know the 'purposes of the processing' and the 'identity of the controller'. The Article 29 Working Party's ('WP29') guidelines specify the type of data to be collected, and the existence of the right to withdraw consent, should also be provided.[29] WP29's guidelines, however, possess only 'advisory status'[30] to the European Commission (the executive arm of the European Union).[31] The more onerous the standard, the less binding it is. However, even the more onerous standard contained in the WP29's guidelines fail to require the data controller to disclose risks (if any) posed by their data processing.

It could be argued that the GDPR addresses the moral requirement for informed consent by requiring data controllers to make information disclosures to data subjects regardless of what ground of processing is being relied upon. We may call this a 'privacy notice' (as opposed to a 'privacy agreement', which implies that the data subject needs to 'agree'). In a privacy notice, the data controller is required to disclose to the data subject the details of any entities who will receive the personal data, the period for which it will be stored, and the data subject's rights in relation to that data.[32] This goes some way in ameliorating some of the shortcomings we have identified earlier, since the data subject will be more informed about the consequences of data processing. However, the GDPR does not require the data controller to show that the data subject understood the information in the 'privacy notice' *as well as* the information in the 'privacy agreement' before giving consent to the privacy agreement; only the privacy agreement must be consented to. While in practice, it is entirely possible that some data subjects would seek out a website's privacy notice, it is not a legal requirement. This means the 'privacy notice' disclosure obligations do not remedy the defect in the GDPR's consent requirement.

Other Grounds For Lawful Processing

In addition to the consent ground, there exist five other grounds for lawful processing under the GDPR.[33] Keeping the data subject's *control* at the centre of our moral framework, we may evaluate the other grounds on a sliding scale of how effectively they draw on the data subect's consent.



Article 1(b) is closest to the article 1(a) consent ground, because the data processing is a direct 'by-product' of the data subject consenting to enter into the contract. We may interpret article 1(c) in a similar light, at least in theory. If the binding authority of legislation is derived from popular sovereignty, or if laws are interpreted as terms in a social contract, then to some extent we have all 'consented' to these legal obligations. In practice, this is far from the case. We have little control over what jurisdiction we are born into, and furthermore the degree of nuanced influence any one elector has on the content of laws is minimal.

Article 1(d) is further down the scale because the data subject has not had the chance to exercise her power of choice at all. Article 1(e) is a more extreme version of article 1(d), as it further broadens the scope from the *data subject's* own vital interests, to the public interest as a whole. Most individuals have very little control over the expectations of their community. Article 1(f) then expressly prioritises the data controller's interests over that of the data subject, and only prohibit activities where the data controller's activities directly conflict with the data subject's essential freedoms. Articles 1(d), 1(e) and 1(f) are similar in that they prioritise interests which are not determined by the data subject herself. While article 1(d) does ostensibly seek to protect the data subject's vital interests, it leaves the question of whether processing does protect those vital interests up to the data controller.

From article 1(c) onwards, the data subject's consent plays a very minimal role if at all in the processing of their personal data. The inviolability of the data subject's personality is based on the idea that there is something special about the data subject's own freedom of choice, and that they should not be required to do things they do not wish to do. The right to privacy is more than the right to be let alone, it is the right to control your own personal information. Articles 1(d) and 1(e) may appear to promote the data subject's inviolate personality by protecting 'vital interests' or the 'public interest', but this presumes the data subject will choose those interests. If we are going to justify these other grounds for processing, we cannot only look to the data subject's inviolate personality, we will need to draw on other moral frameworks like the collective good.

Conclusion

As technology advances, law is playing catch-up. Data controllers have set the rules of engagement for data processing, and reactive regulation now seeks to claw back pockets of privacy. From a moral perspective, the right to privacy is the right to control the use of our personal information. The GDPR's consent ground for data processing directly facilitates the data subject's right to privacy — however, this exists alongside five other grounds which do not effectively promote the data subject's active participation in the processing of their personal data. And even within the realm of consent, there are limitations on the efficacy of that consent. The GDPR fails to (1) address macroscopic concerns about whether it is possible for an individual to freely give consent to data processing in a data-driven society, and (2) require data controllers to disclose the amount of information that is needed for a data subject's consent to be truly 'informed'. Accordingly, in its current form, the GDPR's lawful grounds for processing do not satisfactorily promote the data subject's control over what is done with their personal information in accordance with our moral framework of inviolate personality.

Policing, detention and youth indigenous justice

Suspect targeting as a form of racial vilification?

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Juris Doctor II

Disclaimer: The author undertook a part-time, unpaid internship at the Public Interest Advocacy Centre, Sydney in 2018. Whilst the essay makes reference to this as a place of employment, the views however expressed in this article are that of the author and her own research, and not that of the Public Interest Advocacy Centre's.

Introduction

This essay draws upon my experiences within the strategic litigation branch of the Public Interest Advocacy Centre ('PIAC') Sydney. During my time at PIAC I became acutely aware of the New South Wales Police Force's Suspect-Targeting Management Program ('STMP'). After witnessing the increase in litigation support and queries regarding the STMP's effect on young people, further research led me to believe that the program is fundamentally unlawful, and a form of systematic, oppressive and perhaps outright racist policy that is particularly detrimental to Indigenous youth. I argue for this claim by drawing upon the philosophical notion of crime control as a way of legitimising oppression.[1] In short, this philosophical perspective helps inform how young Indigenous Australians are, at this point, criminals 'created' by the suspect-targeting program, and thus policed accordingly. I also explore how the STMP directly conflicts with the *Young Offenders Act 1977* (NSW) (the 'Act') and Australia's other international obligations to further illustrate the unjust harassment of Indigenous youth by police.

My Time at PIAC

I was privileged enough to work as a legal intern at PIAC for a period of six months in 2018, within the policing and detention litigation team. It was within this small team that I participated in two false imprisonment lawsuits against the police force for their sustained harassment of young, male, Indigenous clients listed on the STMP. Many of these kinds of cases use evidence from a 2017 report on the STMP,[2] which was published by the Youth Justice Coalition and written in conjunction with key PIAC staff members.

Litigation is a last resort protection mechanism for those detrimentally affected by the suspect-targeting program. Historically, PIAC's strategic litigation branch is utilised for claims that most significantly impact the public law sphere. Through strategically selecting certain cases, PIAC's achievements lie in its ability to secure a ruling or declaration that a certain social problem is unlawful. This is important because PIAC, like most community legal centres, has incredibly limited resources and litigation is a draining and resource-consuming method of activism. It takes on a particularly special role in relation to the STMP due to its ability to set precedent. In the near future, litigation could hopefully signify an upheaval of the program, opening it up to greater forms of oversight and transparency. This essay now shifts its focus onto the most stifling results of the Youth Justice Coalition's STMP Report, and how its victims — some of whose cases I engaged with during my time at PIAC — are effectively silenced by the heavy-handed, unwavering and plausibly unlawful assault by the NSW Police Force.

STMP: A Case Study

For those not affected by the STMP, the program might seem harmless at first glance. However, it is important to recognise that in reality, this intelligence tool has a silencing effect on Indigenous people, particularly those under the age of 18. Traditionally, the NSW police operate through utilising an internal, online, constantly accessible system called COPS.[3] All information about the people targeted by the STMP is logged in this program, including personal information, bail conditions, or warrants for arrest.[4] The STMP was created in conjunction with COPS to 'identify, assess and target people suspected of being recidivist offenders, or those responsible for emerging crime problems within each Local Area Command ('LAC').'[5]

The STMP is essentially a policy that utilises individual data to recognise certain 'risky' individuals. This creates an avenue for people to be targeted and policed in a certain manner as a result of this identification, which is a phenomenon that disproportionately and detrimentally affects Indigenous youth. While it is a covert operation, some of the particularly harmful features of the STMP have come to public attention. Of note, the STMP subjects individuals to a sustained targeting program, which may include being excessively stopped and searched in public, or visited and checked in on at one's home.[6] The STMP is therefore a strategy of 'preventative justice',[7] a phrase coined by Ashworth and Zedner to encapsulate all situations where an individual's liberties are restricted or deprived in the absence of the commission of the criminal offence.[8] The STMP can also be seen as a form of 'pre-crime',[9] given that people listed on the program are potential risks of harm to the community, rather than people already acting in a criminal way. This shift away from traditional policing has three rather substantial issues: the problems associated with policing children heavily, the targeting of Indigenous youth, and a lack of transparency over the program's framework and success rates. The focus on youth includes 'children' as those under the age of 18, or 'young people' under the age of 25.[10]

Firstly, and perhaps the most significant public finding regarding the STMP,[11] is the disproportionate impact the suspect-targeting program has on children and young people. Data taken recently from 10 different LACs' quantitative reporting, confirms that 50% of the 204 people listed in the program were under 25 years old.[12] Furthermore, 25% of these targets were between 11 years old and 18 years old.[13] These statistics exist

against a legislative backdrop that aims to achieve the curtailment of youth engagement with the justice system. The *Young Offenders Act* is set up to reduce the detention of young people, often through diversionary options, [14] and has a set of guiding principles that combine the notion of civil rights with support to children in their pursuit of rehabilitation and community re-integration.[15] The Act's goals align with one of the most widely adopted UN Treaties, the Convention on the Rights of the Child, ratified by Australia in 1990 and hailed as the '*Magna Carta*' for children.[16] The objectives of both the Convention and The Act include following practices that involve the least restrictive sanctions for children who have allegedly committed offences. However, the STMP is in no way the 'least restrictive' approach to alleged offenders. On the contrary, it is an approach to policing that ultimately criminalises children under the age of 18 for their past behaviour or associations. The STMP seems close to infringing other basic rights, including freedom of association, presumption of innocence, and the rebuttable *doli incapax* presumption of minimum age of children's criminal responsibility. Incarceration rates for children will continue to disproportionately rise if strategies such as the STMP continue to be used in a way that directly conflicts with NSW legislation and international treaty obligations.

However, the Act has its faults as well. In his 2013 report, Indigenous lawyer and author David Pheeney notes that deficiencies in the Act's broad and general powers and language allow police officers to control the criminal justice environment to the demise and neglect of Indigenous youths.[17] This occurs mainly through the under-utilisation of the 'diversionary options' articulated within the Act, such as granting police the power to issue cautions or warnings to offenders.[18] This under-utilisation plays one of the major roles in the 'ever-increasing incarceration of Aboriginal juveniles in NSW,'[19] according to Pheeney, and is problematically interlinked with other issues relating to the STMP, as explored below.

The second issue with the STMP is that it disproportionately targets Aboriginal youths: over a 12-month period in 2016, 44% of those listed on the STMP were Aboriginal identifying,[20] yet Indigenous Australian's made up 3% of the total Australian population at that time.[21] This implicates the STMP in contributing to racially targeted policing practices, leading to the overrepresentation of Indigenous youth in the criminal justice system.[22] The immense impact of this is not within the scope of this article. However, the program can be identified as contributing to broader patterns of LAC's over policing of Aboriginal young people, which only damage police-community relations and further stigmatise young Aboriginal people. Overwhelming evidence highlights that Indigenous offending figures are disproportionate. For example, around 50% of the 'average daily intake into detention for all juveniles in NSW are Aboriginal people.'[23] Furthermore, a recent Justice Reinvestment Report emphasises that 'Aboriginal young people are 24 times more likely to be placed in juvenile prison than non-Aboriginal young people.'[24] The Youth Justice Coalition's STMP report paints the program in the light of a form of systematic oppression of Indigenous youth by targeted policing, prejudicial application of the law, and the classification of these people as criminals opposed to victims. These high rates of incarceration are only furthered by the program's existence.

Third, a substantial flaw of the STMP is that the specific risk management framework used to add or remove people from the STMP is not publicly available.[25] As the targeted management of individuals on the STMP is particularly punitive in nature, the absence of public information perhaps attempts to mask lawfully unjustified punishment.[26] Client interviews listed in the STMP report revealed that the Indigenous youth on the program's list had many interactions with police officers, yet had engaged in a small amount of criminal activity – for example interactions resulting in no criminal charge, or a minor/non-violent conviction. However, these interactions with police had been logged in such that their sheer volume led to their enlistment in the program.[27] This means Indigenous young people are being placed on the program in the absence of serious (or in some cases even minor) criminal activity, which is in direct conflict with best practice management of children in conflict with the law.

Moreover, we must also consider the impact that being on the STMP might have on one's life, in terms of its far-reaching psychological effects. Indigenous young people have retold scenarios where they were stopped and searched every day while on the train to school or work, or being strip-searched repeatedly by large groups of officers in broad daylight, or constantly being issued 'move along' orders from the suburb where their children lived. [28] Victim interviews listed in the publically-available STMP report, describe a complete sense of helplessness within the boundaries of these interactions.[29] Contrary to popular opinion, these young people were not committing criminal acts, simply riding the train or occupying public space with groups of friends. Recently, the exercise of police search powers upon Aboriginal youth listed on the STMP has been found to be unlawful by the courts.[30] However the STMP's 'tough on crime' approach has not ceased, only fostering further anger and hardened feelings within the police-youth relationship dynamic. Meanwhile, evidence is emerging that unfair policing strategies like suspect-targeting programs actually 'contribute to future offending patterns' of Indigenous youth.[31] These harmful effects of the STMP are especially troubling given that there has been no evidence to show that the program effective prevents or reduces youth crime. Without these figures and with the program being clouded in secrecy, it is seemingly impossible to weigh up the 'net good' or 'net bad' of conducting preventative programs such as the STMP.

Conclusion

Young people or children, particularly those who are Indigenous, have no control over being placed on the STMP due to its lack of transparency, irrespective of the debilitating impacts the program has on one's daily life and relationships with police and society. While there are differing recounts of the oppressive methods applied by the NSW Police Force when targeting Indigenous youth, the culmination of the sustained targeting and 'criminalisation' of these people has consequently led to most clients being unable to contest the conduct they are enduring, and seeking legal assistance in the form of litigation. The Suspect-Targeting Management Program as a form of crime control 'legitimises oppression,'[32] inherently altering an individual's access to rights, freedoms and responsibilities, and coming close to being a simply racist policing strategy.

The silence of the worker

Australia's industrial action laws

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Workers of the world awaken. Break your chains, demand your rights.
All the wealth you make is taken, by exploiting parasites.
Shall you kneel in deep submission from your cradles to your graves?
Is the height of your ambition to be good and willing slaves?

Joe Hill - Workers of the World Awaken (1910)

In theory, going on strike is a highly effective method that a worker can use to pressure their bosses to accede to their industrial demands. The ability of a worker to place pressure on an employer — for example, to strive for fairer pay, better working conditions or stronger job security — is critical to balance out the fundamentally unequal employee-employer relationship.

However, for a nation with a relentless streak of anti-authoritarian larrikinism embedded deep in its character, it is ironic that for most of Australia's early history, going on strike was unlawful. Before the *Industrial Relations Act 1993* (Cth), which recognised a limited right to strike, employers could sue strikers for damages in industrial torts — and if workers defied a court order to stop striking, they could face hefty fines.

This paper will examine Australia's strike laws and highlight how significantly restrictive they are on the ability of the worker to stand up for themselves in workplace disputes — industrial action should be a more freely available option, considering that the withdrawal of labour is so important to balancing the unequal employment relationship. This paper will also examine the nature of 'industrial torts' to highlight how Australian workers have been subjected to unfair penalties and lawsuits for strike action. This paper will also outline how the incredibly limited immunity from tort actions provided under the contemporary legislative framework through Part 3-3 of the *Fair Work Act 2009* (Cth) (the '*FWA*') — a concept known as 'protected industrial action' — effectively allows many employers to silence industrial action in Australia.

'Industrial Torts' and the Power of the Employer

Industrial torts, or 'economic torts', are a powerful piece of arsenal in the armoury of the employer. Industrial torts are tort actions (with the exception of the injunction) that generally take place in an industrial relations context. These torts originate from 14th century England, but were primarily developed in the late 19th century.[1] This paper will consider injunctions to stop strike actions and the tort of inducing breach of contract.

Injunctions

Injunctions to stop strike actions are relatively easy to obtain *ex parte* because an employer can easily show that the industrial action is causing significant and continuing economic loss to their business - for example, major disruption in a supply chain with flow-on effects for later processes, creating an urgency that would favour an injunction to be granted. Injunctions are largely effective at inhibiting strike action. Sappideen et al. said that:

> The effectiveness of the injunction as a potential industrial weapon for employers lies not least in the fact that breach of the order may constitute contempt which attracts powerful sanctions at the discretion of the court including imprisonment.[2]

In *AMIEU v Mudginberri Station* ('*Mudginberri*')[3], an abattoir was required to pay their employees according to a contract where the employee would not receive less than the award entitlement plus 20 per cent. The Australian Meat Industry Employees Union ('AMIEU') formed a picket line at the abattoir because the AMIEU found that 'had [Mudginberri's employees] been employed under the worst award that we had anywhere in Australia, they would have been about $400 a week ahead' than their current agreements, negotiated individually rather than through the AMIEU.[4]

Mudginberri was granted an interlocutory injunction under s 45D(1) of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)). However, the AMIEU kept on striking, publicly declaring that it would not pay daily fines imposed on them of $44,000. The High Court drew on UK and Australian authorities to find support for imposing fines for actions which are 'wilful and not casual, accidental or unintentional',[5] awarding Mudginberri a total of $1,759,444 in damages.

Mudginberri clearly displays how, through injunctions, workers could not withdraw their labour in protest without facing court orders and heavy fines if they continued. It did not matter that the workers were receiving sub-award rate wages and worked in appalling conditions, nor that there were workplace safety issues and problems with bullying and harassment.

Inducing Breach of Contract

Party A may have an action against party B for inducing party C to breach their contract - for example, when a union persuades their members to breach their contract with their employers (such as persuading members to withdraw labour), ostensibly as a tactic to pressure the employer to provide better wages or better conditions. The origins of this tort go way back to the *Lumley v Gye*,[6] where theatre A sued another theatre B for inducing an opera singer employed by A to breach her employment contract and sing for theatre B.

Inducing a breach of contract is an intentional tort. The defendant needs to have the intent to persuade, procure or induce a breach of contract. Negligent interference short of reckless indifference is not sufficient.[7] The defendant must also *know* of the plaintiff's contract.[8] It is not required that the defendant knows the particular clause that will be breached, but the defendant just needs to have sufficient knowledge of the contract itself. There can be either a 'direct persuasion to break a contract' or 'the intentional bringing about of a breach by indirect methods'[9] — which may include unprotected strike action with the intention of inducing their employer to breach a contract. There also must be resulting damage.

This tort can be easily used against unions. Throughout history, unions have often encouraged their members to pressure their employers through varied tactics, which may include collective breaches of contract, like refusing to do certain tasks, or only agreeing to do certain jobs at certain times. The industrial tort of inducing breach of contract, however, incentivises employees to act individually rather than collectively.

In *Ansett v Australian Federation of Air Pilots* ('*Ansett*')[10], the Australian Federation of Air Pilots ('AFAP') sought a near 30 per cent wage rise for their members, but the Prices and Incomes Accord — an agreement between the then-Labor Government and the Australian Council of Trade Unions ('ACTU') — limited salary increases to 8 per cent. As a result of AFAP's directive to their members to only work between 9:00am and 5:00pm for six days, in order to obtain the wage rise, Ansett lost $120 million in income income from lost flights.[11]

The Supreme Court of Victoria found that AFAP was liable for damages over $6 million for inducing breaches of employment contracts, even though the AFAP never engaged in actual strike activity.[12]

The industrial action may have achieved the economic pressure the AFAP had intended — but *Ansett* has meant that unions now think twice before issuing this type of directive. How are unions supposed to encourage their members to pressure their bosses without facing tortious liability? The decision against inducing breaches of contract in *Ansett* was explicitly

clear and made public; unions may have to tell their members in *secret* what to do to achieve their goals.

Ansett clearly implies that any directive by a trade union for some kind of industrial action will likely be a breach of contract. This means that not only the employee but the *union* could be sued for breach of contract, which hands the employer a useful tool to attack both the worker and their representatives for collectively organising to stand up for their rights.

Other Possible Actions by Employers

Employees and their unions can be sued for a range of other torts; for example, through the scary-sounding 'tort of conspiracy' (where employees collude with the intention of damaging their employer's trade interests)[13] or 'interference with trade or business by unlawful means'.[14] Furthermore, employers may sue their employees on common law breach of contract grounds.

The Limited Immunity from Lawsuit

Section 415 of the *FWA* provides limited immunity from any action, including the torts described above, if employees engage in 'protected industrial action' ('PIA').

To engage in lawful striking in Australia, a worker needs to be an *employee* (s 19); the strike needs to occur during the negotiation of an enterprise agreement (s 409(1)); and it needs to be PIA protected by a vote on a Protected Action Ballot involving a tightly regulated procedure (s 409(2)–(7), explained later). Alternatively, the strike needs to be based on a reasonable concern about an imminent risk to one's own health or safety (s 19(2); note also s 84 of the *Work Health and Safety Act 2011* (Cth) also allows *worker*s, not just an employee, to 'cease unsafe work').

However, actions within the strike cannot involve personal injury, wilful or reckless destruction of, or damage to, property or the unlawful taking, keeping or use of property.

Employees Only

The 'employee' requirement under section 19 prohibits independent contractors, dependent contractors and other workers not engaged by a contract of employment from participating in any type of industrial action because their relationship is purely based on common law contract. If an independent contractor refused to work, they would breach a contract for services, which would then give the other contracting party the right to terminate and sue for damages.

As a result, workers involved in the emerging 'gig economy' are excluded from protected industrial action. The Fair Work Commission (which is not a court, thus providing only quasi-judicial authority) decided in *Kaseris v Rasier Pacific VOF* ('*Kaseris*')[15] that an Uber driver could not bring an unfair dismissal claim because they were not an 'employee' of Uber, but an independent contractor.[16] As these takeaway delivery riders are classed independent contractors, they cannot withdraw labour to protest against any issues they may face at work at all (unruly customers, unfair contract terminations due to less than 5-star ratings and, reportedly, being paid below minimum wage). They also have no access to rights like annual leave, workers' compensation or superannuation. These workers, already vulnerable due to the transient job-to-job nature of their work, are therefore placed in an even more unfortunate position.

PIA is one of many protections or entitlements that the current Australian legislative framework provides for *only* employees. Independent contractors, no matter how vulnerable they are, are not protected from unfair dismissal laws, have no leave entitlements, and have no workers' compensation. Deputy President Gosentcnik commented in *Kaseris* that the current approach to distinguish employees and independent contractors is outmoded.

These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy.[17]

Enterprise Agreements and Protected Action Ballots

An employee may engage in PIA only if they satisfy the complex requirements outlined in Part 3-3 of the *FWA*. First, PIA may only occur in the course of bargaining to make a proposed 'enterprise agreement' ('EA'), a collective contract between an employer and a group of employees that is given the force of statute (thereby overriding common law contracts). Employees and employers are able to *bargain* for EAs in order to negotiate for better wages, working conditions and leave entitlements, amongst other benefits. Each EA has a 'nominal expiry date', normally four years after the EA commences, after which time employees and employers may bargain for a replacement EA.

The restriction of PIA to the creation of EAs means that there are many circumstances where industrial action cannot be protected. For example, a lone shopkeeper covered by an industrial instrument that is not an EA (like a modern award) is not protected at all.

Even employees covered by an EA are at a power disadvantage compared to employers. Section 417(1)(a) states that from the moment an EA is approved until its nominal expiry date, employees under the EA must not engage in or organise industrial action,[18] even if the employer wants to *vary* the EA to their detriment.[19] EAs are generally favoured amongst some employers for this reason.

If a worker contravenes section 417(1), the Federal Court has the power to grant an injunction to stop them from engaging in their planned action.[20] The Fair Work Commission ('FWC') may find the industrial action unprotected and order that it be stopped[21] if an employer makes an application. Afterwards, an employer can sue the worker in an industrial tort.

Section 409 defines the concept of an 'employee claim action' ('ECA'), which is the most common type of industrial action initiated by employees. ECAs may only be organised or engaged in for the purpose of supporting claims 'in relation to the EA' that are 'only about, or are reasonably believed to only be about, permitted matters',[22] creating an extra hurdle for employees. A 'permitted matter' is defined in section 172(1) to include:

- matters pertaining to the relationship between an employer ... and [their employees or] the employee organisation (i.e. the union);
- matters pertaining to the relationship between the employer(s) and the employee organisation(s) that will be covered by the agreement;
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and
- how the agreement will operate.

Thus, employees can not engage in industrial action for matters that are *extraneous* to the narrowly-defined employee-employer relationship, as affirmed by the High Court in *Electrolux v AWU*.[23] Extraneous matters may include the relationship a company has with another company, a relationship with a labour hire company or the impact of a business on the environment. It may include pressuring an employer to reinstate a suspended employee or striking in solidarity with workers employed elsewhere.

This shows that due to the legislative limitation of industrial action to 'permitted matters' and 'in relation to the EA', employees and unions need to think carefully before considering industrial action. They cannot protest about anything they choose and selecting the wrong choice may lead to harsh legal consequence.

There are a range of procedural matters that must be strictly complied with, the first being the conducting of a protected action ballot ('PAB'), which asks employees if they want to strike, and what type of striking they want to do. Employees can apply to the FWC for a PAB Order.[24] Section 437(3) states that the application must specify a number of requirements, including the names of employees to be balloted and the questions to be put to employees.[25] The way the application is framed must be done carefully to minimise the possibility that the industrial action falls outside authorised methods under the Act.

Within twenty-four hours of making an application, the applicant must give a copy of the application to the employer and to the ballot agent (usually the Australian Electoral Commission).[26] The FWC must make a PAB Order within two working days of receipt[27] if they are satisfied that the applicant has been 'genuinely trying to reach an agreement with the employer'.[28] A PAB then occurs, and there must be at least 50% employees who vote in favour of industrial action for it to occur.[29] The applicant must then give three days' written notice of the action.[30] The notice must not be given until after the results of the PAB have been declared.

The procedure for PABs is rigid and bureaucratic. If it is not followed precisely, any subsequent industrial action on the negotiation will not be protected, which opens up employees to the industrial torts and penalties described above. This potentially means that employees will need to get legal advice before

they can engage in any kind of work stoppage. It is a long, drawn-out process, with scholars Roles and O'Donnell commenting that these limits 'have had a detrimental impact on worker voice'.[31]

Stopping Industrial Action

Even when industrial action is allowed, employers have significant power to stop it before it happens or *while* it is happening. Employers may seek approval from the FWC to suspend or terminate protected industrial action if it is causing, or is threatening to cause, significant economic harm (s 424),[32] if it is threatening or would threaten to endanger the life, the personal safety or health or welfare of the population or part of it (s 424(1)(c))[33] or cause significant damage to the Australian economy (s 424(1)(d)).[34] The FWC can also suspend industrial action if it is 'adversely affecting' the employer (s 426(2))[35] or if it is threatening to cause significant harm to a third party (s 426(3)).[36] These stipulations shift the balance of power firmly towards, or are misinterpreted to favour the interests of, employers over employees.

The Rail Tram and Bus Union's ('RTBU') planned strikes earlier this year displayed the FWC's powers in action. In January 2018, the RTBU announced that rail workers would stop working over a 24-hour period on 29 January due to a breakdown in negotiations between the RTBU and Sydney Trains over pay. The RTBU had sought a 6 per cent pay rise each year for four years, against Sydney Trains' proposed 2.5 per cent. RTBU secretary Alex Claassens said that while the negotiations with management had lasted for six months, bosses refused to 'bargain fairly'.[37] A PAB was held, resulting in a vote approving strike action. Protected industrial action which also included a ban on overtime, began at 12:01am on 25 January.

Sydney Trains made an application under s 424 of the *FWA* to stop the RTBU's protected industrial action, which was heard on 25 January.[38] In granting the application, Senior Deputy President Hamberger found that the industrial action threatened to endanger the welfare of a part of the population, including the large number of people in Sydney and surrounding areas who relied on trains 'to get to work, attend school or otherwise go about their business, as well as all those who will suffer from the increased congestion on the roads that would be an inevitable consequence of the industrial action'.[39] The Senior DP was also satisfied that the action threatened to cause 'significant damage to the economy in Sydney, the largest and most economically important city in Australia'.[40]

The grounds Senior DP Hamberger used to suspend the RTBU's PIA were unfortunate. The economic damage resulting from the RTBU's PIA was obvious, which was entirely the point — to cause a significant disruption to the Sydney Trains network so RTBU members would be recognised for their vital work, and to get the pay rise that they were fighting for.

Sally McManus, secretary of the Australian Council of Trade Unions, was not entirely wrong when she claimed the right to strike in Australia was 'very nearly dead'.[41] *Nearly* is the operative word — applications to terminate PIA have failed. In *Application by KDR Victoria Pty Ltd*,[42] Yarra Trams made an application to terminate PIA organised by the RTBU. The PIA was a 4-hour stoppage from 10am - 2pm on a working day. Commissioner Lee found that whilst there would be disruption and inconvenience to the public, there would 'be a range of options for passengers to make alternative arrangements for travel using combinations of replacement buses, trains and other modes of transport'.[43] Commissioner Lee dismissed Yarra Trams' application.

This was different to the RTBU's attempted strike, where evidence indicated that significant future congestion would result from the attempts at a 24-hour stoppage. Therefore, it seems that large enterprises the public rely on — like public transport — will be very limited in the industrial actions they can undertake.

Concluding Remarks

It is unfortunate that Australia's industrial action laws have made it exceptionally difficult for Australian workers to pressure employers to concede to necessary industrial demands. Both the common law and statute have for many centuries favoured employers, with the use of injunctions, industrial torts and anti-striking legislation making it difficult for workers to attain higher wages and better working conditions through withdrawing labour. Even though Australia has introduced legislation to create 'protected' industrial action, the procedure to reach that stage is rigid. Conversely, unprotected industrial action can result in the fining or prosecution of employees and unions. Parliament must act to strike a better balance between a stable, profitable workforce and the freedom of association.

Weapon and shield

Advocating for the twin purposes of vicarious liability

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Vicarious liability is a nominally simple legal concept; an employer, in certain circumstances, can be held responsible for the actions of an employee. But this concept is far from settled in courts around the globe. Critically, depending on the scholar or judge one asks, you may receive a wildly different answer on the purpose of the doctrine. Some argue it exists for reasons of policy so that 'liability for tortious wrong is borne by a defendant with the means to compensate the victim'.[1] Others argue it is a philosophical acknowledgment of the fact that an employee is an emanation of their employer.[2] Should the law 'impose liability on someone who can pay rather than someone who cannot ... Or is it just a weapon of distributive justice?'[3] Perhaps the more appropriate question is whether it can be both.

Vicarious liability in Britain, its evolution abetted by proliferating sexual abuse cases involving schools and religious institutions, now accommodates a wide array of cases. Harrowing in their abundance, these cases have forced courts in certain jurisdictions to take a previously stringent doctrine 'on the move'.[4] In England, for instance, most judges now accept Lord Phillips' view that the policy objective underlying vicarious liability is to ensure fair, just and reasonable avenues to compensate the plaintiff.[5]

By contrast, Australian courts have remained oddly reticent to embrace vicarious liability as a protective doctrine to safeguard the vulnerable. In *Hollis v Vabu*, the High Court acknowledged that 'the modern doctrine... was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy'.[6] That policy, however, 'has been slow to appear in the case law'.[7] By exploring issues relating to vicarious liability for independent contractors and for crimes, it is clear that Australian law has failed to embrace the objectives of this doctrine: both to protect victims and to disincentivise organisational malfeasance. While vicarious liability cases tend to involve individuals contending with larger entities, the position of the Australian courts launders agency from the individuals, thereby silencing victims who are unable to receive the compensation that they deserve.

Independent Contractors and the Issue of Control

In *Hollis v Vabu*, McHugh J warned that if 'the law of vicarious liability is to remain relevant [it must] accommodate the changing nature of employment relationships.'[8] With the propagation of the sharing economy, his caution was incredibly prescient. Yet the High Court has since ill-advisedly hedged against his crystal-balling with unnecessarily restrictive factors in determining employment.

Let us take an example of an Uber driver who, regrettably, botches a routine lane merge and leaves his or her passenger with a shattered collarbone. The passenger's insurance is insufficient, and the Uber driver is hardly cashed up. Given the cost of emergency shoulder surgery, the passenger may be left out of pocket. In *Hollis v Vabu*, the Court opted to list myriad factors that may indicate employment,[9] including the employer's degree over the control of their employees. Uber classify their drivers as independent contractors and, under current Australian law, would probably be able to avoid any vicarious liability suit as their drivers are not technically employees.[10] So beyond issuing a very sassy one-star rating, the passenger is left without recourse.

British courts have sought to do away with an overly prescriptive test for the employment relationship, simply requiring something 'akin to employment'.[11] The problem with Australia's factorial approach is that the very circumstances where claims for vicarious liability for intentional torts have been most common are most incongruous with this test.

For example, though a priest's uniform may render him an 'emanation' of the Church, the nature of work within the Church means that little direct control is exercised over quotidian activities. Yet when the influence that gives rise to the opportunity for wrongdoing is so closely connected with the employee's relationship to their employer, it is counter-intuitive to ignore the employer's role. If a priest sexually assaults a child, it is either wilfully naïve or downright ignorant to believe that his putative holiness had no influence over the vulnerable child. Yet, under current Australian law, we deny that same child the right to compensation from the priest's employer.

Crimes on Company Time

This leads to another area of doctrinal ambiguity that is perhaps the most problematic. There is natural difficulty in assessing whether an action has taken place in the course of employment or, as the nomenclature of the Court goes, 'on a frolic'.[12] Courts are attempting to resolve an issue of whether the company should be responsible for an employee who commits a crime on company time.

As it is difficult to contemplate how a criminal act can ever be considered something that occurs in the course of employment, a degree of judicial flexibility is naturally beneficial in achieving an outcome protective of victims. As Lord Phillips notes, 'sexual abuse can never be a negligent way of performing [your job]'.[13] Far from flexible, however, the Australian jurisprudence is 'bewildering'.[14] The waters of vicarious liability are no less murky following the most recent landmark decision on vicarious liability in Australia, the case of *Prince Alfred College v ADC*,[15] involving an Australian man at a boarding school in Adelaide who was sexually assaulted by a boarding housemaster on numerous occasions. The boarding housemaster had been hired by Prince Alfred College despite having been previously convicted of gross indecency and suspected of committing child abuse at a previous school.[16]

British and Canadian Courts have developed a test of 'close connection' between the acts of the employee and their role in employment in adopting a more protective approach to vicarious liability. The High Court in *Prince Alfred* did helpfully clarify that an act being 'a criminal offence does not preclude…vicarious liability'.[17] Moreover, in discussing the influence of 'a position of power and intimacy',[18] the Court decided it should consider any 'special role' that the employer had assigned to the employee and the position into which the employee was thereby placed vis-à-vis the victim.[19]

Does being a boarding master, rather than a regular teacher, constitute a special role? Maybe. But it should not matter. I would posit that the 'special role' test should be extended to a 'special profession' test. If an organisation employs persons in a profession characterised by intimacy with children, that organisation should be responsible for some of the criminal actions of their employees. Society should expect such organisations to mitigate their risk of incurring liability, for example by conducting rigorous background checks on the people they hire into their special profession. There is no denying that vicarious liability is at odds with the general approach of the common law by deviating from fault as the basis of liability, but it is equally true there are clearly more ways to be responsible for a crime than to be its perpetrator.

Non-delegable Duties

This problem is, essentially, one of optics — employers do not wish to appear responsible for criminal acts when they themselves have lacked any criminal intent. This is easily cured by another legal doctrine that is receiving increased support, that of the non-delegable duty.[20] If I knock on the door of a hospital, it has a non-delegable duty to treat me. It can use a contractor, an employed doctor, or even the janitor, but if the person treating me is negligent, the hospital is responsible. This kind of vicarious liability regime creates a powerful incentive for the hospital to use a qualified person to do the job.

Imposing a non-delegable duty on religious institutions, boarding schools and other care providers can effectively punish acts of sexual abuse anathema to the enterprise without foisting liability for acts in contravention with the employer's alleged purpose. Formulating a valid test is important — companies should not be held generally responsible for acts they had nothing to do with — but the vulnerable should not be left without a cause of action against those that could have mitigated their suffering.

While British and Canadian courts have allowed for a more robust application of vicarious liability, Australia has limped behind with ineffectual judgments, with overly complex tests, and with eyes shut to the principle's overwhelming policy purpose. Though there have been small movements to bring vicarious liability into effect as a sufficiently protective doctrine, the jurisprudence has been varied and insufficient. The risk is not in expanding vicarious liability, but in the judiciary's failure to move fast enough, because in its weak and confused state, vicarious liability is neither weapon nor shield, but simply a muzzle.

Rethinking Australia's animal protection regime

A rights-based approach

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Non-human animals are inherently silenced through their status as property. Australia's animal protection regime is built on an understanding that the human voice rings louder than all others. This understanding reflects the powerful cognitive dissonance in how society perceives animals, which allows them to be commoditised while simultaneously being recognised as sentient. As such, Australia's current anti-cruelty framework is directed largely in accommodating human interests, particularly through the exploitation of animals for consumable products, while failing to adequately voice the nonhuman interest. A grant of legal personhood to nonhuman animals is essential to create a base level of legally recognised rights that cannot be swept away in favour of human interests. This article considers: firstly, how Australia's historic paradigm of animals as property prevents meaningful protection for non-human animals; secondly, how legal personhood can mend deficiencies in Australia's current welfare framework; and lastly, how personhood can be practically achieved. This article argues that an expansion of legal personhood to grant rights to non-human animals is a feasible method of giving a voice to animals that is unencumbered by human bias.

Australia's Current Animal Protection Regime

The animal protection regime in Australia is a product of the classification of non-human animals as property. Under the property paradigm, non-human animals are not entitled to the rights and obligations that are afforded to legal persons, rendering them vulnerable to exploitation.[1]Further, the current legislative welfare regime ineffectively prevents animal suffering because, '...fundamentally, parliaments have chosen not to.'.[2] While this legislation is informed by a variety of stakeholder interests, the agriculture and food processing industries have overpowered all others in Australia. As such, a wide variety of systematic cruelty, particularly in the agriculture industry, are permitted simply because exclusions in legislation are designed to allow it. Moreover, the property classification denies 'moral culpability' in the human treatment of animals on the basis of the 'otherness' status of animals.[3] For example, by conceptualising farm animals as property, our society's appreciation for their capacities as sentient beings is greatly removed, making it easier to permit treatment, such as live exportation, that would otherwise never be permissible if the animal did not have this classification. Although the property paradigm persists under Australian law, the legal tendency to treat non-human animals as strictly insentient objects has somewhat eroded.[4] For example, while the law maintains the status of animals as property, it simultaneously acknowledges that animals are more than innate 'things' through anti-cruelty legislation, which penalises explicit animal cruelty, but fails to eliminate animal exploitation.[5] Further, to reduce barriers to economic efficiency in agricultural industries, farm animals are exempted from the anti-cruelty regulation that is enforced for companion animals. This suggests that any erosion

to the property paradigm at a conceptual level, is still far from manifesting in actual animal welfare protection, largely because the maintenance of this classification remains economically viable. The recognition of legal personhood for non-human animals may provide an avenue to secure more valuable legal protection than is available under the property paradigm.

What is Legal Personhood?

An expansion of legal personhood to recognise non-human animals will strengthen the legal framework that safeguards the protection of animals. Many of those opposed to the granting of legal personhood to non-human animals advance arguments rooted in misunderstandings of how the human conception of 'person' can be practically attributed and applied to animals. The legal meaning of 'person' is defined as 'a separate legal entity, recognised by the law as having rights and obligations'.[6] Consequently, the legal term 'person' is not interchangeable with the colloquial understanding of 'human', and is often used in a legal context to refer to non-human entities, such as corporations.[7] Common law tradition has typically classified entities in a rigid dichotomy as either a 'person' or a 'thing', and only affords rights and obligations to those recognised as legal persons.[8] Animals should not be granted complete legal personhood, which would include rights such as the right to vote, since like corporations they do not possess the full spectrum of human capabilities. However, the protective object of anti-cruelty statutes 'would seem to distinguish ... [non-human animals], and their relationship to humans, from most other non-humans or 'things''.[9] As such, animals are in a 'grey area', which either points to the falsity of the current person-thing dichotomy, or alternatively, a reluctance to depart from the engrained property paradigm. I argue that one way to improve legal animal protections is to confer non-human animals, like corporations, with *partial* legal personhood, which would give non-human animals the right for human representatives to bring legal actions on their behalf.

Why is Legal Personhood Necessary?

The human-centric nature of anti-cruelty legislation inadequately voices the interests of non-human animals. While the notions of 'welfare' and 'rights' are often conflated, each provides a distinct method of protection.[10] The 'welfare' approach to animal protection regulates the exploitation, ownership and treatment of animals in accordance with prescribed minimum standards. This utilitarian approach does not oppose the property status of animals, but instead argues against 'unnecessary suffering' within this paradigm.[11] Contrastingly, 'rights' proponents believe that animal suffering cannot be eliminated without reconsidering the status of non-human animals under the law. While the latter notion is more radical, it is a necessary step in producing a legal framework that is truly in the interests of animals, as opposed to the current

animal welfare legal framework which '...reflects an unbalanced trade-off between human and animal interests.'[12] Moreover, the 'rights' approach is consistent with the prevalent belief that sentient beings should not be commoditised.[13] Ultimately, while implementing welfare standards has fuelled an initial shift away from animals as mere property under the law, a rights approach to animal welfare is necessary to provide an unbiased voice for the protection of non-human animals.

How Would Legal Personhood Work?

The legally recognised rights and obligations that arise with legal personhood do not assume a 'one-size fits all' model, but instead are unique to the nuances and voice of each entity or species. As discussed above, the reluctance towards expanding legal personhood is in part, a product of the assumption that legal personhood in non-human animals would confer them with all human legal rights. This fallacy is aptly clarified by academic Christopher Stone's emphasis on the need to ensure relativity between rights granted and the nature and cognitive ability of the entity or species.[14] While no 'shopping list' type criteria exists for granting personhood, each species would need to be considered individually. The cognitive ability of individual species may be a possible way to determine the level of personhood rights – the greater the cognitive ability, the more rights conferred.[15] It is practically important that the rights and obligations granted to non-human animals are not inflated in a way that would impractically confer duties towards humans and other species.[16] As such, any grant of personhood to non-human animals would only confer a duty on humans in their dealings with animals.[17] According to Douglas Fisher, this variable grant of personhood should be 'framed in terms of rights rather than human duties[, as] duties are the corollary of rights'.[18] This notion is exemplified by the constitution of Ecuador, which recognises nature's right to 'integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes' does not depend on reciprocal duties owed by nature itself to other entities.[19] This idea is succinctly surmised in Thomas Berry's observation that:

> Trees have tree rights, insects have insect rights, rivers have river rights, mountains have mountain rights. So too with the entire range of beings throughout the universe. All rights are limited and relative.[20]

While in theory this tailored approach to granting legal personhood may give a voice to a variety of species, in practice, the task requires interpreting the interests of the animal through a human perspective. Despite the potential variation in interpretation of animal interests, the protection afforded to non-human animals would still be more effective than maintaining the property and commodification paradigm as these animals will no longer exist solely as commodities. For example, in the United States, the Non-Human Rights Project (the 'NhRP') brought three actions in the New York County Supreme Court to extend legal personhood to four captive chimpanzees through habeas corpus.[21] Through this action, the NhRP sought legal recognition that the detainment of certain species was unlawful. [22] While this action was unsuccessful, it demonstrates the possibility of advocating animal interests and protection relative to the capabilities of the non-human animal. Such an expansion of legal rights would provide a legally recognised voice to non-human animals.

Objections to Legal Personhood for Non-Human Animals

While personhood in nonhuman animals is legally feasible, in practice the expansion has been stifled by strong objections. This idea is confirmed by Justice Jaffe's conclusion that 'efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed'.[23]As discussed above, a powerful barrier to even gaining consideration for expanding legal personhood, is the misunderstanding that a grant of rights is a 'one size fits all' model across all species. This perceived conflation of nonhuman personhood rights with human personhood rights remains a barrier to recognition, which may stem from a fear that such rights will erode engrained notions of speciesism. This article argues, as discussed previously, that for any grant of personhood to be practically feasible, it must be tailored to nuisances of each species. Subsequently, human rights will not be undermined by any grant of personhood because fundamentally they are not equivalent same rights.

A further barrier for the expansion of legal personhood is the 'argument from the marginal cases',[24] which presents a philosophical difficulty in justifying legal personhood for non-human animals. The marginal cases argument proposes that if legal personhood is granted to humans who have impaired cognitive abilities comparable

to certain non-human species, it is subsequently rational to grant rights to these species based on equality principles. This presents obvious fears that the legal status of cognitively impaired persons may be undermined.[25] This argument is insubstantial because it suggests that cognitive ability determines humanness, opposed to a right to have nonhuman rights. Irrespective of whether cognitive ability is the criteria for determining personhood, it should not matter if it happens that some people with cognitive impairment have similar cognitive abilities to highly intelligent animals, because the grant of personhood would reflect the species as a whole. Further, it would be impractical to confer human rights, on a nonhuman animal simply because its cognitive ability is equivalent to a person with cognitive impairment. In *Lavery*, decided by the New York Supreme Court, it was held that chimpanzees could not gain the same rights as humans 'as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility'.[26] As such, any arguments based on marginal cases may do little more than cause offence and misunderstanding of the importance of proportionality when granting rights to non-human species.

Finally, the practicalities of litigating using legal personhood create substantial barriers to the expansion of these legal rights. While *habeas corpus* has been the vehicle for arguing personhood in chimpanzees in the NhRP litigation, this writ could not be arguable in favour of less intelligent animals. Additionally, Academic Mike Radford suggested that in a common law legal system 'it is highly improbable [sic] that the judges would consider it appropriate for they themselves to introduce such a novel principle into law'.[27] While the barriers to granting rights to non-human animals are rigid, courts remain capable of expanding the scope of personhood, particularly with the increase in international precedents.

Conclusion

While the road to assigning personhood to non-human animals is long, it is important to remember that:

> Throughout legal history, each successive extension of rights to some new entity has been, thereto, a bit unthinkable... each time there is a movement to confer rights onto some new 'entity', the proposal is bound to sound odd or frightening or laughable.[28]

A shift away from the property paradigm is necessary for non-human animals to receive substantive protection unencumbered by human interests. While there are practical challenges involved in expanding the scope of personhood, the organic nature of the law provides that this is not an impossible feat.

Granting legal rights to nature

Reframing environmental consciousness through the courts

How narrow we selfish, conceited creatures are in our sympathies! How blind to the rights of all the rest of creation![1]

John Muir (1867)

VICTORIA CHEN

Bachelor of Commerce / Bachelor of Laws III

In 1972, Professor Christopher Stone posed a pivotal question in environmental jurisprudence — *should trees have standing?*[2] Aimed at according a voice to nature in our courtrooms, Stone's seminal article called for the 'unthinkable' — recognition of legal personhood and rights for the natural environment.[3] Many early reactions were dismissive, disparaging, and even trivialising.[4] Yet roughly 40 years later, New Zealand would be the first country to grant legal personhood to an environmental entity — the vast, rugged forest of *Te Urewera* now enjoys the rights, powers, duties and liabilities of a legal person.[5]

A legal 'person' possesses legal rights and responsibilities,[6] however, these rights are not synonymous with human rights.[7] Rather, the elements of legal personhood include the right to standing (the capacity to commence proceedings), the right to property ownership, and the right to enter and enforce contracts.[8]

Despite the ostensibly radical nature of Stone's proposal, legal personhood for non-human entities, which ordinarily cannot 'speak' for themselves in our courtrooms, is not as new of a concept as it may seem. Trusts, corporations and nation-states are amongst the many inanimate beings upon which juridical personhood is conferred.[9] However, only recently has discourse and application of the notion broadened to environmental entities.

As pressures on our ecological systems intensify and environmental exploitation persists beyond sustainable levels, there is an urgent need to reframe our legal structures within the limits of the natural world.[10] This article aims to explore the notion of environmental personhood as a legal pathway for managing our interaction with nature. It begins with a brief overview of the shortfalls of existing legal arrangements in Australia, including a consideration of how their underlying anthropocentric (human-centred) paradigms silence the needs of nature. It will then explore how extending legal personhood to specific environmental entities, such as rivers and forests, can be used to remedy these deficits. Cases of application in various common law jurisdictions are considered. Finally, the socio-environmental benefits of extending the rule of law to nature are highlighted through a discussion of the concept of ecocentrism.

Where Trees Stand: The Shortfalls of Existing Environmental Protections

Legislative Protections

Since the rapid expansion of environmental law in the 1960s and 1970s, a plethora of legal protections have emerged in an effort to regulate the human relationship with the natural world.[11] Yet, many of these frameworks have proven woefully inadequate.[12] Currently, 1800 Australian species are listed as nationally endangered,[13] three million hectares of native forest will be cleared by 2030,[14] and Australia's carbon emissions are on a marked trajectory of falling short of our UNFCCC Paris Agreement targets.[15] The alarming rate of environmental degradation indicates a failure of existing legislative arrangements, and casts doubt on the fundamental attitudes and paradigms that underpin them.

At the core of Australia's legislative environmental protections is the unyielding cultural paradigm of 'anthropocentricism'[16] — a fundamental view that the value of the natural world is solely contingent on its usefulness to humans.[17] Most environmental protections merely regulate our *use* of the natural environment, rather than taking proactive measures or restoring ecosystems to their natural state.[18] Furthermore, given the huge amount of discretion afforded to ministerial decision makers and their tendency to favour economic considerations over longer-term sustainability, our legislative provisions often perpetuate highly exploitative behaviours.[19] For example, under the Commonwealth Government's key piece of environmental legislation, the *Environment Protection and Biodiversity Act 1999* (Cth) (the 'EPBC Act'),[20] developments or projects that are likely to have a significant impact on federal land or waters (known as 'controlled actions')[21] must be referred to the Minister for assessment.[22] Yet as of 2016, only 18/806 of the controlled action applications have been rejected, which has perpetuated ecological destruction.[23] Such an instrumentalist approach to the environment has been referred to as the 'root of all ecological problems',[24] as it obscures the core interests and needs of nature.[25]

At the State level, the degradation of Victoria's iconic Yarra River is a key illustration of the implications of human encroachment faced by natural entities. Despite years of legislative efforts to restore the river's health, the Yarra remains highly polluted with industrial run-off, sewage and waste products.[26] The construction of dams has led to riverbed erosion and salinity, and planning laws have failed to prevent the over-development of housing on the Yarra's riverbanks, which has further worsened water quality.[27] Historically, governance of the river has been fragmented between 11 different councils,[28] and it is clear that the failure to treat the river as a single, living entity has exacerbated environmental degradation. The Yarra has been silenced in the policy decisions and environmental management plans directly affecting it.

Judicial Protections

Access to the courts is crucial for the enforcement of laws, but especially so in the realm of environmental law, as litigation connects together a highly fragmented domain of decision makers, regulators and actors.[29] Standing to sue, or the right to instigate litigation, must be established before the merits of a case can be heard. In Australia, the common law test for standing without joining the Attorney General and where no private right has been interfered with, is that a plaintiff must possess a 'special interest' in the subject matter of the action,[30] beyond any other member of the public.[31] These requirements aim to avoid 'opening the floodgates' to vexatious or frivolous claims.[32]

However, these standing requirements can preclude environmental claims from being heard, as advocates who cannot demonstrate a special nexus or interest in the environmental matter are barred from litigating.[33] In *Australian Conservation Foundation v Commonwealth*, the High Court deemed the ACF's environmental concerns regarding the development of a resort area as merely 'intellectual or emotional', which was considered insufficient to establish standing and maintain the action.[34] Further, in *Australian Conservation Foundation v South Australia*, Cox J referred to these public interest standing requirements as 'unfortunately restrictive procedural rules that limit access to the courts.'[35]

Nonetheless, there have recently been some statutory relaxation of standing requirements. Many environmental laws in NSW now contain an open-standing provision, entitling any person to challenge breaches of the law.[36] Moreover, inquiries into the implications of widened standing laws under the EPBC Act has found no evidence of abuse of process, nor were there any frivolous or vexatious claims by litigants.[37]

While these liberalised standing laws represent progress on the issue of access, a fundamental problem remains — many remedies in environmental litigation do not adequately consider damage to the *environmental entity itself*.[38] A large proportion of total injuries are not accounted for if injuries to the human plaintiff, as opposed to the entity itself, are considered in the assessment of damage.[39] This approach fails to address the broader needs of the entity's ecosystems.[40]

Granting Legal Rights to Nature

Stone's Model: A Courtroom Voice for Nature

Under our current legal system, there is no option for representatives to seek protection for nature's own sake, *in nature's best interests.* According legal personhood to nature presents a unique opportunity to overcome the deficiencies of our instrumentalist legal protections, as we shift away from conceptualising the environment as mere 'property' to recognising its intrinsic worth.[41] Professor Stone stipulates three requirements for this to be given force and effect in our courtrooms — the environmental entity must be entitled to institute legal action at its own behest, damage to the entity itself must be considered, and any relief awarded must flow to the entity's benefit.[42]

Firstly, to overcome the strict procedural standing rules that have often denied access to the courts, an environmental entity should be able to litigate in its own name.[43] The fact that nature cannot physically vocalise its concerns is not an insurmountable problem; much like in the case of corporations, infants and the mentally challenged — guardians can be appointed to speak on their behalf. [44] Guardians may be environmental groups or indigenous representatives, and may take on the role of general monitoring of the environmental entity's health and preservation.[45]

The second and third requirements are that any relief granted must consider injury to the environmental entity itself and directly flow to its benefit.[46] A key advantage of allowing nature to stand for itself in our courts is the prospect of compensatory damages being awarded *directly* to the environmental object that has suffered harm.[47] Stone's suggested method of calculating pecuniary damages is to make the environment 'whole' again.[48] There are, of course, inherent difficulties in defining and estimating this, but this is no different to any non-economic loss.[49] Any damages awarded to the environmental entity could be placed into its own trust fund for future conservation benefits, to be administered by the guardian.[50]

Extant academic commentary has explored the practical challenges of enforcing legal personhood for the environment. Such an institutional change requires significant financial resources, knowledge and time in order to effectively uphold nature's rights in court[51] and to avoid the conferral of rights being merely illusory or symbolic.[52] The choice of guardian is also a remaining question, however, guardians should be independent from governmental agencies, to avoid the risk of conflating protective efforts with hidden agendas.[53] Another pertinent concern is the potential difficulty in defining the substance of the rights. Several approaches have been suggested — for example, an entity's rights may be based upon what is considered in its 'essential nature', such as a river's right to flow unobstructed, which would oppose the construction of a dam.[54] The Ecuadorian Constitution has taken a more holistic view by stipulating nature's right to 'exist, persist, maintain and regenerate'.[55]

From Theory to Practice

Over the last decade, a number of jurisdictions have recognised the legal rights of nature, demonstrating that this concept is steadily integrating into environmental law. Each case of implementation has been in response to a set of pressures that have demanded an innovative shift in environmental governance.[56]

In 2014, the New Zealand parliament passed the *Te Urewera Act*,[57] vesting legal personhood in the expansive forest of Te Urewera, home to the indigenous Tuhoē iwi (tribe). Te Urewera now owns itself in perpetuity,[58] and possesses full legal personhood.'[59] A board of representatives, comprised of both Tuhoē and the Crown,[60] will speak as its voice to preserve it in 'its natural state' as far as possible.[61] This means that Te Urewera can defend itself from potential corporate encroachment or developments,[62] without the need to demonstrate human harm. The Act stipulates the activities that require authorisation, however, makes clear that Te Urewera may still be mined by the Crown.[63]

The vesting of legal personhood in Te Urewera has been described as 'legally revolutionary',[64] particularly due to the unprecedented legislative shift in the purposes of the forest's management. Prior to its recognition as a separate legal entity, Te Urewera was governed by the *National Parks Act*, which sought to preserve the area for its scenery, recreation and science.[65] The new *Te Urewera Act* now recognises the cultural and spiritual importance to Māori, and perhaps most importantly, the *intrinsic worth* of the land.[66]

New Zealand's Whanganui River gained legal personality in 2017, ending 140 years of negotiations between Māori and the Crown.[67] The riverbed is now a legal entity known as Te Awa Tupua. An advisory group, consisting of 17 key representatives from government, business and local communities, will support the river's independent guardians.[68] Thus while the *Te Awa Tupua Act* has legislative force at a national level, it concurrently allows for decentralised management and fosters diverse stakeholder participation in order to operationalise legal personhood at a municipal level.[69] Moreover, a contestable NZ $30 million fund has been set aside for the governance of the river.[70]

In 2017, in the wake of enormous amounts of pollution, the High Court of Uttarakhand conferred legal personhood upon the sacred Indian Ganges and Yamuna rivers.[71] In an essentially overnight ruling, the High Court of Uttarakhand adopted a guardianship model, treating the rivers as minors under the law and appointing specific government officials *in locus parentis*.[72] Immediately, the daily dumping of 1.5 billion litres of untreated sewage and 500 million litres of waste became unlawful.[73] However, the decision was stayed on appeal by the Supreme Court of India, particularly due to the transboundary nature of the rivers.[74] The appellants questioned whether a river could be held liable for damage caused by flooding, and the court ruled it could not.[75] This example demonstrates that while the conferral of legal rights through the judiciary is rapid and expedient, an abrupt shift away from existing legal frameworks is not practically sound. Moreover, the treatment of the rivers as *minors* under the law risks a conflation of legal personality with human personality; which implicitly carries with it excessively broad definitions of 'harm' that are unlikely to be successfully implemented.[76]

The push for legal rights for nature has also made its way into Australian legal discourse. Community rallies have recently advocated for legal rights for the Margaret river in Western Australia.[77] The Australian Earth Laws Alliance has been working alongside local communities to extend legal personhood to landmarks such as the Great Barrier Reef and the Blue Mountains.[78]

Returning to the Yarra River — in 2017, the Victorian Parliament passed the *Yarra River Protection (Wilip-gin Birrarung murron) Act*,[79] granting a permanent voice to the river through the establishment of the Birrarung Council (which must include indigenous representatives).[80] However, the legislation is not an explicit recognition of legal personhood. Instead, the Yarra's new voice only has an advisory status.[81] Nonetheless, this development is reason for cautious optimism, as the river has now been acknowledged as a holistic, living entity and is afforded a voice against potential human encroachment. The Birrarung Council will speak for the river in the formulation of a new management and protection plan.[82]

Given that these cases are relatively recent developments, their practical legal implications are yet to unfold. Important questions still remain, such as the exact content of rights and when the guardians will choose to invoke them. New Zealand's discrete legislative approach may prove the most effective in the long run. Despite being slower to implement, New Zealand's conferral of legal personhood allowed for enough time to generate public support, is supported by adequate funding and prioritises indigenous guardians.[83]

A New Consciousness: Thinking Ecocentrically

'Deliberatively, we are resetting our human relationship and behaviour towards nature. Our disconnection … has changed our humanness. We wish for its return.'[84]

In the context of granting rights to a right-less entity, it is impossible to disentangle the underlying ethical and philosophical considerations. Society's collective consciousness tends to conceptualise the environment as a discrete, 'other-than-us' entity. It is deeply ingrained into contemporary Western 'natural attitude' to view the environment as a resource, [85] as a mere 'thing' for human use.[86] This attitude may have been borne out of the search for economic growth and higher living standards.[87] However, as we enter an unprecedented era of environmental destruction, it is imperative to reflect upon whether this anthropocentric rationality has taken society to a dangerous ecological tipping point.

Plainly, granting legal rights to environmental entities is an unequivocal recognition of their intrinsic worth. It is a legal manifestation of ecocentrism; an adoption of a *nature-centred* worldview.[88] Legal personhood for the environment affords a protective flexibility that cannot be replicated by a fixed list of legislative standards. Perhaps more crucially, it shifts society's consciousness towards a worldview where nature is no longer regarded as a ready-to-exploit commodity, but as a broader community in which we are a part of.[89] This perspective does not blindly oppose economic uses of the environment, rather, it urges decision-makers to acknowledge nature's intrinsic value whenever they interact with the environment. Rather paradoxically, thinking ecocentrically and recognising the inherent value of nature may ultimately have anthropological benefits, as intergenerational human wellbeing is highly dependent on environmental health.[90]

Moreover, ecocentric thinking that acknowledges nature's intrinsic value presents a valuable opportunity to reconcile and connect with indigenous worldviews — many of which deeply revere the natural world.[91] The conferral of legal rights upon Te Urewera and the Whanganui River was borne out of decades of ownership disputes between the Crown and Māori, representing an attempt to align Western legal precedents with indigenous worldviews.[92] The *Te Urewera Act* reads: 'Te Urewera has an identity in and of itself, inspiring people to commit to its care'.[93] This phrase makes clear that the decision to grant legal personhood to Te Urewera is an attempt to manage *humans*, not the land. The legislation embraces ecocentrism by recognising that humans are not above or superior to the natural environment, rather, that human existence is intrinsically linked to the health of our planet.

Conclusion

It seems particularly odd that society no longer thinks twice about corporate personhood — rights to a truly *legal fiction* — yet a proposal to grant legal rights to the tangible, animated natural world around us is met with an initial onslaught of opposition. But if history has taught us anything, it is that each new crusade to confer rights upon an unjustly silenced entity passes through three stages — 'ridicule, discussion, adoption'.[94]

It is clear that the anthropocentric nature of existing legislative and judicial arrangements has perpetuated unprecedented rates of ecological degradation. While granting legal personhood to the environment inevitably brings with it practical and ethical challenges, the difficulty of these challenges alone should not be grounds for automatic dismissal of the notion. Further legal and academic commentary is needed to fully assess the implications of environmental personhood, especially as cases unfold in the various jurisdictions that have recently implemented the notion.

Our existing attitudes towards the natural world are plagued by an excessive sense of entitlement and ownership. The same systemic attitudes and conceptualisations that have engendered the rapid deterioration of our planet cannot reasonably be expected to reverse these damages.[95] According legal rights to nature confronts this poignant reality by fundamentally transforming our relationship with the natural world. Indeed, it may prove to be an effective way to free the natural world from the relentless anthropocentric paradigm it finds itself in.

The unheard voices of asylum seekers and refugees

An Australian perspective

SHOM PRASAD

Juris Doctor II

Australia is a signatory to the *United Nations Convention Relating to the Status of Refugees* ('*1951 Refugee Convention*'),[1] which has been partially incorporated into Australian law through the *Migration Act 1958* (Cth). As such, Australia has international obligations to protect the human rights of asylum seekers and refugees who arrive in Australia, regardless of how or where they arrive, and whether they arrive with or without a visa.[2]

However, current public attitudes towards asylum seekers and refugees are being heavily influenced by political propaganda that dehumanises these groups. The unfounded claims that people seeking asylum are 'illegal' or 'jumping the queue' result in perceptions that these people do not deserve to be treated with respect and dignity, and have no place in Australian society. Their voices are silenced, and their rights are stripped away.

Australia's current offshore processing regime sends asylum seekers to Nauru (and previously, Manus Island) to have their refugee claims determined.[3] This offshore processing scheme has led to enormous human suffering, with a lack of media attention and compassion contributing to the continuation of this inhumane process. The purpose of this article is to raise awareness about the atrocities faced by refugees and asylum seekers attempting to resettle in Australia, and the civil liberties of these groups that are being breached during this process by the Australian government.

This article also attempts to use landmark cases decided in the High Court of Australia to illustrate how these decisions have contributed to this suffering. These decisions have been widely condemned by various commentators, and have shown a sincere disregard for the international obligations owed by Australia to the global community.

Who Are Asylum Seekers and Refugees?

The terms 'asylum seeker' and 'refugee' are often used interchangeably in general conversation, leading to erroneous conclusions about the status of these individuals. According to a research paper published by the Parliament of Australia, the terms are defined as follows:

> An asylum seeker is someone who is seeking international protection but whose claim for refugee status has not yet been determined. In contrast, a refugee is someone who has been recognised under the 1951 Convention relating to the status of refugees to be a refugee.[4]

According to the 1951 Refugee Convention, a refugee is a person who:

> … is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[5]

Refugees have their status determined by a national government or an international agency, such as the United Nations High Commissioner for Refugees ('UNHCR').[6] Upon determination of their refugee status, refugees must be afforded protection if they flee their country of origin, and they must not be forcibly returned to a country where they may be subjected to persecution. Many refugees escape their country of origin due to civil conflict and genocide. For example, the largest number of refugees are from Syria, with a total of 6.3 million people having fled the ongoing Syrian Civil War since 2017.[7]

Asylum seekers are those people who *may* be refugees, but their refugee status has not yet been determined. In many situations, people seeking asylum travel without documentation, simply because they may be fleeing persecution by the government and are unable to obtain their passports from officials in that country.[8] Alternatively, these people might want to reduce the risk of being unable to flee, resulting in travel without documentation to avoid identification.[9]

Article 14(1) of the *Universal Declaration of Human Rights* states that everyone has the right to seek and to enjoy in other countries asylum from persecution.[10] Article 31 of the 1951 Refugee Convention states that it is legal for a person to enter a country for the purposes of seeking asylum.[11] Together, these international instruments emphasise that regardless of how they arrive, an asylum seeker who comes to Australia to seek asylum is not an 'illegal entrant' or 'jumping the queue'. Rowe and O'Brien's article published in the *Australian Journal of Social Issues* analyses contrasting depictions of asylum seekers, stating:

> A dichotomous characterisation of legitimacy pervades the discourse about asylum seekers, with this group constructed either as legitimate humanitarian refugees or as illegitimate 'boat arrivals'. Parliamentarians apply the label of legitimacy based on implicit criteria concerning the mode of arrival of asylum seekers, their respect for the so-called 'queue', and their ability to pay to travel to Australia. These constructions result in the misrepresentation of asylum seekers as illegitimate, undermining their right to protection under Australia's laws and international obligations.[12]

These misinterpretations have featured widely in the opinions of Australian politicians and recent media coverage of this issue, feeding into negative perceptions of asylum seekers as illegal entrants who should not be afforded rights and protections in Australian society. For example, Malcolm Turnbull recently defended his tough border protection policies in his speech in Germany, where he stated that people who travel by boat with the intention of arriving in Australia would be denied entry into the country.[13]

regardless of how they arrive, an asylum seeker who comes to Australia to seek asylum is not an 'illegal entrant' or 'jumping the queue'

Does Australia Have An 'Influx' of Refugees and Asylum Seekers?

Australia does not host many refugees and asylum seekers compared to other nations. Due to Australia's lack of neighbouring countries and geographical isolation from many civil conflicts, comparatively few people seek asylum in Australia. In 2015, Australia received 16,117 applications for asylum, accounting for just 0.5% of the global total.[14] Additionally, population statistics published by the UNHCR show that at the end of 2015, Turkey hosted more than 2.5 million refugees, whilst Australia hosted 57,362 refugees and asylum seekers in total.[15] It is important to note that that Turkey's population is three times that of Australia and Australia is the sixth-largest country in the world in terms of land mass. Realistically, Australia does not face an 'influx' of refugees and asylum seekers. In fact, on the basis of this analysis, Australia has the capacity to host a higher number of refugees and asylum seekers.

The disappointing facet of this controversial debate is the array of views about refugees and asylum seekers presented by Australian politicians, usually painting a negative picture about this minority group. During her time as Prime Minister, Julia Gillard's hard-line policy did not allow refugees who came by boat to be afforded the same protections as those who arrived through non-IMA (non-illegal maritime arrival) means. During his Prime Ministership, Tony Abbott did not allow for the resettlement of the Rohingya people fleeing Myanmar in 2015, claiming they should use 'the front door' if they wanted Australia's protection.[16] In a recent radio interview with 2GB's host Alan Jones, Australian Minister for Immigration and

Border Protection, Peter Dutton, stated that lawyers providing pro bono assistance to asylum seekers were 'un-Australian'.[17] In another interview with Ray Hadley, Dutton verbally abused 52 refugees leaving Australia's offshore detention centres to seek resettlement in the United States of America, calling them 'economic refugees'.[18] As important figureheads in Australian politics, such comments are a poor display of the Australian values of kinship and cultural diversity. The reality is quite clear — many Australian politicians do not support the settlement of refugees and asylum seekers in this country.

These perceptions have had an immense influence on the way the general Australian public perceive these minority groups. Results from the 2017 Lowy Institute poll revealed that 48% of Australians believed that refugees in detention centres on Nauru and Manus Island should not be settled in Australia.[19] Additionally, almost 40% saw asylum seekers coming to Australia as a critical threat to Australia's interests.[20] Despite being a culturally and linguistically diverse nation, these statistics demonstrate the apprehension Australians hold towards the arrival of refugees and asylum seekers from other countries.

Indefinite Detention Under the Migration Act and the High Court of Australia

Whilst international obligations mean that Australia must protect the human rights of asylum seekers and refugees, they do not necessarily provide guidelines as to how this protection must be offered. Landmark cases concerning the rights of asylum seekers that have gone before the High Court have questioned this form of 'protection' provided by the Australian government, such as the permissibility of indefinite detention as well as the inhumane conditions under which these individuals are kept.

In the controversial case of *Al-Kateb v Godwin*,[21] the High Court ruled that indefinite detention of a stateless person was permissible under the Australian Constitution. The plaintiff, Al-Kateb, was a stateless Palestinian who had arrived in Australia by boat and without a visa. Upon being refused a temporary protection visa, he sought removal to a third country but was unsuccessful due to his statelessness.

Under the *Migration Act*,[22] if a person is deemed to be an unlawful non-citizen, they must be kept in immigration detention until they are removed from Australia, dealt with by an officer, deported, or granted a visa.[23] As removal was not possible due to his stateless status, the High Court had to decide whether the *Migration Act* permitted his ongoing indefinite detention. In a 4:3 decision, the High Court ruled that indefinite detention for people in such a situation was permissible, as even if there were no prospects for removal at that time, they could nevertheless arise in future.[24]

As well as breaching fundamental human rights, this decision demonstrated the ambiguity of High Court decision-making. Following the decision, an article by Cameron Boyle emphasised that this result did not conclusively determine how this precedent would be applied in the future.

> The judgment of the High Court in *Al-Kateb* has not resolved the question of whether the executive can indefinitely detain an unlawful non-citizen. Due to the flawed majority decision, the slim majority and the questionable political climate, *Al-Kateb* is a decision that should remain the subject of caution.[25]

Many cases following *Al-Kateb* have cited, considered and approved this precedent. Whilst s 196 of the *Migration Act* specifies the circumstances under which a person is considered an unlawful non-citizen and is therefore to be placed in detention, the decision of *Al-Kateb* has continued to be applied arbitrarily by the High Court to later cases in light of this legislation.

One such example of this is the case of *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*.[26] In this case, the applicant claimed that since they did not have permission to remain in Australia as a non-citizen, their detention in immigration residential housing was unlawful. The plaintiff also claimed that the continuation of such detention would only be lawful if it is done for the purposes of deportation, which in this case it was not. The arguments put forward by the plaintiff were in light of s 196 of the *Migration Act*. The applicant also challenged the decision in *Al-Kateb* of indefinite detention of 'unlawful non-citizens'.

In a unanimous judgment, the High Court ruled that the plaintiff's detention was authorised under ss 189 and 196 of the *Migration Act*. In applying *Al-Kateb*, they stated that continued detention of an unlawful non-citizen for the prospects of removal from Australia was permitted. Disappointingly, a 4:3 majority elected not to decide whether the

decision in *Al-Kateb* should be overturned, as the question of indefinite detention had not arisen for the refugee in *Plaintiff M76*.[27]

The decision in *Al-Kateb* has remained uncertain ever since, leaving much equivocation as to the future of other asylum seekers placed in indefinite detention. After the decision in *Plaintiff M76*, this uncertainty was further heightened by the changing composition of the High Court bench.[28] Hayne J, who retired in 2015, was the last remaining judge to have sat on the *Al-Kateb* case when *Plaintiff M76* was decided. Since this period of cases concerning indefinite detention, *Al-Kateb* has not been overturned and this area of law remains quite ambiguous in its application.

A comment by Ben Saul in his article concerning the detention of refugees provides insight into the false justifications provided by the Australian government for detaining these groups:

> In the absence of substantiation of any prima facie security case against the refugees, it could be inferred that Australia's detention of them pursued other, illegitimate, objectives: a group-based classification that all 'boat people'... may be potential 'terrorists'; a generalised fear of absconding which is not personal to each refugee; a broader policy or political aim of punishing unlawful arrivals (contrary to art 31 of the Refugee Convention) or deterring future unlawful arrivals...None of these is a legitimate justification for detention under art 9(1), which presumptively favours individual liberty unless strong and personal grounds for detention exist.[29]

The Significance of the Plaintiff M68/2015 Case

On the theme of detention, the case of *Plaintiff M68* decided by the High Court of Australia in 2016 sparked significant controversy surrounding the rights of asylum seekers in offshore processing centres.[30] In this case, the plaintiff argued that the Commonwealth government's involvement in her detention during her time at Nauru Regional Processing Centre was not supported by a valid statutory provision.[31] Upon commencing this proceeding, the Commonwealth Parliament enacted the *Migration Amendment (Regional Processing Arrangements) Act 2015*, which inserted s 198AHA into the *Migration Act 1958* (Cth) with retrospective effect.[32]

With a 6:1 majority, the High Court held that arrangement for offshore detention by the Commonwealth government was valid. The Court stated that the Commonwealth's conduct was supported by s 198AHA of the *Migration Act*, which allowed for government involvement in detaining asylum seekers in offshore processing centres.[33]

Following this decision, the government was given the power to remove 267 asylum seekers from Australia to Nauru, including 33 babies born in Australia.[34]

The decision in this case was condemned on a domestic and global scale. In his comments on the High Court judgment, Dr Scott Stephenson from Melbourne Law School stated:

> The second concerning dimension to this case... is the reliance on retrospective legislation to uphold the validity of these agreements. Given the reliance on this retrospective legislation, it appears that the Government was operating without legal authorisation for three years — a point that is explicitly acknowledged in the judgment of Gageler J (see at [180]). In my opinion, this sets a worrying precedent. It encourages Governments to act, even if they don't have explicit legal authority, if they think Parliament can and will be able to bail them out.[35]

His comments highlight that prior to the introduction of the retrospective legislation, the Commonwealth government did not have legal authority to intervene in the occurrences at Nauru Regional Processing Centre. These remarks also shed light on the fact that much of what is occurring in these regional processing centres may not necessarily be supported by a valid statutory provision. At the very least, this may justify some form of humanitarian intervention and awareness of the injustices suffered by individuals trapped in offshore processing centres.

The condemnation of the decision in *Plaintiff M68* was not restricted to a national level. In fact, international views on the High Court decision's infringement of human rights and departure from customary international law were widely discussed. Dr Jill Goldenziel from Harvard University commented on the future implications of such a decision, stating:

> Although the decision does not expressly address Australia's obligations under the 1951 United Nations Convention and Protocol Relating to the Status of Refugees (Refugee Convention), it is likely to influence other courts confronting similar challenges to offshore detention and processing arrangements and could have far-reaching consequences for the state practice and interpretation of the international law involving refugees and migrants.[36]

Dr Goldenziel's comments stem from a concern that this decision sets a troubling example for giving other governments arbitrary power when dealing with asylum seekers and refugees in offshore processing centres, reducing government accountability for any injustices faced by individuals in these facilities. The key point highlighted by this analysis is the detrimental effects of sending asylum seekers to regional processing centres to have their refugee status assessed, where the atrocities they face remain largely unnoticed.

Whilst processing facilities in operation lead to enormous human suffering, the closure of Manus Detention Centre in 2017 by the Supreme Court of Papua New Guinea led to a protest by the 600 asylum seekers who were being removed from the Centre. Those who remained in Papua New Guinea were to either be moved to a transit centre or accommodation in a nearby town. However, the individuals did not want to leave this facility due to a fear for their safety if they relocated, after many instances of being attacked by the local people and authorities. During this ordeal, 6 of the asylum seekers took their own lives.[37]

This begs the question: if offshore detention centres and processing facilities lead to enormous human suffering regardless of whether they are open or closed, where does this leave the safety of asylum seekers and refugees? Why are their rights continuously infringed upon without legal and moral justification? What steps should be taken to ensure they remain protected during the entire process?

Conclusion

It is necessary to break the silence around the atrocities faced by refugees and asylum seekers in offshore detention. There are many methods of shedding light on this issue, such as getting involved in local community organisations like the Asylum Seeker Resource Centre, or lobbying the government and holding them accountable for their actions by writing to local Members of Parliament.

However, the first thing that must be done is to understand the severity and reality of this situation. One must educate oneself on the human suffering these individuals are facing, and understand objectively what is happening to the most vulnerable individuals in society. This requires a removal from the views presented by politicians and mainstream media, to one where individuals are factually informed. Some credible sources include Al Jazeera, Amnesty International and UN News. The only way we can amplify the voices of refugees and asylum seekers is by first unlearning false truths ourselves.

Suffering to belong

The silence of migrant workers in 'fair go' Australia

NICHOLAS BETTS

Juris Doctor I

These scandals show the dark reality of the Fair Go: one of systemic migrant exploitation hidden beneath a culture of repressive silence.

In Australia, we pride ourselves on our home-grown brand of meritocracy: the Fair Go. Underpinned by notions of fairness, mateship and equality, it is a value that has been championed in recent years by successive governments — by Kevin Rudd when criticising the Howard government WorkChoice reforms,[1] in Julia Gillard's defence of the National Disability Insurance Scheme budget,[2] and recently by Prime Minister Malcolm Turnbull in his discussion of tax reform in 2015, where he explicitly referred to our 'culture of fair go, of looking after each other.'[3] More than this, it is a term often associated with our immigration policy — that of aspirational migrants coming to Australia, enriching the nation, and in doing so earning their place through grit, diligence and acceptance of Australia's multicultural values.

Yet, despite the Fair Go's glinting appeal, the past decade has seen Australia wracked by a series of progressively dire employment scandals. At the heart of these scandals, those preyed upon by unscrupulous corporations are the same migrant workers upon which we are told Australia built its post-war success. In 2016, *Sydney Morning Herald* revealed in lurid detail the underpayment and systematic exploitation of employees by 7-Eleven franchisees,[4] circumstances which resurfaced with distressing familiarity in Dominos kitchens less than a year later.[5] Soon enough, the Fair Work Ombudsman found similar issues at Pizza Hut, where only two out of the twenty-six audited franchises were found to be acting legally.[6]

In the aftermath of these scandals, Parliament has been forced to legislate to protect vulnerable workers and close exploited loopholes. Following the 7-Eleven scandal, the Liberal Government took commendable steps to hold exploitative businesses to account through two main instruments — firstly, by establishing the multi-departmental Migrant Workers' Taskforce,[7] and secondly, by passing the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), which introduced significantly harsher civil punishments for findings of systematic exploitative practices. Despite this, however, scandals continue to emerge.

These scandals show the dark reality of the Fair Go: one of systemic migrant exploitation hidden beneath a culture of repressive silence. The protection of vulnerable migrant workers in Australian society is a paramount concern, considering that migrant workers constitute at least 31% of the total Australian workforce.[8] Despite the anti-immigration rhetoric present in the news,[9] as of 2016 65% of the 1.7 million recent migrants and temporary residents were employed.[10] Comparatively, 79% of Australian citizens are employed full time, making the characterisation of migrants as 'dole bludgers' suspect at best.[11] Moreover, the findings of the independently conducted *National Temporary Migrant Survey* show that groups affected by startling rates of wage theft in NSW include international students, temporary migrants, backpackers and agricultural workers.[12] In particular, international students bear strict conditions on working hours and backpackers and agricultural workers are often unskilled and seen as being easily replaceable. Plainly, the egalitarian ideal of the Fair Go has been ill-served.

What is perhaps even more distressing is the frequent and intense vitriol levied at migrant workers by governmental figures. Recently, Minister for Employment Michaelia Cash accused illegal migrant workers of stealing Australian jobs, and continues to repeatedly tar illegal and legal migrants with the same brush.[13] Further, the Minister made a baffling submission to the Fair Work Committee claiming the majority of low-paid workers in Australia resided in high-income households —comments for which she was harshly censured.[14] These efforts seem to go beyond unintentional misinterpretation, and further into the wilful targeting of migrants. Yet, is this response really any different from the comments of our antecedents, or is it an honest representation of our conflicted national consciousness?

This paper addresses the issue of migrant exploitation using a two-pronged approach. Firstly, I will analyse the legislature's response to the crisis, and the effectiveness of legislation in protecting vulnerable workers. Secondly, I will interrogate whether migrant exploitation is a problem that changes to government policy alone can solve, or whether migrant exploitation is a deeper cultural problem requiring other solutions. Is the Fair Go really an ethical framework for fairness and equal opportunity, or rather, a shallow justification of a system that allows the haves to thrive off the subsistent labour of the have-nots? Through our complacency, are we as Australians complicit in the creation of a silenced underclass or has our meritocratic ideology been perverted?

The Migrant Worker's Taskforce

One of the mechanisms introduced to target migrant worker exploitation is the Migrant Workers' Taskforce (the 'Taskforce'). Following the scandal, 7-Eleven appointed an independent body headed

by former ACCC Chairman Professor Allan Fels to address compensation in-house.[15] He was summarily dismissed in May 2016.[16] In 2017, the Taskforce was assembled with Professor Fels as Chairman and Dr David Cousins as Co-Chair.[17] Unsurprisingly, an investigation into the same company that dismissed Professor Fels was at the top of their priority list.

Under its Terms of Reference, the Taskforce is responsible for 'identifying regulatory and compliance weaknesses' that create systemic conditions encouraging migrant worker exploitation.[18] Further, it is to 'develop strategies and make improvements' to eradicate said exploitation,[19] and consider ways in which inter-agency collaboration could help avoid or rectify exploitative situations.[20] Since its inception, the Taskforce has seemed to serve as more than just political lip-service. Its tenure was extended by six months and many of its recommendations were rolled into the Act.[21] Clearly, the Government was taking these scandals seriously.

However, the Taskforce has not been without criticism. There has been some concern that Senator Cash has empanelled a number of different committees, such as Operation Cardena and a Ministerial Working Group on Protecting Vulnerable Visa Holders, which serve to identify but not address migrant worker vulnerability.[22] Ultimately, this concern has been proved somewhat innocuous — although these committees did not substantially affect migrant worker policy, the institution of the Taskforce led directly to the passing of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (the 'Act').

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth)

Passed in 2017, the Act made five substantial changes to the *Fair Work Act 2009* (Cth). Firstly, it increased penalties for 'serious contraventions' of workplace laws.[23] Section 557A of the amended Act prescribes that a 'serious contravention' of civil remedy provisions'[24] is committed 'if the person knowingly contravened the provision' and if the contravention 'was part of a systematic pattern of conduct'.[25] In determining whether a serious contravention has occurred, the court must have regard to the number of contraventions committed, the period over which they occurred, the number of other employees affected by them, and the employer's response or non-response to the complaints.[26]

Secondly, the Act banned 'cashback' requirements from current and prospective employees.[27] A 'cashback' scheme in this case refers to a demand from an employer that an employee pay back a certain amount to continue their employment.[28] This is one of the most impactful changes the Taskforce recommended because cashback demands were a common way of exploiting migrant workers in the case of 7-Eleven.[29]

Thirdly, the Act increased penalties for breaching record-keeping requirements and lapses in pay-slip records.[30] Practically, this translates into three changes. First, there are now penalties for giving false or misleading pay slips to employees.[31] Second, the maximum penalty for failing to keep employee records or issue pay slips has doubled.[32] Finally, the previous maximum penalty has tripled for knowingly keeping false or misleading records.[33] This substantially increases the punitive power of regulatory bodies. Further, whistle-blowers and former employees have frequently complained that regulatory bodies either did not allot enough time for their claim or an avenue to empower them pursue it.[34] Arguably, this ineffectiveness could be attributed to regulator funding cuts in recent years, and an unwillingness by regulators to punish their government peers.[35]

Fourthly, the Act established a reverse onus of proof for wage claims against employers who do not meet record-keeping or pay slip obligations without a reasonable excuse.[36] In essence, the employer must prove they paid their employee correctly. This is important as it denies an employer the opportunity to hide within the margins. Previously, due to dishonest record-keeping, employers could deny an employee the evidence required to persuasively argue their case in court.[37]

Finally, the addition of s 712AA empowers the Fair Work Ombudsman to apply to the Administrative Appeals Tribunal for an 'FWO Notice', if the Ombudsman reasonably believes that a person is withholding evidence and is capable of giving evidence.[38] Although an FWO Notice can only be used to compel the production of information, or one's attendance at an interview, the high penalties for non-compliance (up to $126,000 for an individual and $630,000 for a company) operate to deter non-adherence.[39]

Ultimately, the Taskforce and the Act significantly enhance the powers of regulatory bodies to punish

and deter migrant worker exploitation. However, whilst both instruments play an important role in addressing migrant worker abuse, how effective can they be as ultimately reflexive responses, considering the powerful cultural forces working against them? After all the scandals, corporate fraud and systemic exploitation, we must ask ourselves the question: to what extent does the Fair Go remain alive and well, if it ever really did?

The Muddled Origins of the 'Fair Go' Mythology

Just as the 'American Dream' provided a moral light for American society, so too has the Fair Go guided Australian morality. Though less ideologically concrete and compelling than its American counterpart, the idea of 'fairness' — of a person coming to Australia and being entitled to freedom and opportunity — has been a part of the lexicon of Australian political language for decades. In this, it is worthwhile interrogating its confused origins in order to demonstrate the Fair Go's practical hollowness.

It has been argued that the first inklings of the Fair Go mythology come from the 'bush ethos' identified by Russel Ward in his book *The Australian Legend*.[40] Ward argued that, only by inverting the individualistic ethical framework of the American frontier, could we describe the Australian 'bush ethos'.[41] While the American thrived on their abundance of fertile land, the harsh Australian bush necessitated a collectivist mindset.[42] In this context, the preponderance of wage-workers meant advancement was dependent upon cooperation, upon giving everyone a Fair Go.[43] A controversial claim in itself, Ward clarified in his 1978 article 'The Australian Legend Revisited', that he was referring to the creation of a hollow 'myth', rather than any concrete reality.[44]

Ward's later comments about the artificiality of the Fair Go are supported by Graeme Davison, who claimed that 1890s urban intellectuals manufactured the Fair Go as a rural-based moral ideal, in response to their disillusionment with the immorality of life in the city.[45] Distressed by the soullessness of the city, they transmuted folk culture into a broad national identity centred upon community, mateship, and egalitarianism. The fact that many of these urbanites despised the country during their visits was lost by the wayside.[46] From this flawed foundation, the Fair Go ethos grew.

Nationalists seized upon the 'bush ethos' to define Australian bushmen as pioneers, symbols of the Australian worker, injecting individualistic values into their strawmen. Australia was trumpeted as a classless nation. Yet, in practice, any fairness the worker gained came through the harsh struggles of the union movements.

In many early cases, unionised workers sought to protect and entrench their position, primarily in mining or pastoralism.[47] The Australian economy and labour market benefitted significantly from the rush of immigrants flooding the interior after the Gold Rush. The availability of labour was so pronounced that a noted pastoralist was able to dismiss 'every man who does not please' at his whim.[48] Despite this, in the mid-1800s, Australian workers were able to extract concessions from employers such as the eight-hour work day, a novelty worldwide.[49] However, Bowden challenges that this change was contested by a drop in wages, claiming that in the 1860s and 1870s 'hours for most workers were well in excess of the eight hour ideal'.[50] The development of the Labor Party, who had campaigned explicitly on a worker's platform, aided the Australian worker in improving their plight by introducing compulsory arbitration in industrial disputes and other workplace-related reforms.[51] And yet, as we shall see, their Fair Go was not one that included non-European migrant workers.

The Fair Go was always built on a flawed foundation. Worldwide confidence in meritocratic ideologies is crumbling, and in the media both sides of the political spectrum mourn the death of the Fair Go.[52] But, if the Fair Go was simply an artificial construct of a disillusioned intelligentsia, we must necessarily examine its constructed values. Is the Fair Go really about fairness and sacrifice for all, or is it actually about 'paying your dues', real or imagined? Perhaps we, as Australians desperate for a guiding group morality, have ignored the most potent and most insidious element of the Fair Go: the notion of suffering to belong.

Suffering to Belong

Is it necessary that a migrant suffer in order to belong? Strip away the meritocratic aspirations of the Fair Go, the imagined pastoral morality and union nostalgia of the late nineteenth and early twentieth centuries, and what are we left with? Must a migrant worker suffer unjust and exploitative conditions before being valued as an

adopted citizen? Perhaps suffering is the elemental motivator of our national consciousness.

Has hard work led to greater opportunities for certain ethnic groups? Perhaps. In the wake of post-World War II mass migration, we have seen a marked shift in the cultural character of Australia. The White Australia Policy was reversed in the Whitlam era, and Australia seemed ready to embrace a new era, which promised the delivery of a Fair Go to all aspiring Australians. However, we have not yet reckoned with our bloody history of migrant exploitation, which still continues to this day with much the same faces.

As the Anglo-Australian worker enjoyed the fruits of unionised labour in the mid-1800s and early 1900s, the experience of Chinese and Pacific Islander workers was markedly different. Drawn to Australia by the Gold Rushes, Chinese workers arrived in significant numbers. In 1855, 11,493 Chinese migrants had arrived in Melbourne alone.[53] The Chinese worker became a symbol of racial hatred, even amongst the unionists who should have supported them. Unionists feared they were bringing substandard work practices to Australia and displacing skilled workers from their hard-earned jobs — a fear echoed to this day.[54] Indeed, unionist support for the White Australia Policy was high, represented through Labor's campaigning upon an explicitly racial platform.[55] In many ways, the White Australia Policy exposed the lie of the Fair Go — it was only ever a Fair Go for Anglo-Australians.

Likewise, many Melanesian and Polynesian workers (pejoratively termed 'kanakas') were brought into Australia as indentured workers, destined to ply the sugar cane plantations of Queensland.[56] Many of these workers were 'blackbirded', stolen from their homelands and pressed into servitude, unable to return home and denied basic legal rights.[57] They were, arguably, the original exploited migrant worker and, soon enough, much like the Chinese, Pacific Islanders came to be objects of racial animus. The passing of the *Pacific Island Labourers Act 1901* (Cth) saw the expulsion of the 10,000 Pacific Islanders residing in Australia back to their home islands, and their replacement with Mediterranean workers as a 'docile' underclass.[58] The Pacific Islanders were abused and ignored, until white Australia discarded them.

Disturbingly, the legacy of the exploited Pacific Islanders continues. Many Pacific Islanders still function through the Seasonal Worker Programme ('SWP') as agricultural workers in Queensland. This program purports to benefit temporary and permanent migrants by allowing them access to the Australian labour market and the capacity to send money back home. Yet, last year's 'Hidden in Plain Sight Report' portrayed the bitter fruits of the SWP: increasingly exploitative conditions, created by both local farmers and Pacific Islander community contacts, so much so that the SWP was described as 'a hotbed of exploitation'.[59] And so, as the Pacific Islanders before them, migrant workers suffer in silence.

Conclusion

So where does this leave us? The constant scandals regarding migrant workers have disturbed mainstream Australia and awakened a much-needed legislative response. The fourth estate has trumpeted its anger at the exploitation engendered by global corporate culture again and again, yet the outrage seems like so much water off a duck's back. We have not yet reckoned with the dark heart of our troubled ideology: that the Fair Go is only for the few, not for the many. We are a nation built upon the exploitation of a silenced underclass.

We have condemned the possibility of serious exploitation to the past, allowing ourselves to forget the anti-immigrant sentiments that animated the White Australia Policy and the exploitative practices foregoing the blackbirding of South Sea Islanders. We tolerated the abuse of migrant workers by both domestic and international corporations for the sake of our own convenience. Just as the urban intelligentsia imagined a bush steeped in the mythology of egalitarianism, we have dreamed that in Australia hard work is enough to foster equality. As a former 7-Eleven employee said, 'All we wanted was a fair go ... but once 7-Eleven took over, what could we expect?'[60] The reality of our meritocracy is a harsh one: to get your Fair Go, you have to suffer, and not all suffering is equal.

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Where is Australia's #MeToo moment?: The impact of Australia's defamation regime on survivors and journalists

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#MeToo

ELSPETH CRAWFORD

[1] Gaslighting is a form of psychological manipulation that seeks to sow seeds of doubt in a targeted individual or in members of a targeted group, making them question their own memory, perception, and sanity.

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Breaking the silence on consent

ZACHARY O'MEARA

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FOSTA: Silencing sex workers, online and beyond

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Beyond powerlessness: The trafficked woman as both victim and agent

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A rallying cry: Domestic violence in Australian law and society

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Public considerations for anti-discrimination law: Democratic process or political device?

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Policing power: Whistleblowers and the corporate social licence to operate

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Protecting our right to privacy: Moral perspectives on data processing under the GDPR

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Police, detention and youth indigenous justice: Suspect targeting as a form of racial vilification?

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The silence of the worker: Australia's industrial action laws

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Weapon and shield: Advocating for the twin purposes of vicarious liability

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Rethinking Australia's animal protection regime: A rights-based approach

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Granting legal rights to nature: Reframing environmental consciousness through the courts

VICTORIA CHEN

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The unheard voices of asylum seekers and refugees: An Australian perspective

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Suffering to belong: The silence of migrant workers in 'fair go' Australia

NICHOLAS BETTS

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