Dissent.

DISRUPT

Social Justice Journal
Sydney University Law Society

2017

Dissent.
DISRUPT

Sydney University Law Society
Social Justice Journal 2017

ISSN: 1839-1508

Design

Christina Zhang (Design Officer)
Rina Yang (Cover Art)
Emily Shen (Publications Officer)

Editor-in-Chief

Subeta Vimalarajah

Editorial Board

Umeya Chaudhuri
Wendy Chen
Rachel Irwin
Alison Xiao

Printing

Megacolour

Special Thanks

Sally Kirk (VP - Social Justice)

Special Thanks to our Sponsor

Dissent.

DISRUPT

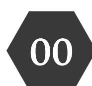
Social Justice Journal
Sydney University Law Society

2017

ACKNOWLEDGMENT OF COUNTRY

Bujari gamarruwa 'Good Day' in Gadical language. 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 acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, in particular, a legal and political system that still to this date doesn't provide Aboriginal people with justice.

Rachel Durmush – SULS First Nations Officer



EDITOR'S FOREWORD

SUBETA VIMALARAJAH

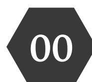
For many, 'disrupt' recalls mass protests and activists. Yet in the last decade, 'disrupt' has taken on a new meaning. Far from its radical roots, 'disrupt' has been co-opted by Silicon Valley types and innovation junkies, to signify something cleaner, more efficient, and decidedly less concerned with social justice.

This year's theme was a litmus test for how we understand 'disrupt'. Many of our contributors brought us articles evidencing the more traditional understanding of 'disrupt'. Ariana and Jacinta both explore mass protest movements in Columbia and China respectively, while Sally looks to the disruption caused by 'vigilante litigants' seeking to salvage the Great Barrier Reef from Adani's CO_2 hungry claws. Rhys questions our unwillingness to disrupt the territorial status quo, and the implications of this on minorities seeking secession rights.

Others have considered how technology has created new legal problems for social justice. Nina explores the law's failures in regulating technology-facilitated abuse, while Harry questions the expansion of liability for manslaughter in the United States, for words uttered over the phone. Kin questions how accessible Australia's current start up culture is, in light of our insolvency laws, and Lucas walks us through the potential inadequacies of international treaties relating to drones.

As always, true to its name, this year's *Dissent* seeks to elevate the voices of those who are often left out of our starred readings at Sydney Law School. Sophie considers Australia's history of wrongful convictions, and the flimsy framework for minimising the injustice that results from them. Robert breaks down racist voting laws in Trumpland and last, but certainly not least, Tilini maps out the calls of our First Nations people in the Uluru Statement, and calls on the Australian government reconcile with Indigenous Australians through a treaty.

A special thanks to our cover artist, Rina Yang. Another thanks to Oscar Monaghan. It is both humbling and heartwarming to have a past *Dissent* editor turned academic writing our foreword. A further thanks to Sally, Em, Christina, and the Sydney University Law Society for helping put this edition together, and funding the extravagant cheese platter at our launch. And last, but not least, my fellow editors.



ACADEMIC'S FOREWORD

OSCAR MONAGHAN

It is a privilege to write the academic foreword for this year's edition of *Dissent*; my thanks to the editorial team for extending me this opportunity to reflect on the theme of this issue – disrupt.

As lawyers and legal thinkers, it is disturbingly easy to internalise or otherwise rationalise the ways in which most legal work sustains the harmful systems we work within, rather than transforms them. For those of us committed to a more just future, we must continually ask ourselves how we can intervene in processes and systems that maintain the status quo – this is not an easy task when much of the training we receive in law school (and subsequently, the profession) is inherently, and perhaps unavoidably, conservative.

Asymmetries in power exist everywhere. Whilst these asymmetries are so naturalised that we may forget the manifold ways they shape our lives, there are moments in which the veneer of equality slips, reminding us that the distribution of chances in life are predetermined along many vectors (like class, gender, race, and ability). Those moments, where expectations of safety (Nina Newcombe; Lucas Moctezuma), opportunity (Kin Pan), and our faith in laws and institutions (Sophie Norman; Robert Clarke; Dominic Keenan; Harrison Rogers & Subeta Vimalarajah) are disrupted, provide opportunities to identify the ways in which the law is implicated in these systems of maldistribution.

Intervening in these systems is important. Disruption can be overt - like protest (Jacinta Keast; Ariana Ladopoulos), or a legal challenge (Sally Kirk). But it can also be found in the slow trudge of enduring resistance, in persisting with political demands in the face of extreme indifference (Tilini Rajapaksa) and systems invested in order instead of justice (Rhys Carvosso).

To disrupt is to upset, interrupt, disorder, disturb and to unsettle. It is, by definition and by design, an uncomfortable action for all involved. As lawyers, we are trained to prefer the comfort of order and familiarity; as such, opportunities to learn to productively engage with discomfort are vital to our training as people committed to redressing the harms produced by the status quo. This year's edition of *Dissent* provides one such opportunity for growth and reflection, and it was a genuine delight to read the articles in this issue.

As a past contributor and editor, I can appreciate the work involved in pulling together an extra-curricular essay amongst the many other commitments during the semester, as well as the labour involved in the months of editorial work required to put together a journal of this quality. My sincere congratulations to Subeta Vimalarajah, the entire editorial team, the contributors, and to all others involved. It's heartening to know that *Dissent* continues its important intervention into the law school landscape, reminding those of us with the privilege to study law, and to study law at this law school, that the law is both a location and a tool for social justice work. ⬣

01

The False Binary Between The Online And Offline: How Cyber-identity Is Challenging The Law's Conception Of Digital Use And Technology-facilitated Abuse

Nina Newcombe **11**
Bachelor of Arts/Laws V

02

Maintaining Momentum: Moving Forward On Reconciliation With Australia's First Peoples

Tilini Rajapaksa **14**
Bachelor of INGS/Laws V

03

Supporting A Fair Go: How Insolvency Law Reform Can Democratise Startup Culture

Kin Pan **18**
Bachelor of Arts (MeCo)/Laws IV

04

Wrongful Convictions: Disrupting Public Faith In Australia's Criminal Justice System

Sophie Norman **22**
Juris Doctor III

05

Manslaughter By Suicide: *Carter* In NSW

Harrison Rogers & Subeta Vimalarajah **26**
Bachelor of Economics/Laws IV &
Bachelor of Arts/Laws VI

06

Law And Disorder - Populist Legislating And Its Consequences

Dominic Keenan **30**
Juris Doctor I

Contents.

07

Disrupting Progress: Vigilante Litigants – The Role Of Public Law And Protest In Upholding International Environmental Law

Sally Kirk **33**
Bachelor of Arts/Laws VI

08

Disruption's In The Air: How Drones Took The Law Of The Skies By Surprise

Lucas Moctezuma **38**
Bachelor of INGS/Laws IV

09

The Right To Assembly And Protest In Colombia And The *Police Code* Of 2016

Ariana Ladopoulos **41**
Bachelor of Arts/Laws VI

10

The Silenced Majority

Robert Clarke **45**
Bachelor of Economics/Laws I

11

Negotiating The Boundaries Of 'Acceptable' Protest In Mainland China

Jacinta Keast **50**
Bachelor of Commerce/Arts IV

12

Are Borders Set In Clay Or Stone? Understanding Our Reluctance To Disrupt The Territorial Status Quo

Rhys Carvosso **53**
Bachelor of Arts/Laws IV

01

THE FALSE BINARY BETWEEN THE ONLINE AND OFFLINE: HOW CYBER-IDENTITY IS CHALLENGING THE LAW'S CONCEPTION OF DIGITAL USE AND TECHNOLOGY-FACILITATED ABUSE

NINA NEWCOMBE

I Introduction

For survivors of domestic abuse, new technologies have opened various channels for support and services, but have also created tools to expand the reach of abuse in domestic violence settings. Perpetrators have seen considerable expansion in their means to abuse, intimidate, harass and stalk their victims, where the constant connectivity of digital communications often means that victims are more accessible and feel tethered to their abusive partners.[1] Nicola Henry and Anastasia Powell have termed these new forms of coercion, harassment and stalking, technology-facilitated abuse (TFA), a form of digital violence which, although common, is noticeably absent from relevant policy strategies and case law.[2]

To effectively address TFA and enable justice for victims, there is a clear need for disruption of current legal and policy frameworks. A SmartSafe study reported that 98 per cent of domestic violence practitioners across social work, health and the law had a client who had experienced TFA.[3] However, scholars note that internet safety campaigns have tended to fixate on the sending of sexually-explicit images between young people, and that the onus has fallen on victims to protect themselves by simply logging off and refraining from using the electronic devices in question.[4] This thinking fails to situate domestic violence within its digital context, and the pervasive nature of this context in our everyday lives.

II Understanding Technology Facilitated Abuse

The Final Report of the Coalition of Australian Governments Advisory Panel on Reducing Violence Against Women and Their Children defines technology-facilitated violence as:[5]

> …technology-facilitated abuse (the use of information and communications technologies to send or post defamatory material, abuse, or harass, post personal information or material, impersonate another person, or cause an unauthorised function) and technology-facilitated stalking (the use of technologies to monitor communication, activities or movements of another person, via physical property, virtual accounts, online profiles, computer monitoring software or spyware, keystroke loggers and location-based tracking software).

In his address to the 2015 COAG Summit, Prime Minister Malcolm Turnbull stated that 82 per cent of women who experience technology-facilitated stalking are also likely to experience other forms of domestic violence.[6] Further, in its review of domestic violence homicides between 2000 and 2012, the NSW Domestic Violence Death Review Team observed that technology was commonly used by perpetrators to

stalk, monitor and control their intimate partners.[7] Groups that were found to be particularly vulnerable to TFA included Indigenous women who rely on technology to keep in touch with their culture and community,[8] women experiencing disability, and women from culturally or linguistically diverse backgrounds.[9]

By its nature, TFA can also damage the relationships between victims and their support systems, which can isolate them even further.[10] In some instances, the perpetrator may impersonate the victim online and post rumours and allegations that they are unable to defend, causing them to lose social support and relationships in their social network.[11]

III Current Approaches to TFA

There are several mechanisms within the existing legal framework which afford protection and remedies to victims for TFA in the domestic violence context. In Vallelonga, Justice Henson stated that the 'seeming inability to eradicate domestic violence from society warrants a strong response from the legal system.'[12] However, NSW does not currently have an offence which directly addresses TFA, a challenge which requires devising appropriate terminology to adequately describe and cover the scope.[13]

There are currently three pieces of legislation that can be used to address TFA in NSW. The *Surveillance Devices Act 2007* (NSW) regulates the use, installation, maintenance and retrieval of surveillance devices that may be used in domestic abuse settings. For example, the Act prohibits the installation, use and maintenance of optical surveillance devices or data surveillance devices without consent.[14] The *Crimes Act 1900* (NSW) contains various provisions that may be applied to TFA, such as filming someone's private parts or filming them in a private act, voyeurism or installing a device to facilitate observation.[15] In addition, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) regulates the use of apprehended violence orders (AVOs), including apprehended domestic violence orders (ADVOs). ADVOs are the main civil law remedy available within the NSW campaign to stop ongoing domestic violence. Under the Act, an ADVO may be granted where the court is satisfied that the person has reasonable grounds to fear the commission of a personal violence offence or intimidating conduct, and may prohibit defendants from engaging in certain kinds of behaviour, such as that which would constitute TFA.[16] At present, behaviours relating to TFA must constitute acts of 'intimidation' to fall within the Act's provisions.[17]

On 21 May 2017, the NSW Parliament introduced the *Crimes Amendment (Intimate Images) Act*, which criminalises the non-consensual recording and distribution of intimate images. NSW Attorney-General Mark Speakman described the distribution of these images as a 'form of abuse that can cause significant distress to victims' who, under the new Bill, will be able to 'take a stand against privacy abuse.'[18] The Bill makes it an offence to record or distribute intimate images without consent, which Speakman said provides victims with additional protections 'against controlling or coercive behaviour which can occur in abusive relationships.'[19] While the Bill does address privacy abuse in these abusive settings, it does not encompass the many aspects of controlling or coercive behaviour in such relationships that is facilitated by the use of digital technologies.

At the Commonwealth level, the *Criminal Code 1995* (Cth) makes the use of a carriage service for a threat to kill, or to menace or harass, a criminal offence.[20] Further, some progress has occurred in acknowledging technology use as facilitating abusive behaviour. For example, the *Enhancing Online Safety for Children Amendment Act 2017* (Cth) passed in late June 2017 re-focused the role of the former Children's e-Safety Commissioner by creating the Office of the e-Safety Commissioner to promote online safety for all Australians.[21] The Office has powers to promote online safety and coordinate related activities, also defining 'online safety for Australians' as 'the capacity of Australians to use social media services and electronic services in a safe manner.'[22]

A common concern amongst domestic violence advocacy groups is that at the state level, the NSW Parliament is casting a wide net and, as a consequence, failing to capture the behaviours related to TFA. Charissa Sun, a solicitor with Women's Legal Services NSW, states that the law is currently requiring creative application to meet the needs of victims as it was not drafted with these behaviours and technology in mind.[23] The resultant patchwork legislation has led law enforcement bodies to encounter difficulties in the successful prosecution of charges, which means that cases involving TFA often do not reach the courts.[24]

The COAG recognised that 'the complex and changing nature of legislation in response to technological advances creates confusion amongst frontline services, police and prosecutors about what is and is not legal.'[25] Further, many victims of TFA have reported feeling that the court was trivialising their circumstances.[26] Former Justice Heydon has also stated that many Australian judges are not up-to-date with technology and social media platforms, and so legislation is important in assisting judges in dealing with the complex nature of TFA.[27] The COAG Advisory Panel determined that it was important for the judiciary to 'be aware of changes in technology and associated behaviours which facilitate violence' and could be informed through formal education programmes, bench books, discussions with colleagues and adduced evidence in individual cases.[28] Similarly, the Panel determined that the police also required better awareness and training in technology safety as they are often the first to respond to violence and assess risk, and because they provide clear links to the justice sector, for example, by providing evidence in court.[29] If victims and frontline service providers are properly informed and supported, it becomes 'possible to reduce the incidence and

impact of technology-facilitated violence, as well as increase the likelihood of perpetrators being caught and sanctioned.'[30] However, victims continue to be unfairly burdened with the onus of protecting themselves, as they are expected to 'delete social media accounts, change email addresses, purchase security software, and/or avoid uploading any photographs or comments.'[31] The panel also determined that options must be developed to support victims so that they are not forced to forfeit technologies or accounts that provide them with important social connection and psychological support.[32]

IV Understanding Cyber-Identity

Rapid changes in communications technology have interwoven digital media into everyday life in an intimate and often unavoidable manner. The perception of the digital user as an anonymous, isolated figure removed from our reality is increasingly outdated.[33] Scholars have documented a breakdown in the distinction between the online and offline worlds.[34] With the extensive spread of digital technologies, they state that the online and offline spaces are becoming 'fully integrated and experienced as a single, enmeshed reality.'[35] Any view of the physical and cyber self as separate, Jurgenson argues, is a fallacy.[36] However, misconceptions continue to exist. Waldman noted that these misconceptions can lead to the incorrect view that harms inflicted in the virtual space are not as real as physical, bodily harms.[37]

In a society where the offline is intertwined with the online experience, we distribute our identity and experience across physical and digital spaces, occupying them simultaneously so that our online selves are 'increasingly identifiable as extensions of our physical selves.'[38] For example, in their studies of social networking services like Facebook, Farquhar,[39] and Senft[40] both found that these social media platforms are premised on users presenting an authentic identity and interacting with pre-existing social connections from their offline lives.[41] Chayko also identifies the essential nature of online connectivity to our participation in various realms of life: as a citizen in political communication, as a professional in the workplace, and as an individual who needs access to networks of social support, social capital and resources, all of which are increasingly located online.[42]

Often, the response to domestic violence is built upon the assumption that victims subjected to physical abuse are more severely impacted, but this is misguided as the 'hallmarks of violence in abuse cases are frequency and duration, not severity.'[43] The impacts of TFA on mental well-being are often damaging and invisible. According to the US National Network to End Domestic Violence (NNEDV) 2015 Safety Net Project, the use of technology as a tool to inflict abuse means that 'the harassment and abuse can be much more invasive, intensive and traumatising' than the traditional offline abuse.[44] Several studies have concluded that victims believed that non-physical abuse was worse than physical violence,[45] but also that victims had difficulty identifying when the abuse was occurring,[46] and that non-physical abuse almost always accompanied physical violence.[47] A study by Gavin, for example, found that 'social pain is remembered long after physical pain has faded in memory, and it appears to have far-reaching consequences for mental health, relationships, and adaptation to change.'[48] According to Dimond et al, stalking via mobile technologies enables the perpetrator to become omnipresent, as traditional spatial boundaries no longer exist and although the victim may physically separate herself from her partner, she is unable to escape from him.[49]

V Conclusion

The universal function digital media plays in many modern interactions makes it 'increasingly impossible for any of us to deny the need for a virtual presence.'[50] As Waldman describes, this trend highlights the need for regulatory law to facilitate 'digital citizenship' because victims who are excluded from cultivating digital citizenship could be 'deprived of civic dignity.'[51] With the growing interconnectedness of offline and online identity, responses such as 'just hit the mute button' or 'turn off your phone' do not suffice in protecting victims from their perpetrators. There is no clear legislation or policy in NSW that directly combats the wider use of technology within a context of domestic violence. Without adopting a new approach to viewing TFA, which understands the nature of cyber-identity, it is impossible to fully address the behaviours through legislation, policy or practical strategies.

It is also important for the judiciary to be aware of changes in technology and associated behaviours which facilitate violence. The judiciary can be informed through ongoing formal education programmes, bench books, discussions with colleagues and evidence presented in individual cases.[52] COAG identified the American National Network to End Domestic Violence as a model of best practice, which was founded on strong partnerships between law enforcement, the judiciary and technology companies. The National Network researches and teaches fundamentals in recognising and addressing TFA, and provides frontline workers with a technical and support service to consult for up-to-date advice and technical support in TFA cases. ⬣

02

MAINTAINING MOMENTUM: MOVING FORWARD ON RECONCILIATION WITH AUSTRALIA'S FIRST PEOPLES

TILINI RAJAPAKSA

I Introduction

The last few decades have seen the progress of reconciliation with Indigenous Australians move at a vexingly glacial pace, but political reform that empowers Aboriginal and Torres Strait Islander people and recognises them as the First Australians may finally be gaining the momentum it deserved long ago. This year marks two major events: the 50th anniversary of the historic 1967 referendum and the first time an active consultation process has been undertaken with Indigenous communities across Australia. The Uluru Statement from the Heart and the Referendum Council's report[1] have gained significant national media attention and could lead to substantive change if the holistic package of political reforms they propose are implemented. However, others, less optimistic, consider the issue of reform to have been overtaken altogether.[2]

Between December 2016 and May 2017 the Referendum Council carried out a series of First Nations Regional Dialogues ('Dialogues') across eleven different locations in Australia[3] engaging with Indigenous organisations, communities and individuals on what their vision of substantive constitutional recognition would entail. Such a consultation process is unprecedented in Australia's history and plays an essential preliminary step in addressing the historical exclusion of First Peoples from consultation in the original development of the Australian Constitution, as the co-chairs of the Referendum Council acknowledge.[4] The Dialogues were followed by the National Constitutional Convention ('Convention') in Uluru in May, during which over 250 Aboriginal and Torres Strait Islander leaders gathered and made the historic Uluru Statement from the Heart ('Uluru Statement').

The National Dialogues and Referendum Council's work have been important for two key reasons: they have provided a platform enabling consensus between geographically-disparate Indigenous communities and have allowed a largely united Indigenous voice to speak directly to the public and politicians through the media. Unsurprisingly, symbolic and minimalist gestures (including mere acknowledgment of Indigenous and Torres Strait Islander people in the Constitution) were collectively turned down. Instead, the Dialogues and the Convention promoted constructive reforms: the formation of a treaty and a representative Indigenous body. As such, the Referendum Council's work and the National Dialogues could constitute not just symbolic appeasement of Indigenous peoples' needs, but also further steps towards true reconciliation and rectification of Indigenous peoples' historical treatment and dispossession. While this progression it positive, whether this will be the beginning of a meaningful and consensual relationship between the Australian

state and its First Australians will be dependent on the future actions of the Australian government.

II The Referendum Council's Report and The Uluru Statement From The Heart

On 30 June 2017, the Referendum Council released its final report, proposing two main recommendations based on the Dialogues and broader community consultations. The first is a referendum for the creation of a 'First Peoples' Voice' (the 'Voice'), a constitutionally mandated representative First Nations body with the power to consult on legislation and policies specifically relating to Aboriginal and Torres Strait Islander Peoples. The second is an extra-constitutional Declaration of Recognition, to be enacted by legislation in all Australian Parliaments, acknowledging Australia's shared history with the First Peoples' heritage and culture.[5] While outside the Referendum Council's mandated terms of reference, the report draws attention to the Uluru Statement of the Heart's call for the establishment of a Makarrata Commission with the purpose of supervising the creation of a treaty and enabling a process of local and regional truth-telling.[6]

III The 'Voice': A Constitutionally-Mandated Indigenous Representative Body

Calls for a mandated Indigenous voice in Parliament are not new. Indigenous advocates throughout the 20th century and onwards, from Fred Manyard in 1927 to Noel Pearson in 2007, have made calls for increased Indigenous representation in Parliament in order to guarantee just treatment for Indigenous communities in Australia's political and legal system.[7]

In terms of constitutional amendment, the Voice was the most endorsed option at the Dialogues,[8] gaining majority support in every regional Dialogue.[9] Although the precise details of its form and structure are undecided, it was proposed in the Dialogues that one of the main functions of the Voice would be supervision of the Commonwealth's use of the race power and Territories power (ss 51(xxvi) and 122 respectively), ensuring discriminatory legislation such as the Northern Territory Intervention could be contested before commencement.[10] Delegates at the Dialogues emphasised the need for the Voice to have authority and legitimacy in Aboriginal and Torres Strait Islander communities across Australia, represent communities in remote, rural and urban areas and promote a treaty-making process.[11] It has been proposed that the body could be comprised of delegates elected from Indigenous groups across Australia to ensure it reflects the diversity of cultures within the Indigenous population.[12]

The Voice would most likely sit separate to Parliament and be limited to an advisory role without any veto powers over legislation,[13] raising concerns across several dialogues that it would have inadequate power[14] and could therefore become a tokenistic process.[15] However, while some may consider this a fundamental limitation of the Voice, constitutional reform advocates Shireen Morris and Noel Pearson have argued that limiting the body to an advisory role is necessary to meet the Indigenous community's wishes while increasing the likelihood the reform will succeed in a double majority referendum. The manner and form requirements of constitutional amendment in Australia make reform challenging, with only 8 of 44 of proposed past amendments having succeeded in the whole of history. While Morris and Pearson make it clear symbolic constitutional recognition would be insufficient constitutional reform, they raise concerns about the political viability of passing a proposal to create a body with binding powers which would enliven concerns about parliamentary supremacy and empowering the High Court.[16] Offering an alternate solution they contend that a representative body, even with non-binding powers, would provide an important starting point for ongoing formal engagement, dialogue and negotiation between Indigenous people and Parliament.[17] Constituted into part of the constitutional framework, it would provide a stable national platform for Indigenous voices to be heard.

IV Atsic: Lessons For a New Indigenous Representative Body

In discussions of a new Indigenous representative body, it is difficult not to be reminded of the gradual demise of the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC came into existence in 1990 as an administrative arm of the Commonwealth and was comprised of numerous elected representatives of regional councils.[18] Ultimately, ATSIC lived a relatively short life, with a number of reforms to its structure by the Howard Government (including the stripping of its funding and resources) finally leading to its dissolution in 2004.[19]

ATSIC was a bold reform at the time it was created. It was built on the principles of self-determination and inclusion,[20] similar to that of the proposed Voice, but fell subject to intense scrutiny for a host of reasons including its bureaucratic top-down nature,[21] its unusual structure as a 'melange of policy, executive and representational roles'[22] and concerns about its transparency and accountability.[23] Many have also pointed out the scapegoating of ATSIC for government failures (including some which existed prior to its creation) and the unrealistic hopes pinned on the organisation that it would create instant change.[24]

The Cape York Institute in its submissions to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples points to lessons to be learnt of ATSIC's controversial and bureaucratic structure, highlighting that the proposed new Indigenous body should be 'aimed at facilitating Indigenous

participation in democracy, not creating bureaucracy' and be designed 'so that it is connected and accountable to Indigenous people at a local level.'[25] Despite ATSIC's reputed flaws, its absolute dissolution with no replacement Indigenous body is a concrete reason for the Voice to be constitutionally entrenched. Constitutional entrenchment rather than legislative enshrinement provides reassurance that the body will endure, instead of being dependent on the whims of the government in power. It would also facilitate a new standard of participation and consultation different to the past.[26]

V The Uluru Statement's Proposal For a Treaty

For centuries, treaties have been important instruments in formalising relationships between colonial entities and Indigenous peoples in various corners of the world, in spite of the distinct circumstances, interests and political processes involved in their formation.[27] To enter into a treaty arrangement is considered a negotiation of the terms of a relationship with a person, or persons.[28] Australia is lamentably the only Commonwealth nation without a treaty with its Indigenous people.[29] Agreement-making with Indigenous people has been critical to nation-building in Canada and New Zealand, where treaties incorporating significant compensation as well as land and fishing rights, continue to play a role in the preservation of Indigenous rights today. Although there have been marked failures to honour these rights, treaties in both countries are considered a legitimate source of an ongoing duty on the part of the Crown towards Indigenous people.[30] While the long-lasting destructive impacts of colonisation cannot be justified by treaty formation, it still holds inherent value. A treaty has the potential to provide a strong normative basis for re-creating Australia's relationship with its First Peoples by rebuilding the nation on the footing of consent[31] in contrast to the settlement theory based on the fallacy of terra nullius.

Not far from Australia, the Treaty of Waitingi is considered an essential part of the composition of New Zealand society. It has even been described as 'the promise of two peoples to take the best possible care of each other.'[32] Signed in 1840 by the Crown's emissaries and numerous Indigenous Maori chiefs, the Treaty of Waitingi has long been considered as New Zealand's founding document.[33]

The Treaty of Waitingi is not perfect. As it is not constitutionally entrenched, orthodox theory posits that the treaty is largely legally ineffective[34] as it has only been upheld 'so far as a legal recognition has been specifically accorded to it.'[35] It is now widely acknowledged that the Crown has failed to respect its obligations under it for much of New Zealand's history.[36] Despite this, the Treaty is still considered very socio-politically effective.[37] The preamble, by acknowledging the prior occupants of New Zealand and the British monarchy, establishes a strong bicultural foundation for New Zealand.[38] In its submissions, the Cape York Institute describes an important role of the Treaty has been expressing and upholding Maori culture as central to New Zealand's national identity.[39]

The Dialogues demonstrate the continuing consciousness amongst Indigenous Australians of the need for a treaty, with agreement-making being the second most popular reform proposal amongst delegates at the Dialogues after a Voice to the Parliament. There are, however, key differences between New Zealand and Australian Indigenous people which partly explain the challenges faced particularly by Australia's First Nation people in finding a voice in the nation. In particular, the greater cultural and linguistic heterogeneity amongst Indigenous Australians in contrast to Maori people and New Zealand's significantly smaller size, which has allowed Maori tribes to communicate and collaborate with greater ease.[40] These differences ought to be taken into account when considering the design of a treaty with Australian Indigenous people. The capacity of a treaty to replicate the outcomes produced by treaties in Canada and New Zealand, where better relations between Indigenous people and the Crown can be largely attributed to treaty formation at the beginning of colonisation over 150 years ago, is also open to doubt. A treaty would not be the panacea for problems faced by Indigenous individuals today and could not undo the unjust historical treatment of Indigenous people. Many promises in the Waitingi Treaty as well as treaties in Canada and North America have not been fully realised. However, they are considerably ahead of the outright coercive force, dispossession and post-hoc justification found in Australia's current political and legal system.[41]

VI Conclusion

The Australian government's attempts to solve systemic issues facing Indigenous people has the notorious reputation of being a 'political football'[42] tossed back and forth between successive governments. Sadly, this urgent priority has fallen to the back of the national agenda repeatedly. Nevertheless, politicians are not solely to blame for this lack of progress. Australian society has managed to develop a disturbing tolerance in response to the government's neglectful treatment of Indigenous people. The extreme overrepresentation of Indigenous people in the prison system and the removal of Indigenous children from their families re-enter the national conversation intermittently. Politically, these issues are treated superficially without explicit recognition of what they truly are: symptoms of a much larger problem of intergenerational trauma caused by dispossession, reconcilable only through a reconfiguration of the Australian state's relationship with its Indigenous people.

Constitutionally mandated representation of Indigenous people and the formation of a treaty

may not produce instantaneous change, but could be a meaningful starting point for long-term progress. The importance of an extra-constitutional declaration should also not be understated; it is necessary to acknowledge Australia's history to be able to move forward. History carries with it powerful cultural capital[43] and the current mainstream Australian colonial discourse, stemming from years of denial by successive Australian governments, needs to shift. The reforms proposed by the Referendum Council and the Uluru Statement of the Heart may seem radical to some, but radical change is inevitably needed. What is at risk if we do not act is the gradual destruction of one of the world's oldest populations and Australia's most significant cultural asset. ⬣

03

SUPPORTING A FAIR GO: HOW INSOLVENCY LAW REFORM CAN DEMOCRATISE STARTUP CULTURE

KIN PAN

I Introduction

In modern conditions, the logic of capitalism has become the prevailing cosmos that rules our lives. Because of our concern for external goods, we are all trapped within an 'iron cage' of materialism.[1] The consequence of this is that most people, regardless of their personal wealth, feel a need to work.[2] In ideal circumstances, that work should be a source of fulfilment. In practice, however, a great number of people do not find satisfaction in their vocations. And even for those who do, the truth remains that we do not live to work, but rather work so that we can live.[3]

For those people who wish to find greater meaning in their vocation, entrepreneurship is a possible path. In this paper, entrepreneurship will refer to 'opportunity entrepreneurship', which is creating a startup to pursue an appealing business idea, rather than 'necessity entrepreneurship', which is launching a new enterprise due to a lack of alternative employment.[4] The problem with startup culture is that it tends to be inaccessible for those without personal wealth. New enterprises risk failure and the cost of that failure is often high. Australia's insolvency laws, regarded as harsh compared to international standards,[5] shape a marketplace where only those who can afford to take risks can create startups.

Social justice demands that the law strive to equalise opportunities in commerce, allowing all individuals the chance to participate in the marketplace, innovate, and even disrupt incumbent firms. This essay will establish the societal benefits of entrepreneurship, and then explore how insolvency law reform can realise those benefits by fostering a startup culture that is more accessible for all people regardless of their financial background.

II Understanding The Social Benefits of Startups

For those who can assume the financial risks of entrepreneurship, the creation of a startup can enable the pursuit of an interest or calling. Entrepreneurship offers scope for self-determination in one's vocation, allowing an individual to be their own master. It is therefore unsurprising that most entrepreneurs cite autonomy as a core motivation for launching a startup.[6] Some of these individuals seek autonomy as an end in itself. In other words, they are motivated by a kind of 'negative freedom'—for example, to avoid working for unpleasant bosses or within the confines of organisational rules.[7] Other entrepreneurs emphasise that being able to lead their own startup is critical to the effective pursuit of new opportunities. Startups are often more agile and have a greater

appetite for risk than larger corporations.[8]

Whilst larger businesses are well resourced and benefit from efficient bureaucracies, startups tend to be more innovative—perhaps due to their flatter hierarchical structures, which are also better at empowering staff.[9] Employees that are more autonomous often feel a greater sense of ownership and control over their work, and provide more input into the direction of their organisation. In a startup, staff may also have the freedom to pursue ideas which might be less tolerable to a more risk-averse and methodical large corporate.[10] Thus, startups often establish workplaces which are more democratic, and better at creating fulfilling and engaging experiences for staff. To that end, it is telling that numerous established firms have attempted to adopt flatter hierarchies,[11] partner with startups, and even invest in their own incubator programs or venture capital arms to develop new sources of competitive advantage.[12]

A strong startup culture also delivers significant economic benefits. New firms create new jobs, enhance competition in the market, and even produce important innovations that can progress or revolutionise industries.[13] In a global economy, innovations are fundamental to a nation's ongoing comparative advantage.[14] Moreover, new technological developments that increase productivity make our nation and its people wealthier by increasing our production and consumption possibilities.

Problematically, however, technology can also hurt those already marginalised within society. Many people, but particularly those who are low-skilled, have lost their jobs due to automation. The ideal outcome of technological progress is the replacement of menial jobs with more fulfilling and higher value work.[15] However, this result hinges on the tenuous preconditions that displaced workers can be retrained for these higher value jobs, and that there will be enough of those jobs in the future. Another challenge with startup culture is that some firms have exploited workers through their new innovations. For example, Uber continues to attempt to hire its drivers as 'independent contractors' to avoid responsibilities such as minimum wage, superannuation and leave entitlements that would arise under an employment relationship.[16] Such behaviour represents a serious undermining of the societal benefits of some startups. But this should not diminish the value of entrepreneurship, but rather emphasise how startups—like all corporates—can harm our societies if there is a lack of appropriate regulation of their activities.[17]

In fact, when it comes to the development of social justice solutions that are not being achieved in the free market, startups continue to be some of the most active participants.[18] Social enterprises which redistribute the profits from trade to their social mission are an example of startups which have social justice at their core. Three notable examples in Australia are The Big Issue, Thankyou and Orange Sky Laundry. The Big Issue is a monthly magazine that is distributed on the streets by homeless vendors who retain a portion of the sale price. Thankyou uses revenue from bottled water sales to fund water and sanitation services in developing countries. And Orange Sky Laundry provides a mobile laundry service for the homeless in Australia. All three demonstrate the power of the social enterprise model, which was born out of startup culture.

III Realities of The Startup Challenge

Whilst social enterprises are a powerful example of social justice oriented startups, the creation of a successful and viable enterprise—let alone a social enterprise which has the added challenge of having to redistribute its revenue—is challenging. All entrepreneurs are 'gamblers' in that 'they make a bet that the combination of their talents, hard work, imagination and their material resources will yield them more than the taking of the bet cost them'.[19] It is not hard to see that this gamble often fails to pay off. The carcasses of dead startups are strewn across the floors of Australian business incubators. Sydney-based startup accelerator BlueChilli has observed that 95 per cent of startups fail, and revealed that it aims for just a 10 per cent success rate.[20] Startup failure is a serious issue because it weighs heavily upon the shoulders of entrepreneurs. Financial costs include a significant reduction in personal income. Given that most nascent businesses are funded out of personal savings,[21] this represents a serious disincentive for prospective entrepreneurs who lack personal wealth to start with. Reduced financial income can also lead to the burden of personal debts that loom over an individual over a substantial time, and can even force that person into bankruptcy.[22]

In addition to these financial costs, failed entrepreneurs often face significant social costs in the form of impacts on 'personal and professional relationships'.[23] Breakdowns in marriages and other close relationships are not uncommon after business failure.[24] Moreover, the death of a business often results in the loss of the social network or community that is established through that business.[25] The stigma associated with failure can lead not only to the 'social devaluation' of an entrepreneur, but also discrimination into the future in terms of access to capital and work opportunities.[26] These social costs can have a cyclic effect in that failed entrepreneurs often withdraw themselves from the public and even private sphere due to the expected social costs that flow from the stigma of failure.[27]

IV The Impact of Laws on Startup Culture

Whilst the financial, social and psychological costs of startup failure are significant, the exit of firms from the marketplace is inevitable within a free market. Nonetheless, laws have a significant function in supporting entrepreneurship, and

moderating some of the costs associated with failed enterprise. To highlight what is at stake, consider Mark West's research into the impact of legislative reform in Japan that reduced the costs and historical stigma associated with bankruptcy. He observed a causal relationship between the increasing leniency of insolvency laws and a decline in rates of suicide.[28]

At a general level, entrepreneurial policy can be described as 'measures taken to stimulate more entrepreneurial behaviour in a region or a country'.[29] Some policies are directed towards providing incentives for prospective entrepreneurs. An example of this is the NSW Government's proposed $35 million startup hub offering subsidised working space and greater collaboration and education opportunities for budding entrepreneurs.[30] Other policies are regulative in nature, reflecting the view that 'stronger legal, political, and economic institutional pillars enhance the quality of entrepreneurship'.[31] Insolvency laws, which seek to resolve corporate insolvencies or personal bankruptcies, are an example of regulative policy. If we approach innovation from the perspective of what psychologists Daniel Kahneman and Amos Tversky termed 'prospect theory', it becomes clear that such regulative laws have a more substantial behavioural impact on entrepreneurs than 'carrots'. In their pioneering paper on behavioural economics, the authors observed:

> A salient characteristic of attitudes to changes in welfare is that losses loom larger than gains. The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount.[32]

In the Australian context, failure is something of an anathema, 'involving a range of harsh legal, economic and social consequences'.[33] The historical view of bankrupts as 'disreputable and dishonest' has given insolvency laws a morally prescriptive force.[34] This is reinforced through the media's denunciation of high-profile failures such as notorious business tycoon Christopher Skase who declared himself bankrupt with personal debts of about $177 million in 1991 before fleeing to Spain.[35] But the sordid actions of a few should not rip from others the chance to start anew where their failure is honest. Social justice demands that all people have equal opportunities to pursue their own professional goals, including in the field of entrepreneurship, regardless of their financial background.

V Australia's Insolvency Laws and The Proposed Reform

In Australia, there are laws that govern formal insolvency processes—personal bankruptcy for individuals and liquidation for companies.[36] There are also restructuring laws that facilitate outcomes which avoid insolvency. Individuals, for example, can access Debt Agreements and Personal Insolvency Agreements,[37] whilst companies have External Administration and Schemes of Arrangement.[38] The challenge with insolvency laws is to strike an appropriate balance between protecting creditors and encouraging entrepreneurship. Compared to international standards, however, Australia is perceived as having 'a rather harsh view of unpaid debt'.[39] This is reflected in how our restructuring laws have tended to be rather unsuccessful in rescuing companies from their financial struggles. With that in mind, the Australian Government launched its National Science and Innovation Agenda in December 2015 which included the following insolvency law reform package.[40]

A Personal Bankruptcy

Personal bankruptcy will be reduced from three years to one year. In Australia, being 'a bankrupt' brings about substantial restrictions on an individual's life. For example, a bankrupt loses control of their property to the Official Trustee,[41] barring some exceptions relating to household items or tools of trade.[42] This means that bankrupts can often lose their family home even if their debts are smaller on a relative scale. Other restrictions relate to being able to travel overseas without the Trustee's permission,[43] and serving as a company director.[44] Bankrupts must also disclose their status when engaging in business or in applications for credit.[45]

Some bankrupts are of course more unscrupulous than others and this reform maintains longer periods of bankruptcy where there are elements of fraud or misconduct.[46] However, the overall reduction in the length of personal bankruptcy will reduce the costs and, in turn, the stigma associated with it. This is important in the context of startups because when it comes to small business loans, most bank lenders demand personal guarantees.[47] In larger corporations, however, it is the very knowledge that corporate debts are not personal debts which drives entrepreneurism.[48] Reducing the length of personal bankruptcy will therefore support the rehabilitation of honest failures, and increase the general appetite for entrepreneurs to create startups.

B Safe Harbour

Company directors who continue to trade whilst their business is insolvent can face both civil and criminal penalties.[49] Whilst there is an obvious need to deter insolvent trading to protect creditors, the risk of personal liability can deter directors from launching genuine attempts to turn around companies that are facing financial difficulties. Instead, the incentive for directors is to shift their companies into external administration—this, however, tends to be a value destructive option due to the stigma and costs involved with formal administration.

In comparison, informal 'workouts'—which describe

attempts to recover a business without going through a formal restructuring process—tend to result in more successful outcomes. The proposed 'Safe Harbour' reform seeks to encourage informal workouts by offering directors protection from the insolvent trading provision if their actions are 'reasonably likely to lead to a better outcome for the company' compared to a formal restructuring.[50]

In the context of startups, this reform could be useful where a firm's solvency hinges on the negotiation of future external investment. The assessment of whether a firm is insolvent can be difficult,[51] and this is particularly the case for startups which generate little revenue. The proposed reform therefore provides greater certainty to entrepreneurs facing financial difficulties, and incentivises their attempts to stabilise and recover their businesses.

C Ipso Facto Provisions

'Ipso facto' provisions allow parties to terminate contracts when one of their counterparties enters a formal restructuring process such as an external administration or scheme of arrangement.[52] Ipso facto reform will nullify these clauses, which can otherwise be very value destructive for a business given the importance of its contractual relationships with customers and suppliers. For those startups which lack any significant assets besides those critical business relationships, the potential damage done by ipso facto clauses is immense. Yet, given the personal liability that exists for insolvent trading, the current insolvency laws encourage directors to move a company into formal administration despite its potentially damaging effects on the viability of the business.

VI Facilitating Culture Change to Enter the Ideas Boom

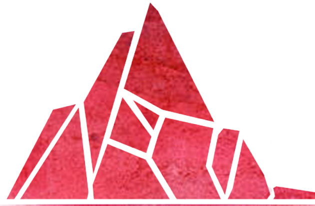
Insolvency law reform in Australia thrusts the nation in the right direction in supporting entrepreneurship. Honest failures should not be construed as personal failings. Individuals who do become bankrupt should not suffer unduly if their debts have arisen through honest but unsuccessful enterprise. Companies that find themselves in financial distress should be given the tools and incentives to restructure themselves where there is a viable future. Under an updated regime that shifts the balance of gains and losses in insolvency, creditors will of course bear a greater burden. However, the positive externalities of entrepreneurial policy should account for this.[53] Unlike a mining boom, an ideas boom is something that can persist and deliver Australia a continuing competitive advantage in a global marketplace.[54] As we continue to realise that innovation is more than just a buzzword but a necessity in a competitive global environment, then entrepreneurs must be given the tools to succeed and the opportunity of have a fresh start where their failure is honest.

Law reform is one matter. Cultural change is another. Both are linked, but changing culture is perhaps the more difficult part.[55] A shift in public perception towards business failure is required to mitigate or moderate some of the costs associated with it, and in doing so encourage entrepreneurism on a broader scale. To that end, whilst insolvency law reform can deliver significant progress in the regulative component of entrepreneurial policy, other support mechanisms are needed. 'Normative' and 'cultural-cognitive' policies remain critical in shaping the culture of entrepreneurship as an institution.[56] These policies focus on developing public awareness of the positive impacts of entrepreneurship, and fostering greater cultural understandings of the startup opportunities that exist for all.

In countries like the United States of America which boast more mature startup markets, failure is treated with a more positive mindset—something that can even be worn as a badge of honour because it signifies determination in the face of adversity.[57] There is significant scholarship that suggests that the entrepreneurial process of pursuing higher risk projects generates greater continuous improvements and economic resilience at a firm level.[58] Failures can therefore be seen as more critical than success for learning.[59] From a broader societal perspective, the fostering of such learning through a more forgiving insolvency regime can deliver entrepreneurial benefits when those failed startup participants go on to create new enterprises with the benefit of their experiences.[60]

VII Conclusion

If our nation can recognise the societal benefits of entrepreneurship, then the natural step is to recast our perception and treatment of business failure to create a startup culture that is more accessible to all people, regardless of their financial background. This is likely to translate into a greater realisation of the societal benefits of entrepreneurship. More than just adhering to the social justice notion of equal opportunities, insolvency law reform is just sensible politics. Under capitalism, more of us should have a choice about our vocation. And in a wealthy country like Australia, the democratisation of choice demands an insolvency law regime that does not punish those who have a fair go. ●



04

WRONGFUL CONVICTIONS: DISRUPTING PUBLIC FAITH IN AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

SOPHIE NORMAN

I Introduction

Our criminal justice system is founded on the premise that those who commit crimes are punished accordingly. When a wrongful conviction occurs, public faith in the justice system is disrupted. While in the United States there is access to the Innocence Project and in the United Kingdom, the Criminal Cases Review Commission, an accused who has exhausted appeal routes and has been let down by judicial process in the Australian context is left with limited recourse. To remedy these miscarriages of justice, Australia relies on the work of the convicted, individuals who are familiar with the legislative post-appeal process, and exoneration projects, including the University of Sydney's own exoneration project: Not Guilty.

First, this article will review notable cases from Australian history, focusing on the factors that contribute to wrongful convictions. Secondly, legislative post-appeal avenues will be explored, such as petitions or applications for judicial inquiry[1] and second or subsequent appeals[2] made under relevant State legislation. Finally, this article will reflect on my personal experiences working with Not Guilty. Through these discussions this article will support suggestions by other writers, that Australia needs to establish its own Criminal Cases Review Commission allowing effective recourse for victims of wrongful conviction.

II Australia's History of Wrongful Convictions

Wrongful convictions disproportionately affect vulnerable groups in Australian society. This article will consider cases where the convicted person was mentally ill or Indigenous Australian. Although Australia has a number of high-profile wrongful conviction cases, such as that of Lindy Chamberlain and Henry Keogh,[3] their cases relied heavily on flawed DNA and forensic evidence in their conviction and eventual exoneration. However, this article will focus on cases involving vulnerable individuals in Australian society where DNA evidence was not available. These cases demonstrate that a wrongful conviction is a relevant and real possibility today.

A Andrew Mallard – Convicted: 1995, Exonerated: 2005

Andrew Mallard's case is a poignant example of the interaction between mental illness and the criminal justice system. Although recognition and acceptance of mental illness has increased, this factor continues to dominate cases of wrongful conviction.

Mallard was convicted of the murder of Pamela Lawrence in 1995. Mallard suffered various

psychiatric conditions, including bipolar disorder. These conditions made Mallard susceptible to police suggestions to present his own theory on Pamela's murder, which under the pressure of a police interview, he did. Although these renditions were similar to how the murder was conducted, Mallard maintained he was innocent. Police conducted an undercover operation to obtain a direct confession from Mallard. During this operation, the undercover policeman made suggestions as to the murder weapon. In a later interview, Mallard referred to this weapon being used. Mallard was convicted as these 'confessions' were allowed into evidence. Mallard's appeals to the Supreme Court of Western Australia in 1996 and to the Court of Criminal Appeal in 2003 were both dismissed. In 2005, however, the High Court of Australia (after granting special leave to appeal) unanimously determined that a substantial miscarriage of justice had occurred and quashed Mallard's conviction.[4]

Mallard's case highlights the difficulties that police face when interviewing mentally ill suspects. Objectively, Mallard's comments indicated he knew in-depth details about the murder and this made him a prime suspect. However, studies in psychology recognise that Mallard's meetings with the undercover police meant he was primed to respond to specific questions asked by the police, reflected in his identification of the exact murder weapon. Perhaps the greatest failing for Mallard was the decision by the trial court to allow these confessions into evidence. Mallard was convicted due to this confession and the difficulty of overcoming a criminal conviction, as will be discussed later, meant upholding his conviction was inevitable.

B Gene Gibson – Convicted: 2014, Exonerated: 2017

The Royal Commission into Aboriginal Deaths in Custody from 1987-1991 found that Indigenous Australians are disproportionately incarcerated in Australia.[5] Joseph MacFarlane and Greg Stratton suggest that these disproportionate statistics are likely to be reflected in the number of Indigenous Australians that have been wrongfully convicted.[6] Studies recognise that Indigenous populations face a number of challenges in their interactions with the criminal justice system, including problems with cross-cultural communication and limited legal resources.[7] Two examples of this are the cases of Gene Gibson and Robyn Kina.

Gene Gibson's case emphasises that wrongful convictions are not a problem banished to pre-2000 – they remain a live issue permeating our criminal justice system. In 2014, upon his plea of guilty, Gibson was convicted of manslaughter for the unlawful killing of Joshua Warneke. In 2010, Joshua's body was found on the side of Old Broome Road. The prosecution's case suggested that Gibson pulled over upon seeing Joshua walking alone, and struck him in the head with a metal pole. Allegedly, Gibson left Joshua unconscious on the road, where he later died from these injuries.[8]

Gibson's case highlights the significant disadvantages that face many mentally ill Indigenous suspects in police interviews. Gibson suffered a cognitive impairment and had a history of alcohol and drug abuse.[9] He lived in an isolated Aboriginal community in the Gibson Desert and spoke Pintupi and Kukutja. English was his third language. Despite Gibson's very limited understanding of English and intellectual impairments, the police never provided him with an interpreter during his interview. Consequently, Gibson gave a false confession. This confession could have been a product of Gibson's intellectual infirmity, police pressure or his limited understanding of English. Regardless, he was likely unaware of what he was confessing to. After serving almost five years in jail, Gibson was acquitted in 2017 on grounds that his false confession arose from his cognitive impairments and limited English language capabilities. The language capabilities of the witnesses were likewise limited and as such the court held that on the admissible evidence available Gibson had no case to answer.[10]

C Robyn Kina – Convicted: 1988, Exonerated: 1993

Robyn Kina was convicted of the murder of her husband in 1993. Kina's case involves all of the aforementioned challenges facing Indigenous Australians, as well as the additional psychological impact of domestic violence. Kina was proven to have stabbed her husband, and so her case is atypical of the cases considered, however, due to the violent physical and sexual abuse she suffered for three years, should not have been convicted of murder.

Like Gene Gibson, Kina had an unfortunate childhood, enduring physical abuse from her father, sexual abuse from an uncle, and at age twelve after her mother left, supported her siblings through sex work. She professed to be an alcoholic around this time and began to clash with the law. During this time she met her husband, who began to violently physically and sexually assault Robyn and enabled his workmates to do the same. As other victims of prolonged abuse have commented,[11] one night as her husband was assaulting her, Kina reported that 'something in her snapped' and she stabbed him.[12]

One factor that led to Kina's conviction were the difficulties she experienced in communicating with her legal team. When Kina was first charged, she was supplied with a solicitor from Aboriginal Legal Services. This solicitor reported that Kina was reluctant to discuss any sexual matters or speak negatively about her deceased husband,[13] but she was aware Kina had suffered abuse.[14] In addition, Kina, as a sufferer of Battered Woman Syndrome (BWS), presented as deeply depressed and had overwhelming guilt at the death of her husband. Kina was assigned a Public Defender who did not see the interviews between her and her earlier solicitor.[15] As he was a young white male, Kina provided him with very little

information regarding the assaults. Consequently, the jury never knew of the physical or sexual abuse Kina endured and she was sentenced to life imprisonment for murdering her husband.

Kina's case illustrates not only the tragic failing of the justice system in grappling with Kina's long-term suffering, but the ease with which a wrongful conviction can occur. Despite Kina's actual involvement in the killing, she should not have been convicted of murder. Kina was exonerated on the grounds that key evidence, regarding the abuse she had endured, was not disclosed and as such, she should not have been convicted of murder.[16] The court suggested a more likely outcome, had that evidence been adduced, would have been a conviction of manslaughter.[17]

For both Kina and Gibson, the lack of experience and understanding by the police and legal services on effective and appropriate communication with particular cultural or intellectual groups, and sufferers of BWS, contributed to their convictions. Greater recognition of the psychological effects of domestic abuse may increase the critical evidence that comes to light, ensuring that juries can deliberate fairly. When police identify that an offender may have suffered abuse, counselling could be sought to ease difficulties in communication.

This article will now discuss the mechanisms available in NSW to overturn a wrongful conviction. Given the deference that is afforded to trial court decisions this is particularly difficult, with statistics indicating there is only a small chance of a successful appeal. In 2016, almost seventy per cent of appeals from the District Court were dismissed.[18]

III Australia's Post-Appeal Avenues

As Professor David Hamer highlights, the position of a defendant in correcting a wrongful conviction is severely weakened once they are declared guilty by the court.[19] As they are now presumed guilty, they face an uphill battle in the appeal process to prove their innocence. This is an arduous and lengthy process, as demonstrated by the time taken for the exoneration of Gibson, four years and eight months, and Mallard, ten years.

In New South Wales, the District Court will hear the more serious criminal charges and the Supreme Court will hear matters regarding murder. The convicted person only has one appeal option and any appeal is heard by the NSW Criminal Court of Appeal, a special division of the NSW Supreme Court.[20] A convicted can apply for special leave to appeal to the High Court of Australia. However, the High Court cannot consider fresh evidence,[21] and these applications are rarely successful.

A common criticism that pervades research on Australia's appeal mechanisms regarding handling wrongful convictions involves judicial commitment to the principle of finality. Professor David Hamer discusses the emphasis of the Australian courts on giving deference to the decision of the trial court, and a reluctance to overturn their decisions.[22] Hamer argues that this reluctance is due to a number of reasons, including the trial court's direct access and observation of witnesses and evidence, and the jury's involvement in the process. A jury is a representation of the general public, so overturning their decision of guilt is not done lightly.

In almost all jurisdictions around Australia there is the opportunity, once appeal options have been exhausted, for a convicted person to petition the Governor for an exercise of the Governor's pardoning power.[23] The Governor has the option to refuse to consider the application or to order a judicial inquiry.[24] Alternatively, the Attorney-General can refer the case back to the Court of Criminal Appeal or ask the Court for an opinion on any point arising in the case.[25] Criticisms of these options often point to the role of government in this decision-making process.[26] Such criticism often focuses on the susceptibility of the government to political and public pressure not to order an inquiry or refer the matter.

In NSW, an alternative option exists for a convicted. They can apply to the Supreme Court for an inquiry into their conviction.[27] The Supreme Court may, like the Governor, refuse to consider the application, order a judicial inquiry or refer the case back to the Court of Criminal Appeal.[28] However, the courts have adopted a narrow approach in applying this option. The court has stressed this application is not to be considered as another avenue of appeal[29] and the range of discretion to refuse an application is broad.[30] Professor Hamer highlights, in addition to the high bar to be overcome, the convicted is often in a disadvantaged position.[31] They have expended great resources on their trial and appeal, their support networks are reduced and they are currently in prison. Combining this with mental illness, intellectual impairment or socio-economic disadvantage, the convicted has a limited chance of a successful application.

A single right of appeal has been criticised as unable to properly protect an accused's right to a fair trial.[32] In South Australia, legislation has been passed to enable a 'second or subsequent appeal'.[33] This change in legislation indicates a commitment to post-appeal avenues allowing a correction of wrongful convictions. Although it has been criticised as being equally narrow as the NSW law,[34] it enabled Henry Keogh to be exonerated[35] and recognises the necessity in Australia to have such avenues.

IV UK and US Approaches

After a spout of high-profile wrongful convictions in the United Kingdom around the 1990's, a Royal Commission was ordered. Upon the Royal Commission's recommendation, the Criminal Cases Review Commission (CCRC) was established in 1995. The CCRC is an independent statutory body responsible for reviewing suspected

miscarriages of justice.[36] The CCRC will review an application for a potential wrongful conviction after the convicted has appealed and failed. It will then decide whether to refer a case back to the Appeal Court for a fresh appeal, allowing a convicted individual to have a second opportunity for appeal.

The Innocence Project in the United States was developed out of Cardozo School of Law in 1992.[37] It exclusively focuses on post-conviction DNA testing to correct a potential wrongful conviction. This testing can not only exonerate an individual but also allows authorities to catch the real perpetrator. The Innocence Project also works on reform of state legislation to minimise the contributing factors to wrongful conviction such as eyewitness misidentification.[38] Although this project has had a significant impact in America, Australia's wrongfully convicted would be better served by a model similar to the CCRC, as it is an independent statutory body rather than a private initiative. In addition, The Innocence Project is limited to cases that involve DNA evidence. As was seen in each of the Australian cases considered above, DNA was not a factor leading to their convictions.

It is not novel to suggest that Australia should adopt a commission like the CCRC. This has been suggested by several Australian academics such as Professor David Hamer and Lynne Weathered. Hamer and Weathered both acknowledge that an absence of an organisation like the CCRC in Australia, empowered with extensive investigatory powers, has left many potential wrongful convictions unidentified and uncorrected.[39] Michael Kirby acknowledged 'that [the] disinclination [to reopen a case] must be confronted and overcome with the help of better institutions and procedures than we have so far developed in Australia.'[40] The success of the English CCRC and the support of Michael Kirby, the Australian Human Rights Commission, the Law Council of Australia and others[41] reinforces the conclusion that it should be considered in Australia.

Currently, individual exoneration projects around Australia consider potential wrongful conviction applications. Such projects provide support to convicted individuals that may not have the resources to file an application on their own. These projects do not have the same investigatory powers that a CCRC would have or the same financial support.

V Sydney's Exoneration Project: Not Guilty

The University of Sydney runs its very own exoneration project using students from law and psychology backgrounds, who assess applications brought by convicted persons who allege they have been wrongfully convicted. It has been said that 'innocence projects generally limit themselves to cases where DNA may be available.'[42] Sydney's Not Guilty project does not exclusively select applications that may have DNA evidence available. My experience working on this project has involved cases where the evidence is solely circumstantial and no DNA evidence was available to support guilt or innocence. However, the greatest challenge arising out of current legislation is the need to find fresh evidence. Such evidence has often been destroyed or used in other appeal attempts by the convicted.

My personal experience working on this project has exposed many factors that lead to wrongful convictions, a number of which have been addressed above. My experience has shown that applicants are often very poor, suffer mental illness, and received inexperienced or incompetent legal aid. In addition, an extensive criminal history can unfairly make someone a suspect and this tunnel vision has resulted in evidence being selectively interpreted to support their conviction. This targeting also appears to disproportionately focus on Indigenous Australians. However, steps can be taken to minimise the frequency with which this may occur.

I have also been challenged on whether to believe an applicant's assertion of innocence. Mental illness plays a significant role in this space and may be an underlying factor for why someone asserts their innocence. This does not detract from the work done, as fundamentally the question is whether the applicant received a fair trial or not. The work we do is not simply for *the convicted*, but also enables victims to receive justice as the real perpetrator is convicted. It also restores faith in our criminal justice system as our work enables a wrongfully convicted individual to be liberated.

Despite the importance of such a project, without the same powers and resources vested in a CCRC the work of individual exoneration projects around Australia is limited. This demonstrates the need for such projects to have government support, whether stemming from the State or Federal level.

VI Conclusion

Fairness is a fundamental requirement of any criminal justice system. This article has shown the ways in which vulnerable and disadvantaged Australians are susceptible to unfairness, and that our post-appeal avenues are insufficient to remedy this injustice. It is not fair that the poor, Indigenous, intellectually-impaired or mentally ill disproportionately suffer from the limited recourse available after conviction. These groups experience the most frequent contact with our justice system and account for a disproportionate number of convictions. These individuals need the greatest support, and at present, Australia is failing them. The lack of effective mechanisms aimed at addressing wrongful convictions is a live issue, and with such disproportionate convictions, this begs the question – how many prisoners should not be there?[43]

05

MANSLAUGHTER BY SUICIDE: *CARTER* IN NSW

HARRISON ROGERS & SUBETA VIMALARAJAH

I Introduction

On June 16, an international audience awaited the decision in *Commonwealth v Michelle Carter*,[1] a case of the Bristol County Juvenile Court in Taunton, Massachusetts, that had captivated media outlets for years leading up to the trial. Before Judge Lawrence Moniz, Michelle Carter was found guilty of involuntary manslaughter. Text messages that revealed Carter had actively encouraged her boyfriend, Conrad Roy, to commit suicide, and theories that she had used Glee quotes to play up her grief after his death, made her the perfect villain.[2] For some, the guilty verdict signalled a necessary punishment for her morally reprehensible actions. For legal experts, the decision was a significant extension of Massachusetts' law of involuntary manslaughter.

Crucially, Carter had not been at the scene when Roy killed himself, and she had not procured the means he used to kill himself. Instead, she had encouraged him with words, telling him to 'get back in' his truck when he made the decision to leave it, and listening to his coughing over the phone, but failing to seek help, as he died. In this essay, we will consider the legal arguments made in Carter's case, and Judge Moniz's reasoning for finding her guilty. We will also consider equivalent principles in Australia's law of involuntary manslaughter to argue that Carter's case would have been decided differently in NSW, and should have been decided differently in Massachusetts. Finally, we will argue that Carter's conviction, if not quashed on appeal, may have far-reaching and undesirable implications.

II Commonwealth v Michelle Carter

The facts, as outlined in the application to dismiss the indictment before Bristol County Justice Bettina Borders, are as follows: Michelle Carter, then aged seventeen, was charged with involuntary manslaughter for encouraging Conrad Roy, then eighteen years of age, to commit suicide. Roy died on July 13, 2014, with a medical examiner concluding that the cause of his death was inhaling carbon monoxide produced by a gasoline powered water pump, which was found in his truck when an officer of the Fairhaven police department discovered his body. Roy had an extensive history of mental health issues, including previous suicide attempts.[3]

Carter met Roy in 2011, and the two began dating. As they lived in different towns, the majority of their contact took place through text messages and phone calls. The messages exchanged between the two revealed that Carter was aware of Roy's history of mental illness, and that much of their communication had focused on suicide. Various messages, such as those excerpted below, showed that not only did Carter discuss Roy's suicide with him, she encouraged him to kill himself, instructed him as to when and how he should kill himself, and

chastised him when he changed his mind.[4]

On July 12, 2014 between 4.25am and 4.34am:[5]

Carter: Do u wanna do it now?
Roy: Is it too late?
Roy: Idkk it's already light outside
Roy: I'm gonna go back to sleep, love you I'll text you tomorrow
Carter: No? Its probably the best time now because everyone's sleeping. Just go somewhere in your truck. And no one's really out right now because it's an awkward time
Carter: If u don't do it now you're never gonna do it
Carter: And u can say you'll do it tomorrow but you probably won't

Judge Moniz placed limited emphasis on these communications. Instead, the Judge focused on Carter's actions in the time shortly before Roy's death. Telephone records revealed that Roy and Carter had been on the phone during the time at which police believed Roy was in his truck committing suicide.[6] In a text message Carter sent to a mutual friend of herself and Roy, she admitted that when Roy left the truck because he was scared, she commanded him to get back in.[7] Subsequent text messages, adduced at trial and referred to in Judge Moniz's oral explanation of his verdict, reveal that Carter remained on the call, listening to the motor and Roy's coughing, as he died.[8]

The prosecution argued that Carter was guilty of involuntary manslaughter by wanton or reckless conduct, in both enabling Roy to produce carbon monoxide and telling him to 'get back in' when he had second thoughts.[9] In response, Carter's counsel argued firstly that she did not commit any affirmative act, being a 'physical act of force', as is required to establish wanton or reckless conduct.[10] Secondly, that no special relationship recognised by the law existed between the two, a prerequisite for an omission to constitute wanton or reckless conduct. Finally, that Carter did not create the risk of death for Roy, as he had contemplated suicide before meeting Carter, and therefore his suicidal condition was not caused by her.[11]

Judge Moniz delivered his verdict on June 16, 2017, in which he found Carter guilty of involuntary manslaughter by virtue of her wanton and reckless conduct, and her serious disregard for the wellbeing of Roy. Under Massachusetts law, very little statutory guidance is given regarding the scope and circumstances which constitute manslaughter.[12] These principles have largely been shaped by the common law.

Judge Moniz's oral statement of reasons divided the evidence into three separate components: the text messages from June 30 to July 12, 2014, being the text messages leading to, and discussing Roy's suicide plans; the phone calls from June 12 to July 13, 2014, including the call during which Carter instructed Roy to 'get back in' the truck; and all the other evidence, primarily of their relationship prior to the period leading up to Roy's suicide.[13]

Regarding the first set of evidence, Judge Moniz held that the prosecution had demonstrated wanton and reckless conduct on Carter's part, but had failed to prove this was the cause of Roy's death. His Honour pointed to the significant actions that Roy took on his own, including performing extensive research, securing the generator and water pump, and placing his truck in a secluded area before he commenced the attempt. The text messages encouraging and planning Roy's suicide were not sufficient, in the Judge's opinion, to constitute involuntary manslaughter.

However, once Roy exited the truck, His Honour found that the 'chain of self-causation' had been broken. Carter's subsequent instruction that Roy get back into the truck was the act that caused his death. Judge Moniz viewed this command in light of Carter's knowledge of Roy's 'fears, ambiguities and mental state, and the fact that she believed, by virtue of their shared research, that the process would take 15 minutes. Moreover, once Carter's act had placed Roy in a situation where he faced a life-threatening risk, there was a duty imposed on her to take reasonable steps to alleviate the risk. Her omission to fulfil that duty – knowing his location, which was close to police and fire departments; not notifying his mother and sister, although she had their phone numbers; and not instructing him to exit the truck – was a further basis on which she was found guilty of manslaughter.

His Honour also briefly addressed the relevance of Roy's previous suicide attempts, and therefore the possibility that he might have killed himself at a later date: this did 'not control or even inform the court's decision.' To support this approach, His Honour adduced as precedent a case from approximately 200 years ago, where an inmate was charged with causing the murder of the man in the next cell ('murder by counselling'), even though the man was to be, six hours after his suicide, publicly hanged for killing his father.

III Carter's Case in NSW

Unlike Massachusetts, NSW is one of many jurisdictions in which aiding, abetting, or inciting the commission of suicide is an independent offence.[14] The lack of such a statute necessitated the prosecution of Carter for involuntary manslaughter, and is why (in addition to the unique facts of the case) it is unlikely that we will see a similar case in NSW. Nevertheless, the possibility of a successful prosecution for involuntary manslaughter in other jurisdictions is of considerable interest, both for what it says about the Massachusetts verdict and its implications for the law of the related but distinct issue of assisted suicide.

In NSW, involuntary manslaughter takes two forms: manslaughter by unlawful and dangerous act (UDA), and manslaughter by criminal negligence.[15] Both may be arguable in this case, and are loosely analogous to Judge Moniz's reference to Carter's 'wanton and reckless' act and omissions. Just as in Massachusetts, this

is a novel case, and very little law in NSW bears directly on the issues it raises. Fortunately, cases dealing with charges of manslaughter brought against the supplier of illegal drugs self-administered by the victim provide a degree of guidance.

In such cases,[16] the charge of UDA manslaughter faces two (related) difficulties:[17] firstly, whether the unlawful act of supply can be dangerous in itself; and secondly whether the act of supply, rather than ingestion, can be said to have caused the deceased's death. The answer, at least where the deceased was an informed and responsible adult, is no on both counts.[18] In Carter's case, the only act on which such a charge could plausibly be based is her instruction that Roy 'get back in' the cabin of the truck – her instruction contravenes s 31C(2) of the *Crimes Act*, which prohibits incitement to suicide, and so certainly qualifies as 'unlawful.' Abstracting from the question of 'dangerousness', the primary issue is whether Roy's re-entry of the truck was an independent and intervening act that broke the 'chain of causation' commenced by Carter's instruction, in which case her act was not, legally, the cause of Roy's death.

Surprisingly, Judge Moniz's oral explanation of his verdict paid little attention to the issue of causation with respect to Roy's re-entry of the truck. Fortunately, the Supreme Judicial Court of Massachusetts, in their reasons for declining the application to dismiss the indictment, addressed the issue in some detail (though only in determining whether the evidence established probable cause). The Court noted that Roy's delays of suicide had been followed by Carter's 'disappointment, frustration, and threats to seek unwanted treatment on his behalf', and concluded that it was arguable that Carter's 'verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression' such that it had a direct, causal link to his death. [19] This conclusion may be consistent with previous Massachusetts authority, which evidences a relatively liberal approach to causation.[20] The same cannot be said of the case law of the United Kingdom or, most importantly, Australia.[21]

Roy's severe depression, his close relationship with Carter, and the pressure she placed on him distinguish this case from those dealing with drug supply, but probably insufficiently to avoid similar problems in proving causation. The criteria for an act of the deceased to break causation are relatively minimal: in Justins v Regina, the NSW Court of Criminal Appeal held that a decision to self-administer would break the chain of causation provided that it was 'reasoned' or 'comprehended', not necessarily 'informed' or 'rational' (in the sense of being supported by a good reason).[22] It does not appear that Roy's depression, though severe, prevented him from comprehending the consequences of his actions; nor does it appear that Carter's conduct, though coercive, rose close to the level of duress or necessity.[23] The statement of Professor Glanville Williams, cited with approval by the House of Lords in *R v Kennedy (No 2)*,[24] and the High Court in *Burns*,[25] is apt for this case:

> I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove.[26]

A possible solution to the issue for causation posed by an intervening act of the deceased is to instead locate liability in a failure to seek or provide help after the deceased's acts have been completed: that is, to argue manslaughter by criminal negligence. [27] As was outlined above, Judge Moniz gave significant attention to explaining why, in his view, actions open to Carter could have saved the life of Roy even after he re-entered the truck. In Carter's own words, 'I was talking to him on the phone when he did it I coud [sic] have easily stopped him or called the police but I didn't.'[28] At least once Roy was so incapacitated that he could no longer be said to be making a conscious choice not to exit the truck, it is not implausible to argue that Carter's omissions were a cause of his death.

However, there is no general legal duty to act to save another's life, nor was there any special relationship – for instance, a parent-child relationship – between the accused and the deceased that could give rise to such a duty.[29] Outside of such relationships, a duty of care, in the relevant sense, has been recognised on two bases. Firstly, where the accused voluntarily assumed the care of the deceased;[30] and secondly, where the accused was responsible for the state of affairs threatening the life of the deceased, as in *R v Miller*.[31] The resemblance of these bases to Carter's case is superficial at best, and Australian courts have been very cautious in recognising novel legal obligations to take steps to save another from harm.[32]

Although Carter was Roy's girlfriend and confidant, none of her actions lend themselves to characterisation as an assumption of care for him. She was several kilometres from Roy at the time of his incapacitation, and prior to that point Roy was neither helpless nor incapable. Roy was secluded, in the cab of his truck in a Kmart parking lot, but he had secluded himself,[33] and Carter's exclusive knowledge of his circumstances is a flimsy ground on which to found a duty[34]

A duty of the kind identified in *R v Miller,* where the accused was found guilty of manslaughter for his failure to take steps to prevent a house fire that he had unintentionally begun, is also problematic. In *R v Evans (Gemma)*, the English Court of Appeal held that a duty may arise where the accused 'created or *contributed* to the creation of'[35] (emphasis added) the hazardous state of affairs. By this standard, Carter's actions – including her participation in planning Mr Roy's death – would probably qualify, but the High Court has approached the issue more strictly. In *Burns v The Queen*, the fact that the act of

supplying methadone could not have caused the deceased's death for the purposes of UDA manslaughter also meant that the accused was not causatively responsible for the risk to the deceased's life, and so no duty was recognised.[36]

The problem of causation cannot be evaded indefinitely. If Carter did not cause Roy's death by instructing him to re-enter his truck, frustrating a charge of UDA manslaughter, then it is unlikely that her subsequent omissions to help Roy were in breach of any duty of care, which is why arguing manslaughter by criminal negligence is no more likely to succeed.

The facts of this case are novel, and any conclusion should be tentative, but it does not appear that Carter would be found guilty of involuntary manslaughter in NSW. Judge Moniz's verdict was only possible because of a questionably liberal approach to causation, which though arguably consistent with Massachusetts law is hardly a comfortable basis for her conviction.

III Carter's Case in NSW

Judge Moniz's verdict has been met with significant opposition in the United States. Soon after it was delivered, legal experts suggested that Carter's defence team should appeal the conviction,[37] though the appeals process could 'take years to resolve'.[38] Carter was recently sentenced to thirty months in a county jail, with fifteen of those months suspended and the sentence stayed entirely pending the outcome of appeal proceedings.[39] Some have speculated that causation would be the focus of an appeal, in particular distinguishing Carter's command that Roy get back in the truck from his decision to do so.[40] As we have argued above, at least under NSW law, this is the issue on which the case turns.

Despite Judge Moniz's claim that the legal principles that informed his decision are not novel,[41] legal experts have argued that the decision extends manslaughter law into a new territory.[42] Of its opponents, the American Civil Liberties Union (ACLU) has been particularly vocal. The ACLU, a progressive, litigation and lobbying organisation, released a statement in response to the decision. In its statement, it concluded that the conviction 'exceeds the limits of our criminal laws and violates free speech protections guaranteed by the Massachusetts and U.S. constitutions' for effectively finding that Carter 'literally killed Mr Roy with her words'.[43]

The fear for many opponents, which to some degree we share, is that this decision could be invoked in support of recognising a duty of care for individuals who assist, or are aware of, family members wishing to die. Doing so could have wide-reaching and uncomfortable consequences. It is undeniable that Carter's behaviour was reprehensible, but the mere fact Massachusetts lacks a statutory provision criminalising aiding and abetting suicide does not justify her conviction. Our discussion of the verdict through the lens of NSW law has attempted to show that even if the verdict is consistent with the common law of Massachusetts – an issue we leave to one side – there is reason to think that her actions should not constitute manslaughter.

Some have suggested that even if Carter's conviction is quashed, a by-product of the media frenzy and popular interest in this decision may be the Massachusetts legislature passing an aiding or abetting suicide law.[44] Ordinarily, populist legislators make bad law, but in Carter's case, an uncomfortable set of facts and the scrutiny of the public eye has resulted in a judge making bad law that might be remedied by legislative action. There is a separate question as to the value of laws against aiding and abetting suicide, but they are a more appropriate response to situations like Carter's case than a dramatic expansion of the definition of manslaughter.

If this piece raises any issues for you, you can contact Lifeline on 131 114. ⬣

06

LAW AND DISORDER
POPULIST LEGISLATING AND ITS CONSEQUENCES

DOMINIC KEENAN

In 2012, the first person to be charged under new NSW anti-consorting laws, intended for outlaw motorcycle gangs, was Charlie Forster, an intellectually disabled man. He received a 12-month sentence for consorting with two childhood friends who had been charged variously with assault and affray.[1]

Populist legislating in response to crime and civil disorder often results in knee-jerk laws designed to disrupt criminal networks and behaviour. While some of these laws achieve their goals,[2] a large majority broadly derogate freedoms and individual rights in ways that were unintended, as seen in the case of Charlie Forster. This article will examine two contemporary case studies to demonstrate this: anti-consorting laws and anti-protest laws in New South Wales. In each case, legislation was passed with specific targets in mind, but the consequences of these laws have been more widespread. These case studies demonstrate the shortcomings of populist legislating as a policy response to disrupt and regulate 'anti-social' behaviour.

I Anti-Consorting Law Reform in NSW

In the years preceding 2012, Sydney faced a spate of gang related violence. Violence became increasingly common, culminating in a ten-man brawl at Sydney airport in broad daylight between members of the Hell's Angels and Commanchero gangs, leaving one man dead.[3] Earlier the same morning, a series of Bandidos gang drive-by-shootings occurred in the Sydney suburb of Auburn.[4] A *Sydney Morning Herald* article on the incident described the 'huge [airport] brawl' as a 'brazen attack', emphasising that a man was 'bashed repeatedly on the head with a metal bollard.'[5] Then NSW Premier, Nathan Rees, was quoted saying 'violence of this nature in front of families and children is nothing short of disgusting.'[6] The rhetoric of fear and disgust has been shown to invoke in readers feelings of imminent danger and social disorder.[7] In fact, prior to the introduction of this legislation this type of rhetoric was common.[8] Targeted legislation to prevent the proliferation of this type of conduct becomes especially attractive as a direct 'law and order' solution.[9] Citizens become much more willing to surrender freedoms in the name of safety, and politicians score easy political points by appearing tough on crime. In fact, the impact of fear and the media were so great that the opposition went as far as saying that the NSW Government had only introduced the anti-consorting laws due to media pressure.[10]

The *Crimes Amendment (Consorting and Organised Crime) Act 2012* was then enacted, making it an offence to 'habitually consort' with individuals convicted of an indictable offence, punishable by 3 years imprisonment and fines of up to $16,500.[11] For a charge to be successful the person must have 'consorted' with two convicted offenders twice or more after being issued a warning.[12] This legislation was designed to expand police powers to

expand police powers to disrupt organised crime networks. Given the violent context from which these laws developed, it is not difficult to see how they fit into a classic populist response. The laws have been widely criticised for their heavy-handed approach and significant possibility for abuse.[13] No restriction is placed on the type of offender the accused must consort with, or the nature of communication, meaning that a broad section of society are vulnerable.[14] The NSW Law Society's joint-submission to the NSW Ombudsman's review of these consorting provisions states that the consorting laws present a serious erosion of the right to freedom of association and expression in contravention of the International Covenant on Civil and Political Rights.[15] Undeniably, these laws represent a 'significant expansion of the parameters of criminalisation'[16] encroaching into human rights and basic freedoms and represent a step toward pre-emptive policing.

Fears that the anti-consorting legislation would be used more widely have materialised. In his Second Reading speech, Minister for Police and Emergency Services Michael Gallacher emphasised that the Bill was specifically aimed at disrupting criminal networks, and that the goal of s 93X was to 'deter people from associating with a criminal milieu.'[17] However, the laws have been employed more universally and for far less serious 'criminal milieus' than organised gangs. Troublingly, early statistics suggest that the laws are being used well outside their intended scope of organised crime. In 2013-14 Indigenous Australians made up 40 per cent of people subject to these consorting provisions, and only comprise 2.5 per cent of the NSW population.[18] In some Local Area Commands the proportion of Indigenous people charged was even higher; in the Western Region and Central Metropolitan Region Indigenous people accounted for 84 per cent and 57 per cent of those charged respectively.[19] Consorting provisions have similarly been used in relation to other vulnerable groups including the homeless and young people. In 2012, a homeless man with terminal pancreatic cancer had come to Sydney for treatment unavailable in his hometown, and was charged with consorting after being given a warning for sitting on a bench at Manly with three other homeless men.[20] The defendant was sentenced to a 12-month good behaviour bond.[21] Cases like this, and that of Charlie Forster, highlight the widespread consequences of these consorting provisions. While politicians claim that this law is a precise instrument that can disrupt and dismantle criminal organisations,[22] the same instruments are having negative consequences for many vulnerable groups. Furthermore, a 2016 report on crime in NSW stated that 'organised crime is increasing and is at levels not previously seen in NSW.'[23] In this light, it appears that while anti-consorting legislation is having little effect on stymying organised crime, its intended purpose; it also has further negative impacts on political freedoms.

Interestingly, in 2014 Charlie Forster along with two other plaintiffs challenged the validity of the anti-consorting legislation in the High Court.[24] The plaintiffs argued that the legislation placed an undue burden on the implied freedom of political communication by stopping people from associating. They also argued that the law was invalid on the basis that it was inconsistent with freedom of association as guaranteed under art 22 of the International Covenant on Civil and Political Rights, which Australia has ratified.[25] Ultimately, the challenge was unsuccessful. While the High Court majority did agree that s 93X did place a burden on the implied freedom of political communication, this did not render the law invalid as a matter of constitutional law.[26]

This legislation demonstrates the trouble with enacting legislation to disrupt specific groups. In particular, the language used in this law was far too general – making it susceptible to abuse.

As seen here, the legislation is often used more broadly than originally intended and its implementation brings with it a serious challenge to Australia's implied freedom of political communication and freedom of association.

II Anti-Protest Laws in NSW

In a similar vein, NSW has recently introduced legislation aimed at disrupting environmental protests. Like the anti-consorting laws, this legislation similarly burdens the implied freedom of political communication. Since 2014, coal-seam gas (CSG) protestors have had a number of large successes including the suspension of a drilling license for Metgasco, and a decision by the NSW government in March 2015 to stop granting new CSG licenses altogether.[27] Protest and civil disobedience has been robust, organised—and most importantly, effective. However, since then, the government has done its best to support further petroleum exploration and expansion of the mining industry in NSW—granting further licenses and pushing through pro-business legislation through anti-protest laws. These new legislative provisions aim to disrupt protests and support business interests, but all in the name of ensuring the 'safety' of protestors and employees alike.[28] Politicians described the Bill as reaching a balance between the right to protest, and the 'need to protect the safety of others and the conduct of lawful business activities.'[29]

In early 2016, the NSW government passed the innocuously titled *Inclosed Lands, Crimes and Law Enforcement Amendment (Interference) Act 2016 No 7*, through both houses of parliament within a week, and was enacted between June and November the same year. This statute amended various laws,[30] and has been regarded generally as NSW's new anti-protest laws. The Act had two main functions: it expanded police powers, and effectively deterred protestors through a harsher penalty regime for certain criminal offences. Firstly, the Act provided police with broader 'stop and search' powers without a warrant, allowing them to seize any property

that could be used to interfere with a business, especially in an environmentalist context.[31] So what might fit this description? Chains and padlocks? Sure. An axe? Definitely. A kilo of sugar? Why not? You could pour it into a petrol tank. The Act also expands police authority to break up and disperse protests.[32] Police can give directions to protestors if they believe on reasonable grounds that direction is necessary to deal with a serious risk to the safety of the person to whom the direction was given or anyone else.[33] This authority gives Police very general power to break up protests and issue move on orders given the relatively ambiguous nature of 'safety', especially considering that large crowds will often lend themselves to a safety risk.

The Act also drastically increases penalties for environmental protestors, with legislators showing their partisanship with mining companies. It has been an offence to trespass onto a commercial property in NSW since 1901, the penalty for which ordinarily is $550 or $1,100 for prescribed premises.[34] Following the 2016 amendments, where a trespasser interferes (or intends/attempts to interfere) with a business, or does anything while trespassing that is a safety risk for anyone, they can be charged with 'Aggravated Unlawful Entry on Inclosed Lands.'[35] The penalty for this offence is $5,500 dollars, a significant increase.[36] The introduction of an aggravated offence indicates a clear legislative intention to deter protestors from entering onto commercial properties. Similarly, the Crimes Act amendment in the 2016 legislation expanded the pre-existing offence of 'interfering with a mine'[37] to include the destruction, damage, or rendering useless of any equipment associated with a mine. This means that any protestor who hinders the use of equipment (i.e. by a blockade, or 'locking on' to machinery) may be liable for up to 7 years imprisonment.[38] These two changes are especially disruptive for environmental protestors as they further criminalise some of their most effective strategies, reducing their courses of strategic action.[39]

These tough new laws present some serious issues worth considering regardless of which side you fall on the fossil fuel debate. In early 2017 three protestors, Beverley Smiles, Stephanie Luke, and Bruce Hughes, were charged with an offence under the newly expanded s201, for interfering with a mine.[40] During a protest they created a human blockade across a road at the Wilpinjong Coal Mine in the Upper Hunter – rendering the road useless for a time,[41] and capturing themselves within the definition of 'interfering with a mine.' The Environmental Defenders Office has stated that these actions would not have fit within the scope of the previous laws.[42] They now face a maximum of 7 years imprisonment. While it is unlikely they would receive the maximum sentence, it is important to consider whether actions like this should fall within the same category as more serious conduct such as significant property damage (e.g. flooding a mine). At the very least, it appears that the inclusion of lower level conduct in this offence has not been done in the name of justice, but rather as a method of social control. Such inclusion raises a number of issues for political freedom in NSW. Australians enjoy no 'right to free speech' but instead enjoy an 'implied freedom of political communication.'[43] While the delineation of political communication is at best a grey area, protest in a political context fits within the scope of political communication.[44] It is arguable therefore that restrictions on the ability to protest represent a restriction on the freedom of political communication, though this is permitted when done for public safety.[45]

The anti-protest laws arguably also infringe Australia's obligations under arts 21 and 22 of the *International Covenant on Civil and Political Rights* and art 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights: freedom of assembly and freedom of association.[46] This is especially concerning given the breadth of these human rights. Despite being targeted at environmental protestors, the anti-protest laws make no direct reference to environmental protests (although some do refer to mines).[47] Troublingly, this means that this legislation can also be used effectively to silence 'legitimate dissent on a range of controversial political issues.'[48] That is, these powers could be used in relation to protests about marriage equality, Indigenous rights, climate policy, offshore detention, if they occur on 'inclosed lands.'

These laws are demonstrative of a trend in populist legislating through which there is a creep of power. In efforts to target one particular group penalties are increased to deter behaviour and disrupt conduct, and the price paid for this result is a derogation of important political freedoms. Unfortunately, as the legislation has such a wide-scope of operation, it may be wantonly used to silence dissenters across the political spectrum.

III Conclusion

Legislation targeted at disrupting particular types of social behaviour can appear attractive solutions for specific issues. However, such legislating is rarely precise enough to affect only the intended targets. As demonstrated by anti-consorting and anti-protest laws in NSW, the effects are often much broader than originally intended, and political freedoms are typically exchanged for a mere perception of safety and order. As populism becomes increasingly powerful in a globalising world, and the potential for more legislation of this variety increases, it is essential to ensure that legislators take a measured and careful approach so as not to derogate fundamental freedoms and rights of other citizens. ●

07

DISRUPTING PROGRESS: VIGILANTE LITIGANTS THE ROLE OF PUBLIC LAW AND PROTEST IN UPHOLDING INTERNATIONAL ENVIRONMENTAL LAW

SALLY KIRK

I Introduction

When it comes to environmental conservation, enforcing Australia's obligations under international law often falls to private litigants commandeering domestic processes of judicial review. While multilateral treaties establish broad principles and shared aspirations, with few mechanisms to ensure compliance, state parties' municipal laws are left with great leeway to interpret and implement their provisions. Most notably, since its approval by then Federal Environment Minister, Greg Hunt, in 2014, controversy and litigation have erupted surrounding construction of the Adani Carmichael Mine in Queensland's Galilee Basin. On one hand, mining industry stakeholders and the Federal government laud it as a crucial development that will provide dividends to the national community for decades to come, generating 1,464 jobs and injecting up to $16.5 billion into the economy.[1] On the other, environmental activists claim its mammoth contribution to global warming will have irrevocably devastating effects for the region. The mine is projected to create over 79 million tonnes of C02 emissions per year[2]—more than twice the annual output of Tokyo (a city with a greater population than Australia).[3] In the battle between economic progress and environmental preservation, successive legal challenges to the mine's approval have raised questions regarding the intersection of international and municipal administrative law—and where enforcement of environmental conservation falls short.

Central to this issue is the concept of 'ecologically sustainable development' (ESD), a principle derived from decades-old international law. This article considers how ESD has been integrated into Australian law, the extent to which it is binding on administrative decision makers, and its efficacy limited by the commitment (or lack thereof) of those in power. The Australian Conservation Foundation's (ACF) 2015 challenge to the Adani coalmine highlights how public law enforcement mechanisms on the municipal level can be utilised by activists as an avenue to uphold international legal standards.[4] Irrespective of the 'green tape'[5] they may create, these 'vigilante' litigants, as the Attorney General has decried them,[6] play a critical, albeit controversial, role in holding governments to account.

II Background Check: The Evolution and Enforcement of Ecologically Sustainable Development in International Law

In 1987, the World Commission on Environment and Development defined the concept of ESD as 'development that meets the needs of the present

without compromising the ability of future generations to meet their own needs.'[7] International legal scholars Alan Boyle and David Freestone then point to the *Rio Declaration*,[8] five years later, as the first 'truly international consensus on… core principles of law and policy concerning environmental protection and sustainable development.'[9] Rather than viewing progress and preservation as diametrically opposed, the *Declaration* advocated for 'environmental protection' to 'constitute an integral part of the development process and… not be considered in isolation from it.'[10] As a necessary corollary of this, the 'precautionary principle' required that, in circumstances of threats of irreparable damage, 'lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[11]

Since the early 1990s, despite the proliferation of more multilateral agreements reflecting broad commitment to ESD—such as the *United Nations Framework Convention on Climate Change*[12] and its associated treaties, the *Kyoto Protocol*[13] and *Paris Agreement*[14]—it remains unclear to what extent international law positively requires that countries' development be 'sustainable.'[15] This lack of clarity partly stems from problems of definition, as determining what is 'sustainable' necessarily involves social and economic value judgments.[16] For example, under the *Paris Agreement*, state parties (including Australia) committed to collectively limiting global temperature increases to 2 degrees Celsius above pre-industrial levels.[17] However, despite the supposedly binding character of the *Paris Agreement*, few provisions created 'precise and enforceable' obligations, most representing more of a 'political aim' than a legal duty.[18] Many international scholars have accordingly questioned the legal status of the *Paris Agreement*, lambasting its failure to impose sanctions or even meaningful 'obligation[s] to comply.'[19]

III Australian Implementation of EST Principles

Australia's 'dualist' approach to international law, meaning that unless environmental treaties are 'transformed' into domestic legislation, neither governments nor private corporations can be held accountable in municipal courts for failing to comply with their contents,[20] has heightened the problem of practically enforcing ESD. To date, this transformation has occurred most prominently in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ('*EPBC Act*'). The Bill's Second Reading speech exalted this as 'the only comprehensive attempt in the history of our Federation to define Australia's environmental responsibilities.'[21] In this vein, the Act stated its primary objects to be 'assist[ing] in the co-operative implementation of Australia's international environmental responsibilities'[22] by 'promot[ing] ESD through the conservation and ecologically sustainable use of natural resources.'[23] In furthering these goals, the *EPBC Act* created an extensive Environmental Impact Assessment (EIA) regime, requiring Ministerial approval of private sector actions predicted to impact marine environments, world heritage properties, or migratory species. The Minister for the Environment and Energy also gained power to attach conditions to approvals to mitigate environmental harm—such as the 270 now attached to the Adani development.

As Justice Jessup noted in *Tarkine National Coalition Inc v Minister for the Environment*, this framework rendered environmental planning more 'tightly regulated' than ever before and, by prescribing factors for compulsory consideration in approval processes, seemingly left 'little room, if any…. for implication.'[24] As raised in the ACF challenge, these mandatory factors include 'economic and social matters' and 'principles of ESD,'[25] as well as the developer's 'history in relation to environmental matters.'[26] Nonetheless, in practice, Ministerial discretion in the selection, interpretation, and weighing up of these elements, remains alive and well, leading to criticism of the *EPBC Act* by some as ineffectual and toothless, particularly as controversial projects are continually approved within its supposedly tight framework.[27] Due to this scepticism, activist organisations have increasingly sought to harness judicial review as a 'second tier' of accountability to challenge how the *EPBC Act* is applied. The ACF's ongoing lawsuit is but one high profile example.

IV A Leg to Stand On: The Role of Judicial Review in Domestic Enforcement of International Environmental Obligations

Access to standing is crucial to the ability of organisations like the ACF to embark on such legal confrontations. Prior to the introduction of the *EPBC Act*, the Australian Law Reform Commission issued two reports highlighting the benefits of broad standing provisions allowing advocacy organisations to bring judicial review applications in the 'public interest.'[28] The Commission recognised such litigation as 'an important mechanism for enforcing laws to the benefit of the general community,'[29] and particularly so for environmental protection, where 'public rights… rely on private enforcement.'[30] This argument is even truer, one would assume, in situations where public rights are of an *international* nature – arising from multilateral agreements with minimal enforcement mechanisms, but with potentially drastic lasting effects for global citizens.

Section 487 of the *EPBC Act* is just such an 'extended standing provision', contributing to better 'market regulation and public sector accountability', 'increased public confidence in… administration of the law', and 'preventing costly market or government failures.'[31] The section expands the ambit of a 'person aggrieved' under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* to allow judicial review to be sought by organisations

who, within two years before a decision, have undertaken activities for protection, conservation, or research into the environment, and who include such activities in their objects and purposes.[32] Since its introduction, s 487 has enabled activists to commence cases against myriad major planning developments for insufficient compliance with the *EPBC Act*,[33] including the accumulating objections to the Adani Mine approval.[34]

However, despite the fact that s 487 purposefully provides for 'public interest litigants' to challenge decisions made in conservation matters, stakeholders and Coalition politicians alike have accused such organisations of engaging in 'vigilante ligation,' spurred by extreme or obstructionist, rather than legitimate, aims.[35] Citing concerns about the cost of delays to development, the Abbott government moved to repeal s 487 in 2015,[36] provoking outrage amongst those who felt it would 'defang' environmental watchdogs.[37]

Tellingly, the Repeal Bill was introduced after the Mackay Conservation Group won the first legal challenge of the Adani coalmine's approval.[38] Whilst the court did not issue a judgment, the approval was set aside by consent on the basis that the Minister failed to take into account two endangered species in the Galilee Basin region (the yakka skink and ornamental snake). Following the loss, Adani issued a statement claiming that *EPBC Act* cases, 'at their core… have been about stopping investment and jobs as part of a wider activist campaign against mining.'[39] Although additional conditions were obligingly attached to the mines approval, the Environment Minister also began agitating for standing to be curtailed, to 'prevent those with no connection to the project, other than a political ambition to stop development, from using the courts to disrupt and delay key infrastructure.'[40] Following suit, Attorney-General George Brandis pilloried s 487 as a 'red carpet for radical activists who have a political but not a legal interest… to use aggressive litigation tactics to disrupt and sabotage important economic projects.'[41] There, Brandis and Hunt employ the same flawed logic. Despite how frustrating disruptions to economic progress may be as a result of judicial review procedures, the eagerness of public interest litigants to hold governments to account under s 487 hardly makes them 'vigilantes,' nor does it rid them of a legitimate 'legal interest.' On the contrary, these activists work exclusively within the bounds of the legal system, and fight tooth and nail to uphold it. Moreover, Minister Hunt's dismissal of ESD principles as mere 'political ambition' and 'sabotage' is not only disheartening, but factually wrong. ESD principles have their root, not only in treaties to which Australia is signatory, but in Australia's own municipal legislation. Hunt and Brandis' comments reflect a growing trend in the Coalition government's attitude to sustainability concerns under the *EPBC Act* (despite the fact that it was introduced under the Howard government). Such discursive tactics serve to smear all conservation efforts as falling beyond the scope of the law—even laws designed (and named) specifically for meticulous environmental protection.

As Tony Burke, the shadow minister for the environment, said of the controversy, 'I find it odd that we've gone from complaining environmentalists are blockading or protesting to now complaining that they're turning up to a courtroom… the way to solve this problem is to make lawful decisions.'[42] Similarly, the NSW Environmental Defender's Office contended that delays to Adani's coalmine are proof that the law is in fact 'working well,' and that a knee-jerk repeal based on 'a successful challenge to one coal mine' would be the real perversion of justice.[43]

The 2015 Repeal Bill lapsed at the prorogation of the Senate in April 2016 before the issue was revived six months later under the Turnbull administration, remaining unsettled today.[44] However, the apparent disregard that federal policy-makers now have for enforcing environmental law is manifestly clear. Principles of ESD that are broadly accepted in international law are framed as leftist, greenie, politically-motivated imaginings, enabling politicians to dismiss entirely legitimate avenues of administrative accountability as roguish disruption. Given that decision-making procedures under the *EPBC Act* still leave significant room for ministerial discretion, such prevalent attitudes bode poorly for the diligence with which international legal standards will be adhered to. Compounding this, as demonstrated in the ACF's Adani litigation, the limited nature of judicial (as opposed to merits) review means that courts often defer substantially to ministers' questionable judgment calls.

V The Adani Case: The Australian Conservation Foundation's Failed Legal Challenge

The wide discretion common to Ministerial decision making and its impact on judicial review proceedings was clearly demonstrated in the Federal Court's first instance judgment, handed down against the ACF on 29 August 2016. As compared to the Mackay challenge, which highlighted more 'direct' threats to the region, the ACF's case was ambitiously novel. Broadly, they were concerned not solely with the construction and operation of the mine itself, but with the emissions it will indirectly produce once coal is exported overseas. They argued that overseas combustion (despite not technically contributing to Australian quotas under the *Kyoto Protocol* or *Paris Agreement*) would, by increasing the global output of carbon dioxide, contribute to global warming and, by extension, cause irreversible damage to the Great Barrier Reef.

Breaking down this argument, ACF raised three distinct grounds of review—each related to a particular section of the *EPBC Act* with which they alleged non-compliance.[45] In accordance with the

inherently 'restricted nature' of judicial review, each necessarily objected to some aspect of the legality, as opposed to the merits or morality, of the Minister's approval.[46] All were dismissed at first instance.

First, the ACF claimed the Minister failed to comply with s 137 of the EPBC Act, mandating that all decisions be made in conformity with the *World Heritage Convention 1972 (WHC)*.[47] In particular, they alleged the approval was inconsistent with Australia's duty to 'in so far as possible, and as appropriate… take… measures necessary'[48] to 'ensur[e] the identification, protection, conservation, presentation and transmission to future generations'[49] of 'natural heritage on its territory' (specifically, the Great Barrier Reef). Rejecting this, Justice Griffiths joined Minister Hunt in denouncing the ACF's overly 'literal interpretation' of the WHC. He agreed the applicant 'overstated the nature' of the obligations imposed on Australia,[50] and affirmed the Minister's interpretation that, whilst State Parties may have 'a duty not to act in a manner manifestly contrary to the Convention,'[51] they nonetheless 'did not envisage absolute protection, but rather a level of protection that took account of economic, scientific and technical limitations, and the integration of heritage protection into broader economic and social decision making.'[52] In other words, preservation of national heritage sites is, legally and politically, only a priority to the extent that it creates minimal disruption to other areas of government policy—a conservative interpretation indeed.

Justice Griffiths deferred substantially to the Minister's 'Statement of Reasons,' espousing the need for courts to be flexible in interpreting the often 'indeterminate language' of treaties which results from 'compromises made between…. contracting State parties.'[53] This approach demonstrates one significant, yet perhaps inevitable, limitation of judicial review: while environmental conventions may be incorporated into Australian law, Federal Ministers retain the ability to self-define their international legal obligations and balance them with domestic political imperatives. Despite broadly agreed conservation objectives, state sovereignty (particularly of the economic variety) remains the real determinant of practical protection measures.

Secondly, and perhaps most contentiously, the ACF argued the Minister also contravened s 527E of the *Act* by failing to take into account the impact of overseas 'combustion emissions'[54] on the 'physical effects associated with climate change… [including] increased ocean temperature and ocean acidification as well as more extreme weather events.'[55] Like the first ground, this failed on a matter of statutory interpretation, in this instance, regarding the requisite causal link required between Adani's actions and their alleged environmental impact. Under s 527E, for an 'event or circumstance' (such as increased ocean temperatures) to be deemed an 'indirect consequence' of an action (such as building a coalmine), the action must be a 'substantial cause.'[56] The ACF contended the Minister misconstrued the meaning of this to mean that causative factors must be 'weighty or big' rather than merely 'not *de minimis*' to warrant consideration.[57] Justice Griffiths rejected this, saying that Minister Hunt did not indicate in his reasoning what he took the phrase 'substantial cause' to mean, nor did the Act require him to do so.[58] Instead, His Honour was satisfied with the Minister's identification of a series of 'variables' which he argued made it difficult to discern the 'quantity of emissions… likely to be additional to current global GHG emissions' as a result of the mine.[59] These included[60] the efficiency of overseas coal power plants, whether coal from the mine would replace (rather than supplement) coal from previous suppliers, and whether the coal would be used as a substitute for other potential energy sources (such as renewables).[61]

Taking account of these, Minister Hunt and Justice Griffiths similarly deemed it too difficult to draw 'robust conclusions' identifying 'any causal relationship between the proposed action and any possible environmental impacts resulting from increased global temperatures.'[62] Unsurprisingly, ACF CEO Kelly O'Shanassy denounced this as not only a denial of conventional scientific wisdom on climate change, but an obvious 'drug dealer's defence'—the tenuous argument that, 'if we don't dig up this coal and burn it, somebody else will.'[63] The 'causation' based part of the ruling is manifestly unpersuasive. Not only is it short sighted and narrow minded, but completely nonsensical when considered in conjunction with the court's treatment of the final ground of review (below). Such an obtuse construction of law and fact defies logic. Any mitigating factors hypothesised by the Minister would certainly be hard put to counterbalance multiple billions of tonnes of carbon dioxide being catapulted into the Earth's atmosphere, regardless of their combustion location.

Putting the final nail in its litigious coffin, the ACF was dismissed in contending that the 'precautionary principle' was not adequately applied, according to s 391 of the *EPBC Act*. In almost identical terms to the *Rio Declaration*, this provision precludes 'lack of full scientific certainty' from being used as justification for postponing prevention measures where there are 'threats of serious or irreversible environmental damage.'[64] In evaluating this, Justice Griffiths adopted Preston CJ's two-limbed analysis in *Hornsby Shire Council*, whereby the need to apply s 391 must be triggered by two conditions precedent: first, 'a threat of serious or irreversible environmental damage' and second, 'scientific uncertainty as to the environmental damage' (for example, its likelihood or extent).[65]

On this construction, it was held that since the Minister already determined (in response to the second ground) there was no ascertainably 'substantial' threat of damage to the reef from combustion emissions, he was not bound to apply

the precautionary principle in relation to that damage. The reasoning here, as the ACF objected, is perplexingly circular. The precautionary principle's core requirement, that lack of full certainty not be a bar to conservation measures, was deemed inapplicable precisely on the basis of such uncertainty—that is, because the 'causal connections' between the mine, overseas carbon emissions, climate change, and reef damage were deemed too 'difficult to identify.'[66] Although frustratingly obtuse, on this basis, the ACF's final argument failed.

VI Conclusion

A Where Are We Now?

The ACF's appeal of Justice Griffith's decision came before the Federal Court's full bench in March this year. Judgment has since been reserved, with a resolution expected later in 2017.[67] If overturned, the Minister's approval will be remitted to be re-made in conformity with relevant *EPBC Act* provisions. Alternatively, if the ACF's arguments again prove unsuccessful, the proven ability of big mining projects to continue operating within the *EPBC Act*'s ambit may, ironically, decrease the likelihood of s 487's repeal.[68] It's a win-win—or, alternatively, a lose-lose—for conservationist tragics. If the courts' application of other sections of the *EPBC Act* continues to downplay the centrality of ESD principles, allowing Ministers and miners quasi-free reign, the accountability framework becomes, overall, relatively impotent.

Even setting aside threats to third party standing provisions, there is little that judicial review, given its limited ambit, can do to rectify the restrictive approach that Liberal Ministers, such as Mr Hunt, continue to take to laws that implement environmental treaty obligations. Systems intentionally built to facilitate advocacy, activism, and international law enforcement on a domestic level still exist, but are of little use when those in power dismiss them as mere obstructions. They are seen as flies on the windscreen of that train to progress. Full steam ahead. No arguments.

B So We Beat On, Boats Against the Current: Alternate Avenues of Advocacy and Enforcement

But all hope is not lost. Judicial review challenges to the Adani mine and to other harmful ventures have sometimes proven successful, and resulted in further safeguards being attached to approvals. Section 487, for now, remains alive and well. Environmental Defenders Offices, despite vast funding cuts in recent years, continue to defend the environment, to create green tape, and to obstruct and annoy Federal and State Environment Ministers.[69]

In addition, the ACF's concerted campaign against Adani, in conjunction with other activist groups, continues to highlight other potential avenues of enforcing sustainability. Following targeted community protests, all four of Australia's 'Big Banks' have ruled out financing Adani's construction of the Carmichael mine. In April this year, Westpac announced it would be limiting all future lending to mines in basins that already produce coal.[70] NAB made a similar public commitment in September 2015, whilst CBA resigned from its 'advisory role' in the project in late 2016,[71] before indicating it would not finance the mine on 11 August this year.[72] These movements highlight the potential efficacy of private enforcement mechanisms for upholding ESD in the commercial sector, driven by community and conservationist concerns and made effective through economic coercion, public pressure, and protest.[73]

Overall—despite the protestations of the right, all is fair in love and green lawfare. The outlook may be bleak, but those tree-hugging 'vigilantes' keep on fighting. Incorrigible. Troublesome. Disruptive.

08

DISRUPTION'S IN THE AIR: HOW DRONES TOOK THE LAW OF THE SKIES BY SURPRISE

LUCAS MOCTEZUMA

I Introduction

In July 2017, the Australian Civil Aviation Safety Authority (CASA) fined a man $900 for flying a drone over the wedding of a well-known TV presenter.[1] In January, SkyPan was fined $200,000 by the United States Federal Aviation Administration (FAA) for flying commercial drones over New York City and Chicago.[2] In 2015, a film-maker copped a £1,225 fine by Westminster magistrates for flying his drone over London.[3] Evidently, the use of unmanned aircraft has come a long way since the 1800s, when unmanned balloons were first used to conduct air raids in Italy.[4]

The advent of 'Remotely Piloted Aircraft Systems' (RPAS), commonly called drones, raises significant legal issues. In this article, I will only discuss the law concerning civil aviation, and not in a military context. First, I will first discuss the regulatory system of RPAS and the issues that arise in an internationally fragmented regime. Second, I will discuss how at present, international laws provide significant difficulty for potential victims of drone accidents to achieve justice. While there have been very few drone accidents causing significant injury, the law should arguably still address this gap.

II The Disrupted Regulation of International Aviation

International aviation is governed by the 1944 *Convention on International Civil Aviation* ('the Chicago Convention'), a treaty that established the International Civil Aviation Organisation (ICAO) – the UN agency tasked with regulating civil aviation. The treaty does not apply to 'state aircraft,' including military, customs and police aircraft.[5] Despite this, art 3(c) provides that no state aircraft of a contracting State shall fly over the territory of another State without authorisation by special agreement or otherwise. Generally, the Chicago Convention establishes the international laws of airspace, the registration of aircraft, safety management systems, aerodromes and the rights of each Contracting State in relation to air travel. Article 1 enshrines the customary law of sovereignty, providing that each State recognises the 'complete and exclusive sovereignty over the airspace above its territory' that each state retains. Article 8 is directly relevant for our purposes:

> No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to [e]nsure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

Notably, it provides that drones cannot enter into other nation's territories 'without special authorisation by that State.' As such, it imposes obligations on member States to devise their own

rules for controlling their sovereignty and determining which drones stay in and which drones stay out. The result of this discretion is that a 'fragmented regulatory environment is created, differing the restrictions placed upon drones according to the country, ranging from permissive (regulatory vacuum) to restrictive (total ban).'[6] As I will explain shortly, this can create significant problems when drones and commercial aircraft collide.

There has been some international recognition of this. In March 2012, Annexes 2, 7 and 13 to the Convention were amended at the 195th Session of the ICAO Council in order to accommodate RPAS used for international civil aviation. The Annexes that were amended, however, primarily place the responsibility of the State to grant licenses and not much else. Charmingly, Annex 2 elaborates on the regulations for 'unmanned free balloons,' which is defined as a 'non-power-driven, unmanned, lighter-than-air aircraft in free flight.' These 'unmanned free balloons' are permitted to operate in a manner that minimises hazards to persons, property or other aircraft. The fact that the Convention addresses balloons while failing to provide a comprehensive system for RPAS indicates the difficulty of keeping up with advancing air technology.

A uniform set of regulations may materialise next year. ICAO's recently formulated RPAS Panel (formerly the UAS Study Group) aim to deliver uniform RPAS standards to ICAO's governing council in 2018.

III International Liability For Drone Accidents

While liability for drone strikes is covered by domestic legislation in NSW,[7] international law does not currently have a mechanism for providing remedies for damage to persons or property caused by RPAS. This is important because it means that a uniform international system of liability is lacking and the amount of compensation awarded is based merely on where a person happens to be at the time of the incident, no matter the extent of their injuries. The position therefore creates a significant social problem and a condition of global unfairness for primarily three reasons.

First, consider the following scenario. People in the United States are currently able to attain a significantly greater amount of compensation for an injury sustained by a drone accident than a person in Germany who sustains a similar injury. As a result, the United States has been described as a 'magnet for litigation' because of the generous remedies its system provides for air accidents.[8] United States law allows plaintiffs to achieve higher non-economic damages and in some circumstances, also allows for the possibility of recovering punitive damages.[9] German law, on the other hand, is very restrictive in the compensation it awards to plaintiffs, especially when those plaintiffs are third parties. Although, this might change with a recent law reform proposal, which would grant compensation to people with close emotional ties to passengers who die in aircraft accidents.[10]

Second, while there have not been many civil RPAS accidents, the potential for damage to property and injuries to people is real, with a number of close calls in the last few years demonstrating this. In March 2016, a drone almost collided with a Lufthansa Airbus A280 flying into Los Angeles. One U.S. senator commented that this 'could have brought down an airliner.'[11] The following month, a British Airways aircraft flying 132 passengers reportedly collided with a drone.[12] This should signal the need to be reactive rather than proactive.

Third, and most importantly, we have already seen the destructive potential unleashed by military drones. The Russians have used small consumer drones to drop grenades in Iraq and Syria, which has proven to be an effective weapon against ISIS.[13] British drones have also unleased waves of destruction against ISIS through hellfire missile-equipped Reaper drones.[14] Between 2004 and 2014, 388 drone strikes killed up to 3,559 people in Pakistan (although some suggest more),many of whom were children[15] Drone harm is clearly an international issue, and their violent potential needs to be addressed from a civilian perspective.

The treaties we currently have regulate drones, but do so insufficiently. The primary treaty that regulates compensation to victims of air accidents is the *Montreal Convention* 1999, which governs international carriage by air. It was intended to replace the 1929 *Warsaw Convention*. Some have argued that this convention could apply to RPAS strikes.[16] There is room to argue this, but doing so is a challenge considering the Convention was drafted primarily to protect passengers, not non-passengers. Article 17 prescribes the carrier is liable for damage sustained in case of death or bodily injury 'of a passenger.'

Others argue that the 1952 *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* ('the Rome Convention') may apply because it imposes liability for damage caused to third parties on the operator of the aircraft – a strict liability offence. The Convention failed to attract much support, as its limits for compensation were unsatisfactory in comparison with what national legislation provided.[17] There is also only one jurisdiction provided – that of the State where the damage occurred (unless some agreement says otherwise). The Convention was drafted prior to the widespread use of drones (like the Chicago Convention) but even if it is held applicable to drones, it has its limitations. The treaty applies to damage caused on the ground. It perhaps provides a uniform compensatory system if a drone was to collide with a person on the ground. However, it does not provide for a remedy where a drone collides with an aircraft in the air, causing damage to the individuals inside. A drone that collides aggressively with a small biplane, for example, may cause significant injury in the air. In any case, only

49 States have ratified this treaty. Australia ratified and then denounced ratification in 1999, instead passing the *Damage by Aircraft Act 1999*.[18]

The 2009 *Convention on Compensation for Damage caused by Aircraft to Third Parties* ('General Risks Convention') is not yet in force. If enough countries sign, it may provide some remedy. Article 3(1) imposes liability for damage sustained by third parties upon condition only that the damage was caused by an aircraft 'in flight.' 'Third party' is defined in art 1(i) to mean 'a person other than the operator, passenger, consignor or consignee of cargo.' 'Third party' could be construed to include drone strike victims, especially since an 'aircraft' is not defined. It might include passengers of regular aircraft if a drone collides into a passenger jet causing injury to passengers. An argument could be made that 'passenger' in art 1(i) only refers to a passenger in an aircraft, the operator of which is responsible for the crash. As art 3(1) imposes liability on an operator for damage sustained by third parties upon condition the damage was caused by 'an aircraft in flight,' that may illuminate the definition to mean third parties from the perspective of the operator at fault (i.e. the drone operator), which could include passengers on other aircraft.

This Convention raises concerning legal questions. First, the General Risks Convention limits liability for events based on the actual mass of aircraft. Article 4(1)(a) limits liability of operators, which shall not exceed 750,000 Special Drawing Rights (SDRs) for aircraft having a maximum mass of 500 kilograms or less. However, per art 4(3), the limits only apply where there was no negligence or wrongful act of the operator's servants or was solely due to the negligence or wrongful act of another person. Some RPAS weigh less than 2 kilograms, so these would be the applicable provisions. However, a very light aircraft, even RPAS, can cause a large amount of damage if it crashes on a sensitive target on the surface, such as an electrical generator or an oil tanker. By contrast, a huge A380 may cause little damage on the ground if it crashes into the Alps or a plain open field.

Second, art 3(2) of the General Risks Convention provides that there shall be no right to compensation if the damage is not a '*direct*' consequence of the event giving rise thereto. Imagine a situation where a drone flown by a hobbyist collides into an aircraft which is taking off, causing the plane to crash, causing significant injury to passengers. Article 6 provides that where 'two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party'. This Convention may not apply if these passengers are not 'third parties'. However, if they are, art 3(2) limits the General Risks Convention's applicability to where there is direct consequence. It is unclear whether the above scenario be a 'direct' injury to third parties for the purposes of the General Risks Convention, or whether the drone be required to actually directly crash into the victims. Determining this will no doubt raise significant questions of causation. Nevertheless, should the General Risks Convention be ratified by enough countries, the opportunity to answer such questions may be tested before national courts. It certainly provides fundamental steps towards a uniform system for RPAS liability.

Third, and very importantly, while provisional measures can be made in any State Party, actions for compensation may be brought 'only before the courts of the State Party in whose territory the damage occurred.'[19] This is currently a significant factor that has led States to oppose the Rome Convention.[20] It is meant to deter 'forum shopping', i.e. prevent victims from electing a jurisdiction which could grant them more favourable remedies. It is also meant to foster certainty, in that aircraft operators would be aware of which legal regime under which they are operating.[21] However, it is understandable why many States want to keep the ability to 'forum shop' open. States have regulatory systems that make it difficult to provide compensation for third parties (notably Germany), so it encourages victims to pursue litigation elsewhere. It thus saves the State's own resources from being utilised for what may otherwise be seen as a foreign claim. As mentioned earlier, the international nature of aviation requires international uniformity. This was recognised by the Montreal Convention in the context of regular air travel, which allows the plaintiff to elect a jurisdiction. This is fairer on the individual who may sustain significant injury and is barred from recovery simply because of the place in which they are geographically located.

IV Concluding Remarks

The innovative phenomenon of RPAS has significantly disrupted the international legal regime. As this article has explored, the law is not currently keeping up with the issues arising out of international drone use. International law, including through the Convention and ICAO Annexes, grant significant discretion to States, resulting in fragmented and unequal aviation regulation systems. ICAO is currently developing RPAS standards that are to be released next year.

The current system of compensation for drone accidents lacks uniformity. The General Risks Convention addresses some issues and provides important first steps, but until it is ratified, we are currently left with a disjointed system. A uniform system is needed because of the destruction that may occur in future and the potential injustice that the current system of global unfairness could result in. States need to work to develop uniform RPAS regulations, and if they do so, we can perhaps one day have one law for one sky. ●

09

THE RIGHT TO ASSEMBLY AND PROTEST IN COLOMBIA AND THE *POLICE CODE* OF 2016

ARIANA LADOPOULOS[1]

I Introduction

Public assemblies and protests are tools of disruption: as powerful, visible expressions of public sentiment, they have the capacity to bring about social, political and legal change. Further, by enabling people to critically comment on exercises of political power in a manner that garners public attention, the right to assembly and protest is fundamentally important in preserving a 'robust and pluralist democratic system.'[2]

This article will focus on the right to peaceful public assembly and protests in Colombia, a fundamental right established by the *Political Constitution of Colombia* (1991), and the extent to which the new *Police Code of Colombia*, introduced in 2016, restricts this right. As of April 2017, the *Police Code* had been subject to over 70 constitutional challenges.[3] In the decision C-223/17, handed down in April 2017, the Constitutional Court of Colombia declared the articles of the *Police Code* that regulate public assemblies and protests unconstitutional. This article will examine the reasoning of the Court in *C-223/17* and the effects of the decision on the right to peaceful public assembly and protests in Colombia.

II A Brief History of Protests in Colombia

Public protests have played a significant role in Colombia's national history. Firstly, one of the most prominent stories about Colombia's path to independence tells of a protest in the central plaza of Bogotá, following a Spanish merchant's refusal to lend a flower vase to a group of *criollos* (people of Spanish descent born in Latin America). Secondly, on 9 April 1948, a day deemed 'El Bogotazo,' violent protests erupted across Bogotá, following the assassination of liberal presidential candidate Jorge Eliécer Gaitán. The estimated death toll of El Bogotazo ranged between 500 and 3000 people. It marked the beginning of an intensive period of horrific violence across the country.[4] Thirdly, vocal student movements have had significant political implications in Colombia, influencing the development of educational reforms, constitutional reforms and, more recently, peace negotiations between the national government and guerrilla group the FARC.[5] These are only three examples of protests, extracted from a national history that is incredibly rich in collective activism.

Over the past few years, Colombia has witnessed an increase in public expressions of dissidence. In 2013, the Centre of Research and Popular Education recorded 2027 protests across the country, the highest figure recorded since the organisation began to collect data in 1975.[6] Further, according to a study conducted by the National School of Unions, workers and unions realised 2168 collective actions between 2010 and 2016, almost 64 per cent of the total of 3403 actions realised between 1991 and 2016.[7]

These collective actions are consistently accompanied by police presence and, often, by police intervention. Abuses of power and police brutality are frequently reported. For example, during the National Agrarian Strike in 2013, masses of rural workers took to the streets to protest the government's management of the agrarian sector.[8] According to data collected by Movice – the National Movement for Victims of State Crimes – and the Coordination Colombia, Europe and the United States, there were 902 formal reports of aggression, including 15 deaths, in the context of these collective actions. [9] 88.15 per cent of these reports were directed against police officers.[10] More recently, in January 2017, videos were released showing police confrontations with protestors during anti-bullfighting protests in Bogotá. Many of these videos bear witness to police throwing tear gas bombs, yelling aggressively in the face of protestors, and roughly handling protestors. [11] One video shows a heavily armed officer shooting rubber bullets at a protestor's dog.[12]

III The Constitutional Right to Assembly and Protest

Article 37 of the *Colombian Constitution* (1991) articulates the fundamental right of all Colombians to engage in peaceful public assemblies and protests. Further, it establishes that the exercise of this right can only be limited by expressly worded legislation. Colombia has also signed and ratified various instruments of international law that recognise the right to assembly and protest, such as the *Universal Declaration of Human Rights*,[13] the *International Covenant on Civil and Political Rights*,[14] and the *American Convention on Human Rights*.[15] Article 93 of the Constitution integrates these provisions into the 'constitutional block,' granting them superior status within the internal legal order. Further, in various decisions, the Constitutional Court of Colombia has reiterated the fundamental nature of the right to assembly and protest.[16]

As a fundamental constitutional right, the right to assembly and protest enjoys special legal protections. Firstly, the State is constitutionally obliged to protect and guarantee the effective exercise of fundamental constitutional rights, including the right to assembly and protest.[17]

Secondly, ch 4 of the Constitution establishes various actions that people can use to protect their fundamental constitutional rights. One such action is the *tutela*.[18] If the action or omission of a public authority threatens a fundamental constitutional right of any person (such as the right to assembly and protest), the person can bring a *tutela* before any judge. The judge will protect the right in question by obliging the authority to immediately act or abstain from acting. Finally, art 152 of the Constitution establishes that fundamental rights are to be regulated by statutory laws. Statutory laws are more procedurally complex than ordinary laws: they can only be passed, modified and revoked by an absolute majority of Congress in one legislature, and they are automatically subject to revision by the Constitutional Court of Colombia before coming into effect.

The right to assembly and protest receives robust and comprehensive constitutional protection. However, as evidenced by the above examples of abuses of police power, this constitutional protection often fails translating to actual protection.

IV The *Police Code* of 2016

Prior to 2016, the matters of police powers and communal living were predominantly regulated by *Decreto 1533 de 1970* and *Decreto 522 de 1971*. The regulations were unsatisfactory for two main reasons. Firstly, *decretos* are executive orders, issued by the Colombian Government in accordance with the legislative powers granted to it by Chapter 6 of the *Constitution*; unlike normal laws, they are not subject to discussion, debate and collective drafting in Congress. Given this, decretos are the product of a comparatively undemocratic process. Secondly, Colombian society and culture has changed significantly since 1971. Over forty years after their introduction, *Decreto 1533 de 1970* and *Decreto 522 de 1971* no longer reflected or catered to the realities of contemporary Colombia. Consequently, the need for legislative reform, in the form of a new *Police Code*, became increasingly obvious and pressing.

The new *Police Code of Colombia* (*Ley 1801 de 2016*) was published on 29 July 2016 and came into effect on 30 January 2017. The objects of the *Code*, according to its first article, are to promote peaceful communal living and to regulate police powers. Part VI of the *Code* is entitled 'The Right to Assembly.' By regulating public gatherings, it seeks to minimise the disruption that such gatherings might cause to public order and peaceful communal living. Some of its most notable provisions are as follows. Article 47 defines 'public gatherings' as the assembly of multiple people in public after being called together by an individual or group. Article 48 requires municipal authorities, in consultation with municipal and district risk advisory organisations, to regulate the conditions and requirements of activities that involve public gatherings, in accordance with the law. Article 53 recognises that every person can publicly reunite or protest with the purpose of expounding ideas or collective interests about culture, politics, the economy, religion society or any other legitimate purpose. It requires that at least three people advise administrative authorities in writing of the time and place of the assembly or protest at least 48 hours before it takes place. Further, art 53 provides that any assembly or protest that alters peaceful communal living can be dissolved.

V Constitutional Challenges and *C-223/2017*

Article 241 of the *Constitution* references a judicial

action (*demanda de inconstitucionalidad*), whereby any citizen can challenge the constitutionality of a law or an executive order.[19] Since June 2016, the Constitutional Court has received various constitutional challenges against Part VI of the *Police Code*.

A number of these challenges argued that certain articles of Part VI were unconstitutional on procedural grounds.[20] These arguments drew focus to the fact that the *Police Code* is an ordinary law, not a statutory law. As previously stated, art 152 of the *Constitution* establishes that fundamental constitutional rights can only be regulated by statutory laws. Therefore, the articles of the *Police Code* that affect the right to assembly and protest (such as arts 47, 48 and 53) fail to meet the requisites of art 152.

The challenge submitted by social justice organisation Dejusticia also drew attention to the problematic nature of the content of art 53 of the *Code*.[21] Firstly, the challenge took issue with the provision recognising the right to assembly and protest in order to expound ideas or collective interests about culture, politics, the economy, religion society or for any other legitimate purpose. The right to assembly and protest, as expressed in the *Constitution*, exists irrespective of the presence or legitimacy of the purpose of the assembly or protest. According to Dejusticia, the *Police Code*'s recognition of the right to assembly and protest only for certain purposes is restrictive and fails to respect ideological pluralism. Additionally, 'for any other legitimate purpose' is an ambiguous phrase that is not defined in the *Code*. Consequently, it relies heavily on police officers' interpretations of the phrase, which could serve to restrict the rights of protestors. Secondly, the challenge took issue with the provision obliging at least three people to advise authorities about the details of the protest or assembly at least 48 hours in advance. Dejusticia posited that this obligation suppresses the potentially spontaneous and disruptive nature of protests. Further, it argued that the notifications could be used as evidence of people's leadership of public assemblies and protests. Here, it is important to understand the grave danger of being a social or political leader in Colombia. A recent report by Public Defender Carlos Alfonso Negret Mosquera recorded 156 murders, 5 disappearances and 33 attempted murders or kidnappings of social leaders and human rights advocates between 1 January 2016 and 1 March 2017.[22] Therefore, by revealing their identity, protest leaders potentially expose themselves to social stigma, litigation or acts of violence. Finally, Dejusticia's challenge disputed the provision allowing the dissolution of any assembly or protest that disturbs peaceful communal living. It argued that the phrase 'disturbs peaceful communal living' is unacceptably ambiguous and grants an excessive amount of discretion to police officers. Moreover, it held that protests are, by their very nature, disruptive. Therefore, to allow the dissolution of disruptive protests fails to respect a key characteristic of protests.

In *C-223/17*, a 6:3 majority decision headed by Justice Alberto Rojas Ríos, the Constitutional Court declared the entirety of Part VI unconstitutional. The Court found that arts 47, 48, 53, 54 and 55 of the *Code* affected the 'essential nucleus' of the right to assembly and protest.[23] Given art 152 of the *Constitution*, such provisions could not be contained within an ordinary law such as the *Police Code*. To ensure the integral nature of its legal reasoning and final decision, the Court declared the whole Part VI (arts 53-75), not simply the disputed articles, to be unconstitutional.[24]

The Constitutional Court did not decide on the constitutionality of the actual content of Part VI. However, whilst clarifying their decision, three judges underscored the importance of protecting the right to assembly and protest and ensuring that it can be exercised in practice.[25] Arguably, this cautionary obiter dicta suggests that Part VI included provisions which did not adequately respect the right to assembly and protest.

VI Where To From Here?

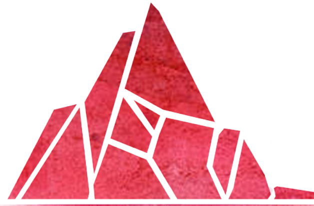
The Court granted the Colombian Congress until 20 June 2019 to regulate the right to assembly and protest in a manner consistent with the *Constitution* (that is, in the form of a statutory law). Until then, the current provisions in Part VI will remain in force.

If Congress fails to act within the designated period, the current regulations will cease to apply. Anecdotally, delays in passing legislation are common in Congress, so this has the potential to occur. If it does, the matter of police powers in the context of public assemblies and protests would be left unregulated.

Alternatively, Congress might pass a statutory law before 20 June 2019. If it does, the statutory law will automatically be subject to constitutional review by the Constitutional Court of Colombia. Presumably, Congress will essentially preserve the content of the current Part VI. This begs an interesting question: will the Constitutional Court decide that the current provisions unjustifiably restrict the right to assembly and protest, as argued by Dejusticia, or will it decide that the restrictions are reasonable and proportionate? The answer is uncertain, especially given that five of the nine judges on the current bench of the Constitutional Court have only been sitting since the start of 2017, such that their judicial tendencies are unclear.

In the opinion of this author, several provisions of Part VI of the *Police Code* – as currently drafted – are problematic. The use of ambiguous phrases such as 'legitimate purpose' and 'alteration to peaceful communal living' is equivocal and confusing; moreover, it grants undesirably wide discretion to police officers, as argued by Dejusticia. Additionally, the provisions impose practical limitations on the free exercise of the right to assembly and protest. These problems are even more pronounced due the fact

that, although certain fundamental human rights enjoy constitutional protection in Colombia, in reality they are frequently unfulfilled or violated, often by the actions or omissions of State authorities. The current wording of certain provisions of Part VI fails to appreciate the fragility of the right to assembly and protest in practice and, thus, fails to adequately protect and promote this fundamental constitutional right. When drafting the new statutory law, Congress should seek to preserve public peace and order in a manner that better respects the right to assembly and protest. ⬣



10

THE SILENCED MAJORITY

ROBERT CLARKE

I Introduction

'Our country has changed.'[1] These are the words declared by Chief Justice Kennedy as the Supreme Court made its ruling in *Shelby County v Holder*, thereby gutting *The Voting Rights Act (1965)* ('VRA').[2] Before this decision had seen the end of its first day, the Governor of Texas had already started the process of passing voting restrictions that would later be described by a federal court as 'designed to discriminate against minorities.'[3] The striking down of s 4 of the VRA has emboldened a shocking proliferation of voter suppression in states previously covered by the law. In order to grasp the scope of its disruption in the political representation of minority communities, it is important to analyse the decision itself and its legal ramifications, the shifts in political power that flow from this, and ultimately the social implications of a political climate that incentivises the disenfranchisement of people of colour.

II The Decision

The VRA contains a range of provisions that enforce the 14th and 15th amendments to the US Constitution by guaranteeing the right of all individuals to vote.[4] The Act was legislated in response to the Civil Rights Movement's protests against the tacit racial discrimination used to prevent non-white voters from casting a ballot in several (mainly southern) states. These discriminatory policies included difficult literacy tests, poll taxes that were unaffordable for the large majority of African Americans, and a reduction of polling places in African American communities.[5] Section 5 of the VRA contains 'special provisions' of oversight and most notably a 'preclearance requirement' for states deemed to be likely offenders of the VRA.[6] These states required federal approval before any amendments were made to voting laws. Section 4 sets out the formula for determining which states required oversight under s 5. The formula included states or political subdivisions that had either used a test or device to determine voting eligibility, or had less than 50% of eligible adults registered to vote in the 1964 election.[7] Congress did not add or remove states or political subdivisions from s 4 throughout the life of the Act other than through the bailout provision which, as amended in 1984, allowed removal for those states/subdivisions that did not violate the act in the ten years prior.[8]

Shelby County, Alabama challenged s 4 of the VRA in 2013 claiming that it unfairly targeted specific states and was therefore contrary to the principles of federalism.[9] It argued that the s 4 formula did not reflect modern political realities as it had not been changed for 50 years. Of course, Shelby County could not remove itself from the preclearance requirement through the bailout provision as its latest violation was too recent.[10] Nevertheless, the Supreme Court, in a 5-4 decision, agreed with Shelby County and struck down s 4 of the VRA citing a lack of congruency and proportionality to the underlying harm the

act aimed to remedy.[11] This indicated the court's belief that the strong federal oversight in the act was proportional to the risk of voter suppression in 1964 but as this risk had declined, the section was no longer necessary. In her dissent, Justice Ginsberg described the decision as the equivalent of 'throwing away your umbrella in a rainstorm because you are not getting wet.'[12]

Regardless of the decision's merits, or the fact that Congress could create a new formula and reinstate s 4, the decision effectively paralysed s 5, and with it, the ability of the federal Department of Justice to respond to violations of the VRA.

III How The Law Has Changed

In all 50 states of America, it is illegal for legislatures to enact legislation with the intent or effect of disproportionately reducing minority turnout.[13] This has not changed based on the Shelby County decision. However, the impetus to prevent abrogation of voting rights has markedly shifted, from a preclearance requirement of states to prove a lack of discriminatory effect, to a requirement of the Justice Department or civil rights groups to challenge legislation in lengthy court battles. The legal effects of this are twofold: states and local counties can quietly pass veiled discriminatory laws that go unchecked, and even the clearest violations of the VRA may go unchallenged if the Justice Department is unwilling to do so.

Florida and Arizona are both interesting case studies of States that have passed veiled discriminatory laws since *Shelby County v Holder*.[14] Both have large Hispanic populations with low turnout rates, and both were less than a two-point swing away from delivering the White House to Hillary Clinton.

Arizona had been covered under s 4; thus, 2016 was the first presidential election in which the preclearance requirement did not apply.[15] While Arizona was also notable for its introduction of a 'two-tiered voting system,'[16] implemented after Shelby County, it has enacted several subtler but equally discriminatory, measures. The most shocking example of these is the reduction of polling places by 70% from 2012 to 2016; consequently, instead of the national average of 1 polling place per 1,700 voters, in Arizona there was 1 polling place per 21,000 voters.[17] A reduction in polling places increases the length of wait required to cast a ballot and as voting in the US takes place on a Tuesday, measures such as these hit the working poor (a disproportionate number of whom are minorities) the hardest. Further to that discriminatory effect, the reduction in polling places was found to disproportionately target areas in which a large population of minorities resided.[18] The political impact of these changes will be addressed later in this article.

Florida was not fully covered by s 4 of the VRA, however it contained several counties, including the large city of Tampa, that were.[19] Florida has the third highest Hispanic population in the country, after California and Texas; thus, the reason that Collier, Hardee, Hendry, Hillsborough and Monroe counties were initially subjected to the preclearance requirement was because of their failure to provide voting ballots in languages other than English.[20] Immediately upon the Shelby County decision, Monroe county returned to English-only ballots and omitted Spanish translations.[21]

As well as the creeping threat of veiled voter discrimination, there is also a further threat posed by a Justice Department unwilling to challenge even the most clear-cut violations. Jeff Sessions has previously described the VRA as 'intrusive'[22] and labelled the Shelby County decision 'good news for the south.'[23] He is now the man responsible for defending the voting rights of all Americans, through his obligation to challenge laws that are discriminatory in their intent or effect. The Voter ID law, known as SB 14, pursued by Texas the same day as Shelby County was decided, sets strict requirements for the ID one must hold to vote.[24] The Justice Department under Eric Holder promptly challenged this legislation and succeeded in blocking it in court. The court decided that 'SB14 disproportionally impacts African American and Hispanic registered voters relative to Anglos in Texas.'[25] During further litigation regarding this piece of legislation, Jeff Sessions' Justice Department switched sides and began defending SB14 claiming the bill was 'no longer discriminatory'[26] in a statement that provides a green light to voter ID laws throughout the US. In a perverse twist, the Justice Department has chosen to argue on the side of legislatures who seek to restrict voting and not against.

The NAACP believes that almost 1,000,000 registered voters will be adversely affected by changes made to voting laws since the Shelby County decision in Texas alone.[27] The legal changes promulgated not only by Texas, Florida and Arizona, but by 9 of the 15 states previously covered by s 4 have dramatic consequences for the political landscape in America.

IV A Changed Political Landscape

Of the states covered by s 4 of the VRA, Florida, Georgia, Arizona, North Carolina, Virginia, Michigan and, potentially in the future, Texas, are battleground states. Importantly, there is an enormous racial disparity in voting patterns in the United States and in 2016, three quarters of non-white voters favoured the Democratic party while almost 60% of white voters chose Republican.[28] This political climate creates an incentive for Republicans to limit the turnout of minority voters through various voter suppression tactics. There is much at stake; millennial voters, now the largest voting cohort, are almost 50% non-white.[29] In such a polarised electorate, Republicans must choose between broadening their appeal to minorities as recommended in the famous so-

recommended in the famous so-called 'autopsy report' that followed Mitt Romney's devastating 126 electoral college vote loss in 2012, or suppressing the turnout of minorities. The Shelby County decision has facilitated the second option.

Despite the belief of the majority in *Shelby County v Holder*, states targeted by the preclearance requirement are far more likely to violate the VRA. In fact, 94% of all violations pre-2004 came from the jurisdictions in questions.[30] It is instructive to consider the political implications of changes to the VRA in the context of a removal of the preclearance requirement from those jurisdictions most likely to offend.

This article has previously referred to the voting restrictions enacted in Arizona that suppress Hispanic turnout. 2016 provides an interesting case study in the effects of such policies. In the 2008 and 2012 elections, there was a one-point difference between the percentage of eligible voters who were Hispanic and the percentage of election day voters who were Hispanic. This gap dramatically widened in 2016 after the new voting restrictions.

Figure 1 illustrates the interruption of a trend towards increased Hispanic participation following the Shelby County decision. This data does not seek to suggest that the Shelby County decision was the sole cause for reduced turnout of Hispanics in 2016, nor that Clinton would have won the state had it not been for this reduction, however it does seek to highlight how voter suppression can put downward pressure on turnout. The stakes of this suppression are only set to increase as the makeup of such battleground states continues to shift.[31]

Shelby County is particularly important because, as previously highlighted, it concerns seven typical

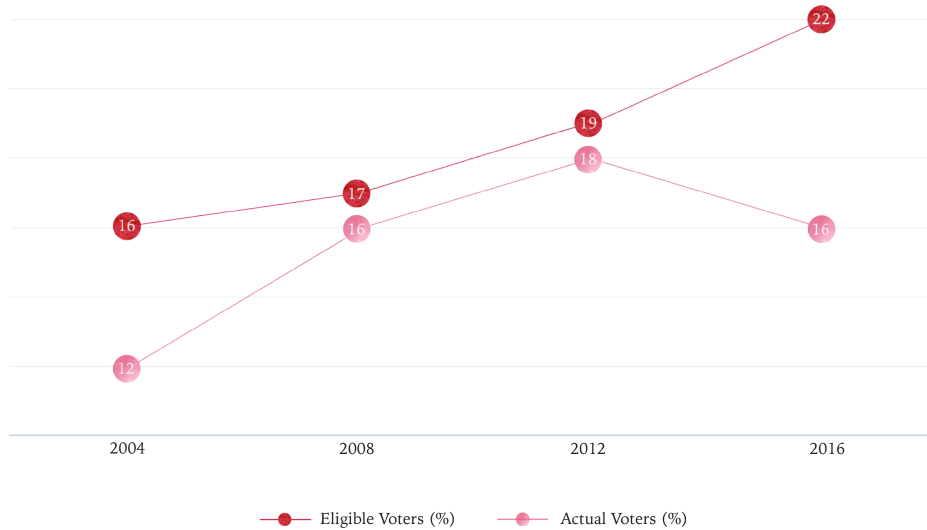


FIGURE 1

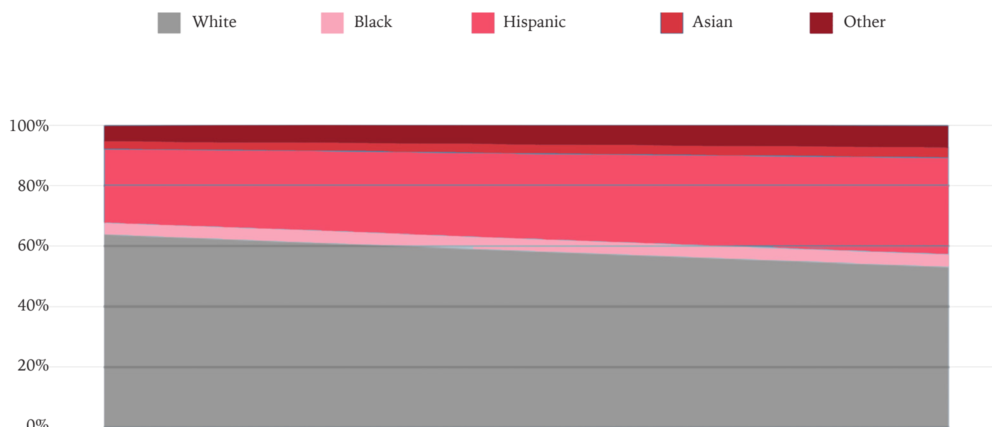


FIGURE 2

2020

State	Scenario 1	Scenario 2
Arizona	Swing GOP	Solid GOP
Georgia	Swing GOP	Solid GOP
Florida	Swing DEM	Swing GOP
Michigan	Solid DEM	Swing DEM
North Carolina	Swing DEM	Swing GOP
Texas	Solid GOP	Solid GOP
Virginia	Swing DEM	Swing GOP
EC Votes[34]	DEM: 292	DEM: 235
	GOP: 246	GOP: 303
White House	Democratic	Republican

FIGURE 3

2032

State	Scenario 1	Scenario 2
Arizona	Swing DEM	Solid GOP
Georgia	Swing DEM	Swing GOP
Florida	Swing DEM	Swing GOP
Michigan	Solid DEM	Swing DEM
North Carolina	Swing DEM	Swing DEM
Texas	Swing GOP	Solid GOP
Virginia	Solid DEM	Swing DEM
EC Votes[34]	DEM: 319	DEM: 263
	GOP: 219	GOP: 275
White House	Democratic	Republican

FIGURE 4

swing states in the US electoral college. The Brookings Institute projected the potential future of the American political map based on two scenarios. The first scenario (scenario 1) considers a 2020 and 2032 election in which minority turnout increases gradually to equal that of white turnout by 2032 with voting preference equivalent to that of 2012.[32] Scenario 2 considers a 2020 and 2032 election in which minority turnout grows more slowly, and white voters turn increasingly to the Republican Party while minority voters keep their current preferences.[33] The projections in scenario 2 are comparable to the post-Shelby County political landscape, as white support for Republicans increases and minority turnout is reduced. Scenario 1, in which minority turnout gradually increases to reach the levels of white turnout, corresponds to a hypothetical political landscape in which s 4 of the VRA is still considered constitutional.

Figure 3 and Figure 4 are not meant to be predictions, but merely simulations of the seven states in question and the effect that this could have on future elections. Scenario 2 shows a post-Shelby County world, where a strategy of appealing to white voters and suppressing minority turnout is forecasted to lead to a difference of 57 and 56 electoral college votes in 2020 and 2032, respectively. In both years, Republicans win the White House. In fact, the Brookings Institute found that even if Republicans increase their margin on minority voters by 7.5 points and turnout increases at pre-Shelby County rates, the GOP still lose the 2020 and 2032 elections based on their calculations. This leads to the conclusion that the best medium-term strategy for the GOP is the suppression of minority votes. Section 4 of the VRA allowed s 5 to strike 1,500 discriminatory laws, effectively blocking scenario 2. Therefore, the Shelby County decision has therefore changed the political calculus of the Republican Party by making voter suppression a viable electoral strategy. There is little evidence to suggest that such tactics cost Hillary Clinton the White House in 2016, however they cost many people their voices and could, in the future, swing elections.

V The Silenced Majority

African Americans are far less geographically concentrated than other minorities in America; thus, they are perhaps the most silenced community in social outcomes. In a press release just a few days before the 2016 election, the state Republican party of North Carolina listed a number of 'encouraging signs.'[34] Among them was the line 'African American Early Voting is down 8.5% from this time in 2012.'[35] Trump went to win the state. This raises the question: what does a society look like when a significant segment of it—African Americans and minorities more broadly—is largely ignored by the party that controls both Houses of Congress, the Presidency, and 32 statehouses?

Since Lyndon Johnson signed into effect the VRA in 1965, no Democrat has lost the African American vote, and Barack Obama delivered 95% of it to the Democratic Coalition in 2008. Conventional wisdom for some time has suggested that the rise of the minority voter to eventually usurp the white voter as the dominant force in American politics would inevitably lead to governments that prioritised their interests. In reality, voter suppression in states such as North Carolina has allowed Republicans to ignore these concerns, leading to governments that are unresponsive to the interests of African Americans.

The African American community's overwhelming

preference for the Democratic Party may in some ways represent its interests, but this commitment does not come without its pitfalls. Approximately 45% of African Americans identify themselves as conservatives, just 2% less than those who call themselves liberals.[36] Clearly the Democratic Party isn't an ideal fit for the entire African American community. Research has shown that minorities tend to be better off under Democratic presidents than Republican, but due to the virtually guaranteed 85%+ support for Democrats, there is little incentive for Presidents to address the concerns of these "non-swing" or "captured" voters.[37] In fact, the Joint Centre for Political and Economic Studies found that policy outcomes were worse for African Americans as a consequence.[38] In a binary choice of 'did the government do what an individual wanted on (x) issue,' there were negligible differences in the percentage of 'yes' responses between genders and classes.[39] In other words, the gender or class of an individual is unlikely to affect whether the government makes a decision that they are happy with. On the contrary, there was a large disparity in race. A black American is 5.7% less likely than a white American to respond 'yes' to the same question, more than 10 time the difference in classes and 13 times the difference in gender.[40]

The Shelby County decision enabled states like North Carolina to 'double down' on white voters at the expense of minorities. This has led to a further 'capturing' of the black vote by Democrats, led to African American voices being further devalued, and therefore made the policies for which they advocate less likely to succeed.

This stark disparity was brought into focus in the recent debate regarding healthcare. The Affordable Healthcare Act increased health insurance coverage rates for all Americans, but it also specifically reduced the coverage disparity between white and non-white Americans. By 2014, the coverage difference between white and African Americans had been cut by 35%.[41] Furthermore, the disparity in insurance rates between African American and white children had been eliminated.[42] The Republican effort to repeal Obamacare would have been disastrous for the state of coverage in minority communities due to its specific focus on Medicare, a programme in which 15 million of the 40 million African Americans in the US are enrolled. Despite this, the key voices on the issue came from the senators from Maine, Alaska, and Arizona, states where the African American population constitute 4%, 2%, and 5% of the total population respectively, compared to the national average of 13%.[43] In a policy debate that so directly concerned the interests of African Americans, they were the silenced majority.

VI Conclusion

Those who hailed the victory of Obama in 2008 as the moment that a coalition dominated by minority voters had displaced white political hegemony in America have since been proven wrong. The demographic and political changes in the electorate that made the so-called 'coalition of the ascendant' into a winning force have been disrupted. The Shelby County decision is symbolic of bystander denial, of an America that would rather close its eyes to the racial injustices that are perpetuated every day than take responsibility for stopping them. It reflects a belief that racism is no longer a problem that requires active combatting. But while some close their eyes, others are working away in the dark to make sure that they make the most of weakened protections for minorities. State legislators have sought to reduce minority turnout in order to achieve their own cynical political goals, national candidates have taken advantage of this to win elections and futureproof ideologies, while the end result of it all is social. The policy desires of minorities are unable to be realised. The legal system in this instance may have disrupted democracy and undoubtedly caused much harm, but this will surely not last forever. Ultimately, with half of the babies born in 2016 being non-white, America's demographic future is an unstoppable one, and these demographics will become its political destiny. In the meantime, civil rights groups will continue to resist the forces of bigotry and subjugation, forcing the empowered to hear their voices. Barack Obama was not an anomaly. Political leaders of colour like Joaquin Casto, Marco Rubio, and Kamala Harris will step forward to be considered as future presidents, safe in the knowledge that America's future lies not just in the hands of its historical power centres, but also in those of people who look like them. ●

11

NEGOTIATING THE BOUNDARIES OF 'ACCEPTABLE' PROTEST IN MAINLAND CHINA

JACINTA KEAST

I Introduction

In American sociologist Seymour Lipset's theory of democracy, he argues that a country with a large middle class, as a result of sustained economic growth, should be one that supports democracy.[1] In China, this has been used to argue for the inevitability of political change, and that the present Communist Party of China (CPC), will eventually be overthrown in favour of a democratic system. Whilst this is certainly an alluring idea, it is unlikely.

As political scientist Andrew J Nathan found, the Chinese middle class differs from Western middle classes in four notable ways: its newness, the nature of their employment, its relatively smaller size and its lack of civil society and associational life. He also finds that this newness, coupled with a lack of historical political involvement, has led to the majority feeling politically alienated, anaesthetised, and accepting, yet also overly anxious about maintaining their unstable social position.[2]

The Chinese middle class broadly approves of the current regime, and will continue to do so if the government manages to address the escalating social, legal and ethical problems that plague the country and pose a threat to all citizens' social stability.[3]According to an analysis by Tyler Headley and Cole Tanigawa-Lau in *Foreign Affairs*, in 2016 there were 130 000 protests in China, a number that has been steadily increasing each year.[4] They have primarily arisen from issues regarding labour laws, social security and the environment.

Yet the space for civil society and grassroots groups has been considerably limited. In many Western liberal democracies, these groups play a role not only in creating community and unity, but also in communicating desirable policy actions to politicians, interest groups and the government—a bottom-up system from the people to the executive. While still ostensibly 'listening to the people', the current leadership has indicated that they prefer for the people's needs to be filtered through its cadre system—still a bottom-up feedback system for policy-making, but one which censors voices at the first chain of command.[5] In recent history, protesting represents a break in tradition as to how Chinese people have made their voice heard.

China does not have the British historical tradition of petitioning as a form of protest. However, since the 1950s, the 'letters and visits' *xinfang* system, a form of administrative appeal in which a protester files a complaint and takes it to the relevant government office or offices in person, has become an integral part of Chinese contention. Despite being judged as ineffective, trust in the *xinfang* system is reflective of the weak faith in the court system in China. From 1998 to 2003, the entire Chinese judiciary handled 42 million *xinfang* cases, compared with approximately 30 million formal legal cases.[6] As both the *xinfang* and judicial

system have undergone reforms, fewer cases have been handled through the former, and a greater number through the latter. Yet the *xinfang* system is often not used by those who strongly oppose a government policy. If they lack the political capital to meet with officials and influence policy, a frequent avenue of redress is mass protest.

However, as restrictions are placed upon their freedom of expression, citizens choose to manifest their unhappiness differently. As the price of a failed protest is high, by comparison to Western liberal democracies, protestors choose to protest on issues that have a high chance of succeeding. The expectation of protests is that they will lead to a policy response. This essay will explore the common areas of contention in China, where protest is used to agitate for policy change.

Firstly, there are the policy issues deemed 'acceptable' to the current government; secondly, there are those issues with policy aims that are deemed acceptable to the government. Policy aims can be defined as the protesters' intended outcome of the protest. This can be anything from advocating revising a new, unpopular government policy (a moderate policy aim) to advocating regime overthrow (a very radical policy aim). This will be demonstrated through three case studies in recent Chinese political history.

II Jiangsu Education Protests

In May 2016, thousands of middle-class Chinese parents protested at the provincial Ministry of Education building in Nanjing, the capital of the Jiangsu province. Their protests were in response to a policy change that would free up more spots in the provinces' universities for students from poorer, more rural provinces such as Henan, Guangxi, Guizhou and Gansu, at the expense of spots for local students. Parents interviewed felt it would increase the difficulty for their own children to be admitted to local universities, and called the policy change 'unfair' and 'discriminatory'. [7] Similar—albeit smaller—protests occurred in 13 other Jiangsu cities, as well as in the capital of Hebei province, Wuhan.[8]

At present, due to the residency permit, or *hukou* system, it is considerably easier for a student to be admitted to a university in their home province than to one outside of it. The highest-ranked universities exist in Beijing and Shanghai, with respectable universities in the Eastern Seaboard such as in Nanjing, and few good universities in the poorer provinces. The distortions created by such a preferential state system clearly renders it increasingly difficult for students from poorer provinces to receive a good education, as they must score higher than the locals of that province to be admitted. Addressing this issue was the stated aim of the policy makers, the Ministry of Education and the National Development and Reform Commission.

As the government tries to more 'comprehensively deepen reforms' in the education sector, they are attempting to build an iterative feedback mechanism for policy.[9] As a result, protesting on issues of education in the last few years has rarely been a dangerous protest issue—it is deemed acceptable. This is because unlike other socio-political issues such as poverty or minority rights, education is an issue that affects all members of the population, and is of immense importance to parents who belong to the middle-class. There is thus less plausible deniability in admitting that issues exist in the education system when the vast majority of children and their parents deal with the state education system daily.

The protest was also advocating for a brand-new policy to be reversed, or at least modified—a moderate change. In the end, Jiangsu officials seemingly bowed and said there would be no policy change. The protesters seemed victorious, but it later came out that the provincial (Jiangsu) officials had never been on board with the nation-wide policy change—making it seem as if those who were protesting actually had a say in changing the matter.[10]

III Wukan 'Democracy' Protests

Protests in the small Guangdong village of Wukan made international headlines in 2011, when the townspeople overthrew their corrupt leader and subsequently democratically elected thirteen town representatives for Wukan village. They also forced the entire local government, Communist Party leadership and police force out of the village.[11] Outsiders observing this suggested this may be the kindling to light the flame of democracy in China.[12]

This period lasted for two years, however, the town has largely returned to undemocratic appointment of cadres and local officials. Social media mentions of the protests have been scrubbed clean, the ring-leader of the 2011 protests was sentenced to jail for bribery and abuse of power in his capacity as the new village chief, and Wukan residents were never reimbursed for the land or money that had been stolen from them—the initial trigger for their protest.[13]

While it is true that small village governments in China are often allowed to operate a 'quasi-democratic' ballot system, these candidates are usually pre-screened and come from vested interest backgrounds.[14] This potentially explains why the government tolerated this 'democracy experiment' for so long—it already existed in similar forms. Alternatively, unlike in these officially sanctioned 'democratic' villages, 'democratic Wukan' did not receive support from party officials at the town, state or national levels, meaning their ability to effect real change, and thus pose a real threat was minimal.

Ultimately, however, the Wukan villagers had selected an unacceptable issue. In a one-party

state, they were protesting to allow a direct election of their village leaders by democratic ballot. While reports indicated that the protesters were still supporters of the CPC, the aim of the protests impliedly indicated a challenge to the central government's legitimacy through changing its political system.[15] This too, was wholly unacceptable, and it is no wonder that this expression of dissent in Wukan did not succeed for long.

IV Subway Harassment Posters by F Feminist

Guangzhou feminist group F Feminist, one of the country's largest private feminist groups, planned on financing an advertisement on a Guangzhou subway line in 2016. The group fundraised and approached an advertisement agency to help create an anti-harassment poster that would be accepted for publication by the Guangzhou Administration for Industry and Commerce. The poster originally began as a woman grabbing a perpetrator's hand and telling him 'temptation is no excuse, stop the wandering hands!.' This has since been revised down four times, and now features anthropomorphic animals, which scarcely indicate the anti-harassment message or the target audience. It has been a year, and the group fears that even this poster will not pass the censors.[16]

At the provincial level, government administrators rarely break with the precedent established at the national level. In March 2015, five prominent feminist activists, known as the 'Feminist Five' were formally detained due to a range of actions that 'provoked trouble' such as instigating a sexual harassment campaign on public transport, a physical march against domestic violence and a public information campaign about the inadequacy of women's public toilets.[17] Similarly, in February this year, the country's most widely followed feminist Weibo account, Feminist Voice, had their account shut down and posts censored when they called for a march against Donald Trump in solidarity with the marches being held around the world for International Women's Day.[18] So, in light of F Feminist's issue selection, government precedent had already established that this was not an acceptable issue.

Furthermore, a non-government group informing commuters about a social issue is seen as undermining the legitimacy of the government. An advertisement being accepted by the local government is literally state-endorsed, as opposed to tolerated. In an ideal society run under 'Socialism with Chinese Characteristics', there would be no need for non-governmental groups to fill an information gap that the government fails to provide for, as theoretically, this would not exist. Without any advertisements alluding to the contrary, the Guangzhou government can deny that sexual harassment occurs in its city and avoid its own authority being undermined.

V Conclusion

There is no conclusive, reliable data on how many protests in China succeed. However, by looking at whether a protest is based on an issue 'acceptable' to the Chinese government and whether it advocates for policy aims also acceptable to the government, a protests' success or failure can be analysed. Protests over a university entrance policy change in Jiangsu largely succeeded because the issue was highly acceptable to the central government, and the proposed policy already lacked across the board support. In contrast, efforts by a Guangzhou feminist group to instigate a sexual harassment public information campaign on the subway failed due to their policy aims being contentious, and undermining the government too much. In the middle, Wukan democracy protests were tolerated for many years, as they were in line with township and village democracy experiments and the local government had very little power. ⬣

12

ARE BORDERS SET IN CLAY OR STONE? UNDERSTANDING OUR RELUCTANCE TO DISRUPT THE TERRITORIAL STATUS QUO

RHYS CARVOSSO

I Introduction

In 1892, Austrian jurist Georg Jellinek offered his theory of the 'normative power of the factual.'[1] Jellinek theorised that humans tend to leap from observing an existing state of affairs to presuming that such a state is 'normal.' He suggested that when disruptions occur, we adapt to those changed circumstances, and assign them the same normative quality as we had done before.

The approach of international law (IL) to State borders is a pertinent example of this tendency. During the twentieth century, the borders of the world's remaining multi-ethnic empires dissolved, and each new status quo, though dramatic and unexpected at the time, eventually came to be seen as 'normal.' The legal mechanism of the 'right to self-determination'—the right of 'all peoples to freely determine their political status'[2]—was instrumental in that twentieth century dissolution process, as it was exercised as a right of colonies to secession, albeit one limited by the principle of *uti possedetis juris*—that is, respect for existing frontiers.

At present, the world has settled on the 'nation-state' as its predominant unit of political organisation. Our gradual arrival at this system has coincided with a reduction in the number and intensity of inter-state conflicts. However, there have been two new consequences of its arrival: firstly, an impetus to regularise and maintain State borders, and secondly, the formal recognition of ethnic and religious minorities as holding certain rights within the nation-state rather than separate from it.

Many States cater to the interests of minorities so well as to obviate the need to vary the territorial status quo. However, for those minorities, including Kurds and Palestinians, whose mistreatment by their respective States has led them to seek secession as the appropriate expression of their right to self-determination, the two corollaries do clash. And it appears that a minority's right to external self-determination through independence as a sovereign State has been extinguished at worst,[3] and limited to *ultima ratio* 'remedial' secession at best.[4] Amidst this legal uncertainty, States have been free to quell minority claims to self-determination on their own unlawful terms, including by use of chemical weapons and unlawful settlement activity.[5]

It is clear that IL does not recognise the right of a minority to external self-determination. It is comparatively unclear, however, why this is the case. There are many plausible arguments why the disruption of the territorial status quo in favour of a prospective 'Kurdistan' or 'Palestine' would be ruinous. But those arguments ought to be canvassed, and weighed up against the civil conflicts between State and

secessionist movement occurring at present. After all, these arguments seem to accept such conflicts as an inevitable by-product of the ethical necessity which the territorial status quo represents.

This article will use the right to self-determination for minorities as a case study for the tentative resolution of the following question: to what extent can we ascribe the reasons given for the international community's reluctance to disrupt the territorial status quo to the 'normative power of the factual,' rather than to reasoned empirical assessment of the circumstances of each particular claim?

II The Current Legal Framework

The Badinter Commission made it clear that minority self-determination is subject to the principle of *uti possedetis juris*: that is, the exercise of that right 'must not involve changes to existing frontiers, except where the concerned States agree otherwise.'[6] Therefore, it appears that the *formal* right to self-determination entails only a right to internal measures of self-rule within an existing State, such as autonomous control over federated regions, or proportionate representation in State legislative organs.

Whilst there exists no definitive statement that a minority has a right to secede other than with the consent of the concerned State, two judicial decisions imply that a minority's secession might have some *de facto* effect, if not *de jure* basis, in IL. First, in advising that Kosovo's unilateral declaration of independence was not unlawful under IL, the International Court of Justice (ICJ) implied that such a declaration could lead to independence if the State was subsequently recognised as such by enough States.[7] The Supreme Court of Canada went further, suggesting that a minority has a right to remedial secession where it has been subjected to 'oppression and exploitation,' or has been 'denied any meaningful access to pursue their political, cultural, social and economic development.'[8] However, it did not prescribe the means to realise such a right other than by consent.

III Consequences of This Legal Framework

In practice, minorities require the consent of their State to exercise the right to self-determination, either internally or externally. Consent is attainable: the secession of South Sudan is evidence that consent can lead to formal changes to international borders.[9]

However, it is a facile observation that consent is, in some cases, an illusory proposition: some States do not abide by IL in the treatment of their minorities in the regular course of governance, and are even less prepared to entertain discussions of that minority's internal or external self-determination. Kurds in Iraq were subjected to hostile campaigns of neglect, sanctions and then extirpation during the tenure of Saddam Hussein—including the use of chemical weapons in Halabjah in 1988—before they obtained the consent of the Iraqi State to govern themselves. The Rohingya in Myanmar, Palestinians in the West Bank and Gaza, Tibetans and Uighurs in China, and the Tamils in Sri Lanka are among those minorities to have been institutionally mistreated, but at the same time to have had their claims to self-determination rejected by their States, often as a matter of ideological principle under the guise of 'territorial integrity.'

There are three problems here. Firstly, in such cases, IL does not provide any criteria, fixed or tentative, according to which the international community will know when, how and to what end it will intervene to prevent the oppression of a self-determination unit. Secondly, when the international community has intervened to ensure the independence of an oppressed minority unit—such as in Bangladesh and Kosovo—the intervention came long after the commencement of inter-ethnic conflict, and that independence has been legally uncertain. Kosovo's status as a sovereign State remains in limbo even after a full intervention and a protracted peace process, and the ICJ was careful to deny it precedential effect.[10]

Thirdly, IL has been prepared to declare State mistreatment of minorities as unlawful, but has refused to clearly delimit the point of mistreatment at which internal self-determination becomes impracticable, and secession becomes the required last resort, in spite of *uti possedetis*. This point does exist, because firstly, it was reached in Kosovo and Bangladesh, and secondly, borders are a legal fiction, not an immutable part of nature, and they have always changed to reflect political moods and necessities. But at the moment, minorities have their mistreatment impugned, but never their underlying claims validated; their States have scope to oppress them to obscene extents before the international community will consider a need to intervene; and the rare interventions which have led to independence were followed by hasty assurances that secession in that case was irregular, and has not set a precedent.

IV Arguments For This Legal Framework

The current regime for the right to self-determination reflects a supreme deference to the territorial status quo. This reflects the perception of the nation-state as the most stable unit of political organisation—not too large as to risk fracture, not too small as to problematise international cooperation. However, the consequence of our fixation with maintaining this system is the continuation of sectarian conflicts of indeterminate length between certain States and their minorities: in Kurdistan, Palestine and West Papua, for example.

These conflicts undermine international peace and

security, which is the foundational principle of the United Nations.[11] IL appears to have contemplated and accepted this fact, given that its organs have eschewed opportunities to clarify the area of law or actively prescribe rules that might abbreviate these conflicts.[12] Rather, an aversion to redrawing borders remains a deliberate and core part of IL. The question arises, then: why is the international community so reluctant to disrupt borders?

Consider again Jellinek's 'normative power of the factual.' Is this reluctance a leap from an observation of the territorial status quo to the normative ethical position that territorial status quo should be preserved? Does the current framework exist because it is ethical, or is it perceived as ethical because it exists?

If the former were true, then the arguments for the maintenance of the territorial status quo should reveal a reasoned value judgment, which compared the alternatives of secession and the status quo by reference to their respective effects on international peace, and concluded that the status quo was more productive. If, however, that conclusion is not borne out on the facts—if international peace would be better served by secession—then arguments which supported the status quo in spite of this fact would be no more than reflections of Jellinek's normative power of the factual.

There are three sets of arguments which support IL's timid approach to the question of minority self-determination.

A The 'Foundational Nature of Sovereignty' Arguments

The first set of arguments is founded on the notion that to supplant *uti possedetis* without the consent of the relevant State would be to undermine the sovereignty and territorial integrity of that State, which are constitutive principles of IL.[13]

This line of argument is tendentious, and speaks to deeper ideological beliefs about how active a role IL should have in regulating the conduct of a State vis-à-vis its own people. For States which do not have irrational prejudices against minorities and are willing to grant them autonomy, sovereignty is not being threatened. However, for States that mistreat their minorities and deny their right to internal self-determination, the debate is vexed. Some would argue that for an international legal organ to even venture the opinion that Myanmar ought to cede a portion of Rakhine State to the Rohingya would be to overstep its mark, and undermine Myanmar's sole competence over its domestic affairs.

Others would argue that sovereignty and territorial integrity are not the ends of IL, but means to maintain international peace, contingent on their effectiveness at securing that objective.[14] To the extent that the preservation of these norms exacerbates the conflict between State and minority, there should be scope to derogate from them.

Ultimately, I agree with the latter: to argue for the unconditional power of 'sovereignty' and 'territorial integrity' is to succumb to the normative power of the factual, for two reasons. Firstly, to indulge the chauvinistic and oppressive inclinations of States like Myanmar, Turkey and Iraq under Saddam Hussein, by accepting their argument that 'sovereignty' precludes the right of their oppressed minorities to secede, is not consistent with international peace. Turkish Kurdistan in the 1980s and Rakhine State now could hardly be *less* peaceful and stable if they were independent. To insist on the supremacy of 'sovereignty' at the expense of Kurdish and Rohingya lives is to privilege the fact of statehood over the merits for statehood, a formalistic approach that diminishes the prosperity of all peoples.

Secondly, it is clear that most States do not even regard sovereignty and territorial integrity as unconditional; they uphold them when convenient and undermine them when disadvantageous to their interests. Russia did this when it prioritised Serbia's territorial integrity over Kosovo's right to external self-determination, then reversed that position when it came to Crimea less than a decade later.[15] Therefore, if these concepts are conditional, IL should be responsible for stating the conditions for lawful derogation from them. As long as it fails to do so, rogue States will take advantage of that ambiguity for nefarious purposes. As such, the idea that territorial integrity should be maintained for its own sake represents a baseless leap from empirical to normative, contrary both to State practice and to the purposes of IL.

B 'Opening The Floodgate' Arguments

This set of arguments tends to run as follows: that any positive indication in IL that borders were susceptible to revision would firstly, invite a flood of frivolous claims to secession from non-oppressed minorities, secondly precipitate a wave of inter-ethnic bloodshed, and thirdly result in the political segregation of 'nations,' precipitating a more virulent vein of nationalism.[16]

The first argument evinces a bias to the status quo for the following reason. First, all minorities have the right to internal self-determination, as explained above. All minorities also have an obvious interest in asserting that right peacefully, and within the existing structure of their State. In fact, many of them do exactly that. Therefore, it would not awaken dormant minorities which had never made a claim before, because firstly, one would assume that all genuine minorities have already voiced their claims, secondly, frivolous claims would be exposed as non-genuine and treated accordingly.

As for the other two arguments, the likelihood of such inter-ethnic bloodshed or segregation depends on how drastic a change to the legal

regime there would be. If the ICJ had decreed in the Kosovo Opinion that all minorities have the right to secede whether or not their right to internal self-determination can be achieved, then it would have 'opened the floodgates,' and there probably would have been additional, unforeseen conflicts. But if it had designed a set of formal and measured criteria for secession, which applied to a small number of existing and oppressed minorities, then it would be clarifying the respective legal positions of parties to an ongoing conflict, and would be consistent with international peace. As such, these are arguments against an international legal position which is excessively liberal, and not an argument against an international legal position in general.

This set of arguments evokes fears of the worst possible situation—a reversion to anarchic times without adequate regulation. However, there are intermediate stages between complete stasis and the revolutionary upheaval of all world borders. Arguing for the former in fear of the latter demonstrates a baseless bias for the status quo.

C Practical Arguments

There are a number of defensible practical arguments for the preservation of existing borders, and for internal over external self-determination, in particular instances. Without enumerating them in detail,[17] one such argument is that secession would not solve underlying ethnic or religious differences in Palestine or south-east Turkey.[18] However, this does not mean that IL should abstain from engaging with these arguments. Rather, it should fashion them into considerations when adjudicating a claim for secession, which are then weighed against the benefits of secession to international peace, the affected State and the affected minority.

V A Suggested Model

There are a range of defensible arguments against disrupting the territorial status quo in particular cases. There is also a general risk that if IL were to express rules to govern the rights of minorities to secede, they might be too broad, and might lead to new violent secessionist movements and the collapse of ethnic pluralism. But there is no reason that 'sovereignty' and 'territorial integrity' should be treated as the unconditional ends of IL.

In light of these conclusions, an international organ should assume responsibility for governing the right to self-determination—as it did during the era of decolonisation. Therefore, the course of action which would best reflect the role of IL in maintaining international peace and maximising human prosperity is for there to be some proactive mechanism for the adjudication of self-determination disputes between State and minority.

To this end, a Self-Determination Claims Tribunal should be convened—either as an ad hoc judicial body, or as a reconstitution of the ICJ—to conduct full inquiries into minority claims to self-determination. The UN General Assembly could engage its jurisdiction by passing a Resolution which requested an opinion on how a minority's right to self-determination would best be expressed.[19]

Such a Tribunal might have three stages. First, there would be a preliminary assessment as to whether all domestic avenues of diplomacy and negotiation have been exhausted. This would appease proponents of the 'foundational nature of sovereignty' argument, but would acknowledge that where a State has persistently disabled a minority from exercising their right to self-determination, then IL should be capable of considering the substantive merits of their claim.

Second, the Tribunal would consider whether the minority constitutes a 'self-determination unit,' having regard to factors such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people, common suffering, and geographical distinctiveness.[20]

Third, for claims which met the threshold tests above, the Tribunal would assess how their right to self-determination can most effectively be realised, having sole regard to the furtherance of international peace and to maximising the prosperity of all peoples concerned. The Tribunal would consider, *inter alia*, the nature, gravity and length of past and future civil conflict; the willingness of the State to negotiate; the minority's use of terrorist tactics; and the above practical arguments against secession insofar as they are relevant to that particular claim. There would be a strong presumption in favour of *uti possedetis* and internal self-determination, but that could be displaced by convincing evidence that a minority group has been so mistreated that its secession would be more consistent with international peace. Changing borders would remain a last resort, but IL would at least be addressing the dispute in a proactive and impartial manner, instead of enabling States to use the current legal uncertainty to their advantage. This departs from the Kosovo precedent, towards a set of formal *de jure* preconditions and processes for external self-determination.

To this end, it would issue non-binding recommendations as to the specific processes which the State must set into motion to realise that minority's right to self-determination, internal or external.

This Tribunal would solve the two main problems with the current framework. First, no longer would the international community be stepping in too late, after a State has oppressed a minority to a grievous extent. Instead, the Tribunal could issue proactive recommendations to mitigate future conflict rather than halt a full-blown

civil war. Second, it would solve the problem of the framework being ambiguous. Instead, it would clarify the application of the right to self-determination to the particular claim, and make concrete, specific and impartial recommendations, by which the State could be monitored for compliance. International actors could then make an informed and defensible decision as to whether and how to aid the realisation of the claim, on the basis of the Tribunal's actionable recommendations.

Importantly, the Tribunal would not require the consent of the concerned State(s), unlike most international judicial bodies when resolving disputes between States.[21] The distinction here is that the dispute is not between two States, each with sovereign equality under IL; it is between a State, with all the competences and advantages of statehood, and a minority, which may have a well-founded claim to statehood, but must seek that within the existing State apparatus, without the benefits of international legal personality in furthering their claim. Where that State has proved an unwillingness to honour the claim or negotiate reasonable terms—and therefore, has rendered consent illusory—it follows that IL should not regard that State's consent as a precondition to adjudicating that dispute.

VI Borders: Clay Not Stone

Stable borders are crucial: they promote legal certainty, and allow for the effective exercise of sovereign authority. However, they are not immutable or eternal; just fifty years ago, the world's borders were unrecognisably different. Even now, certain borders, which trap oppressed minorities under the control of an unobliging State, appear so inconsistent with international peace and human prosperity as to merit revision. To insist on the preservation of the territorial status quo for its own sake, rather than to the extent that it guarantees these more fundamental objectives, is to undermine peace and stability and to succumb to the 'normative power of the factual.' As such, borders are not set in stone, but modelled in clay. Where States are unwilling to meet their legal obligations to their minorities, then IL ought to be proactive in dictating when and how that clay should be remodeled.

1. The False Binary Between The Online and Offline

[1] Charissa Sun, 'Technology-facilitated stalking and abuse: putting our legal framework to the test' (June 2015) 12 *Law Society of NSW Journal 78*.
[2] Nicola Henry and Anastasia Powell, 'Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research' (2016) 1 Trauma, Violence & Abuse 1, 6.
[3] Sun, above n 1.
[4] Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) *Social and Legal Studies* 397, 410.
[5] Council of Australian Governments, COAG Advisory Panel on Reducing Violence against Women and their Children: Final Report (2016), 4. <http://www.coag.gov.au/sites/default/files/communique/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>.
[6] Malcolm Turnbull, 'Address to The COAG 2016 National Summit: Reducing Violence Against Women and their Children' (Speech delivered at the COAG 2016 National Summit, Brisbane, 28 October 2016).
[7] NSW Domestic Violence Review Team, 'Annual Report 2013-2015' <http://www.coroners.justice.nsw.gov.au/Documents/DVDRT_2015_Final_30102015.pdf>.
[8] Commonwealth of Australia, Department of the Prime Minister and Cabinet, *COAG Advisory Panel onReducing Violence against Women and their Children – Final Report* (2016) <http://www.coag.gov.au/sites/default/files/communique/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>; Delanie Woodlock,'Recharge: Women's Technology Safety, Legal Resources, Research & Training' (National study findings No 1, Women's Legal Service NSW, Domestic Violence Resource Centre Victoria and WESNET, 2015) 1, 598.
[9] Delanie Woodlock,'Recharge: Women's Technology Safety, Legal Resources, Research & Training' (National study findings No 1, Women's Legal Service NSW, Domestic Violence Resource Centre Victoria and WESNET, 2015) 1, 11-12.
[10] Delanie Woodlock, above n 8, 595.
[11] Ibid, 596.
[12] *DPP (NSW) v Vallelonga* [2014] 13 NSWLC 26.
[13] Henry and Powell, above n 4, 398.
[14] *Surveillance Devices Act 2007* (NSW) ss 8, 10.
[15] *Crimes Act 1900 (NSW)* ss 91J, 91K, 91L, 91M, 578C.
[16] Department of Justice, Submission No 29 to Legislative Council Law and Justice Standing Committee, *Inquiry into remedies for the serious invasion of privacy*, 25 September 2015, 5.
[17] Ibid, 7.
[18] NSW Justice, New laws make intimate images abuse a crime (21 May 2017) NSW Justice <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/new-laws-make-intimate-image-abuse-a-crime.aspx>.
[19] Ibid.
[20] *Criminal Code 1995* (Cth) ss 474.15, 474.17
[21] *Enhancing Online Safety for Children Amendment Act 2017* (Cth) ss 3-4.
[22] *Enhancing Online Safety for Children Amendment Act 2017* (Cth)
[23] Sun, above n 1, 2.
[24] Redfern Legal Centre, *Online abuse pervasive, yet hard to prosecute* <https://rlc.org.au/article/online-abuse-pervasive-yet-hard-prosecute>.
[25] Commonwealth of Australia, Department of the Prime Minister and Cabinet, *COAG Advisory Panel on Reducing Violence against Women and their Children – Final Report* (2016) 91 <http://www.coag.gov.au/sites/default/files/communique/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>.
[26] Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 23.
[27] Felicity Nelson, *Lawyers shouldn't 'assume' judges know how social media works* (2 September 2015) Lawyers Weekly <https://www.lawyersweekly.com.au/news/17076-don-t-assume-judges-know-how-social-media-works>.
[28] Council of Australian Governments, COAG Advisory Panel on Reducing Violence against Women and their Children: Final Report (2016), 48 <http://www.coag.gov.au/sites/default/files/communique/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>.
[29] Ibid.
[30] Commonwealth of Australia, Department of the Prime Minister and Cabinet, above n 25.
[31] Council of Australian Governments, above n 28.
[32] Ibid.
[33] Ari Ezra Waldman, 'Durkheim's Internet: Social and Political Theory in Online Society' (2013) 7 *New York University Journal of Law & Liberty* 345, 386.
[34] Mary Chayko (July 2014) 'Techno-social Life: The Internet, Digital Technology, and Social Connectedness'. *Sociology Compass:* 8(7) 976.
[35] Ibid.
[36] Nathan Jurgenson, 'Digital Dualism Versus Augmented Reality' (2011) <https://thesocietypages.org/cyborgology/2011/02/24/digital-dualism-versus-augmented-reality>
[37] Waldman, above n 33, 344.
[38] Sherry Turkle, *Introduction: Identity in the Age of the Internet. In Life on the Screen: Identity in the Age of the Internet* (Touchstone, 1st ed, 1995) 13-14, 346.
[39] Lee Farquhar, 'Performing and interpreting identity through Facebook imagery' (2012) 19(4) *Convergence: The International Journal of Research into New Media Technologies* 305.
[40] Theresa M. Senft, 'Microcelebrity and the Branded Self' in John Hartley, Jean Burgess and Axel Bruns (eds), A *Companion to New Media Dynamics* (Blackwell Publishing, 2013) 1, 346.
[41] Farquhar, above n 39, 305.
[42] Ibid, 979.
[43] Evan Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12 *Journal of Police Crisis Negotiations* 199, 201.

References.

[44] Henry and Powell, above n 4, 409.
[45] Laura R. Seff, Richard L. Beaulaurier and Frederick L. Newman, 'Nonphysical Abuse: Findings in Domestic Violence Against Older Women Study' (2008) 8(3) *Journal of emotional abuse* 355.
[46] Ibid, 355.
[47] Ibid, 369.
[48] Helen Gavin, 'Sticks and Stones May Break My Bones: The Effects of Emotional Abuse' (2011) 20(5) *Journal of Aggression, Maltreatment & Trauma* 503, 525.
[49] Woodlock, above n 9, 592.
[50] Waldman, n 33, 415.
[51] Ibid, 415.
[52] Council of Australian Governments, above n 28
[53] *Baker v Campbell* (1983) 153 CLR 52 at 118 per Deane J.
[54] Vivienne Elizabeth, 'From domestic violence to coercive control: Towards the recognition of oppressive intimacy in the family court' (2015) 30(2) *New Zealand Sociology* 26, 38.

2. Maintaining Momentum

[1] Referendum Council, Parliament of Australia, *Final Report of the Referendum Council* (2017).
[2] Michelle Grattan, 'Uluru Call for Constitutional First Nations Voice Presents New Challenge for Referendum Council', The Conversation (online), 28 May 2017 <https://theconversation.com/uluru-call-for-constitutional-first-nations-voice-presents-new-challenge-for-referendum-council-78458>.
[3] Locations and conveners: Hobart (Tasmanian Aboriginal Corporation), Broome (Kimberley Land Council), Dubbo (New South Wales Aboriginal Land Council), Darwin (Northern Land Council), Perth (South West Aboriginal Land and Sea Council), Sydney (New South Wales Aboriginal Land Council), Melbourne (Federation of Victorian Traditional Owners Corporation), Cairns (North Queensland Land Council), Ross River (Central Land Council), Adelaide (Aboriginal Legal Rights Movements), Brisbane and Thursday Island (Torres Shire Council and a number of Torres Strait regional organisations).
[4] Referendum Council, above n 1, iv.
[5] Referendum Council, above n 1, 2.
[6] Ibid.
[7] Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91 Australian Law Journal 350, 352.
[8] Referendum Council, above n 1, 14.
[9] Ibid, 15.
[10] Ibid, 14.
[11] Ibid, 30.
[12] Fergus Hunger, 'The Explainer: All the Questions You Were Too Afraid to Ask about Indigenous Recognition' The Border Mail (online) 1 June 2017 < http://www.bordermail.com.au/story/4699991/explainer-all-the-questions-you-were-too-afraid-to-ask-about-indigenous-recognition/?cs=7>.
[13] Hunger, above n 12.
[14] Referendum Council, above n 1, 30.
[15] Ibid.
[16] Morris and Pearson, above n 7, 357.
[17] Ibid.
[18] Jeremy Beckett, 'Introduction: ATSIC and After' (2004) 15(3) *Australian Journal of Anthropology* 304.
[19] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a Sustainable National Indigenous Representative Body – Issues for Consideration* (2018) 19.
[20] Angela Pratt, 'Make or Break? A Background to the ATSIC Changes and th ATSIC Review' (Current Issues Brief No. 29), Parliamentary Library, Social Policy Group, 2003).
[21] Debra Jopson, 'Pearson Calls for Reform of ATSIC', The Sydney Morning Herald (online), 11 November 2002.
[22] Beckett, above n 18, 303.
[23] Pratt, above n 20.
[24] Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 19, 20.
[25] Cape York Institute, Submission 38 Supplementary Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, January 2015, 22.
[26] Referendum Council, above n 1, 14.
[27] Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Politics' in Marcia Langton, Lisa Palmer, Maureen Tehan and Kathryn Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 34, 35.
[28] Ibid.
[29] 'What will Indigenous Treaties Mean?', ABC (Sydney), 14 December 2016 < http://www.abc.net.au/news/2016-12-14/creation-of-indigenous-treaties-being-led-by-states/8119488>.
[30] Noel Cox, 'The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand' (2002) 28(1) *Brooklyn Journal of International Law* 125.
[31] John Borrows, 'Ground-Rules: Indigenous Treaties in Canada and New Zealand' (2006) 22 *New Zealand Universities Law Review Journal* 188.
[32] Bishop Manu Bennett, cited in Human Rights Commission (2003), Human Rights and the Treaty of Waitangi: te mana i Waitangi (Auckland: Human Rights Commission).
[33] Cox, above n 30, 125.
[34] Cape York Institute, Submission 38 to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, August 2014, 6.
[35] Cox, above n 30, 125.
[36] New Zealand Human Rights Commission, 'Human Rights in New Zealand' (2010), 39.

[37] Cape York Institute, above n 34, 7.
[38] New Zealand Human Rights Commission, above n 36, 39.
[39] Cape York Institute, above n 34, 9.
[40] Ibid, 5.
[41] Borrows, above n 31, 211.
[42] Kevin Rudd, 'Apology to Australia's Indigenous Peoples' (Speech delivered at the Parliament of Australia, House of Representatives), Canberra, 13 February 2008.
[43] Anna Clark, 'Australia's History Wars Fought Inside Ourselves', The Sydney Morning Herald (online), 5 February 2016 <http://www.smh.com.au/comment/australias-history-wars-fought-inside-ourselves-20160203-gmkmg2.html>.

3. Supporting a Fair Go

[1] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Dover Publications, 2012) 179.
[2] See, eg, Elizabeth Kolbert, 'Why Work?', *New Yorker* (online), 29 November 2004 <http://www.newyorker.com/magazine/2004/11/29/why-work>.
[3] See generally Zoe Williams, 'We Don't Live to Work, We Work to Live. Why Don't We Say So?', *The Guardian* (online) 9 June 2015 <https://www.theguardian.com/commentisfree/2015/jun/09/we-dont-live-to-work-we-work-to-live-why-dont-we-say-so#img-1>.
[4] See Zoltan Acs, 'How is Entrepreneurship Good for Economic Growth?' (2006) 1(1) *Innovations* 97.
[5] See, eg, Jason Harris and Michael Murray, 'Reforming Bankruptcy Laws is the First Step - Next, Remove the Stigma', *The Conversation* (online), 13 January 2016 <http://theconversation.com/reforming-bankruptcy-laws-is-the-first-step-next-remove-the-stigma-52821>.
[6] Marco van Gelderen and Paul Jansen, 'Autonomy as a start-up motive' (2006) 13(1) *Journal of Small Business and Enterprise Development* 23.
[7] Ibid 30.
[8] See, eg, Tobias Weiblen and Henry W. Chesbrough, 'Engaging with Startups to Enhance Corporate Innovation' (2015) 57(2) *California Management Review* 66.
[9] Tim Kastelle, 'Hierarchy is Overrated', *Harvard Business Review* (online), 20 November 2013 <https://hbr.org/2013/11/hierarchy-is-overrated>.
[10] Heinz Hartmann, 'Managers and Entrepreneurs: A Useful Distinction' (1959) 3(4) *Administrative Science Quarterly* 429.
[11] See, eg., Nicolai J. Foss and Peter G. Klein, 'Why Managers Still Matter' (2014) 56(1) *MITSloan Management Review* 73.
[12] Weiblen and Chesbrough, above n 8.
[13] See, eg, Sander Wennekers and Roy Thurik, 'Linking Entrepreneurship and Economic Growth' (1999) 13(1) *Small Business Economics* 27; Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2013).
[14] Michael E. Porter, 'The Competitive Advantage of Nations' (1990) 68(2) *Harvard Business Review* 73.
[15] Richard Waters, 'Technology: Rise of the Replicants', Financial Times (online), 4 March 2014 <https://www.ft.com/content/dc895d54-a2bf-11e3-9685-00144feab7de>.
[16] See, eg, Claire Parfitt and Kirsty McCully, 'The State of the Class' (2016) 225 *Overland* 32.
[17] See, eg, Harry Glasbeek, 'Shielded by Law: Why Corporate Wrongs and Wrongdoers are Privileged' (2002) 6(1) *University of Western Sydney Law Review* 1.
[18] Chris Mason and Michael Moran, 'Will More Business-like Social Enterprises Improve Care?', *The Conversation* (online), 18 March 2014 <https://theconversation.com/will-more-business-like-social-enterprises-improve-care-23643>.
[19] Harry Glasbeek, 'Piercing on Steroids' (2014) 29 *Australian Journal of Corporate Law* 233, 267.
[20] Evan Schwarten, 'The Grim Reality of Start-ups: 95 per cent Fail', *The Sydney Morning Herald* (online), 20 March 2015 <http://www.smh.com.au/business/the-grim-reality-of-startups-95-per-cent-fail-20150320-1m3wtb.html>.
[21] Productivity Commission, *Business Set-up, Transfer and Closure*, Final Report No 75 (2015) 16.
[22] Ucbasaran et al, 'Life After Business Failure: The Process and Consequences of Business Failure for Entrepreneurs' (2013) 39(1) *Journal of Management* 163.
[23] Ibid.
[24] Smita Singh, Patricia Corner and Kathryn Pavlovich, 'Coping with Entrepreneurial Failure' (2007) 13(4) *Journal of Management & Organization* 331.
[25] Stanley G. Harris and Robert I. Sutton, 'Functions of Parting Ceremonies in Dying Organisations' (1986) 29(1) *The Academy of Management Journal* 5.
[26] Ucbasaran et al, above n 22, 177.
[27] Jason Cope, 'Entrepreneurial Learning from Failure: An Interpretative Phenomenological Analysis' (2011) 26(6) *Journal of Business Venturing* 604.
[28] Mark D. West, *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes* (University of Chicago Press, 2005) 217.
[29] Lois Stevenson and Anders Lundström, *Patterns and Trends in Entrepreneurship/SME Policy and Practice in Ten Economies* (Swedish Foundation for Small Business Research, 2001) 19.
[30] Michael Bailey, 'NSW Spends $35m on 11-floor Sydney CBD Startup Hub' *The Australian Financial Review* (online), 13 July 2017 <http://www.afr.com/leadership/entrepreneur/nsw-spends-35m-on-11floor-sydney-cbd-startup-hub-20170712-gx9lv3>.
[31] Siri Terjesen, Niels Bosma and Erik Stam, 'Advancing Public Policy for High-Growth, Female, and Social Entrepreneurs' (2016) 76(2) *Public Administration Review* 231.
[32] Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47(2) *Econometrica* 263.
[33] Paul Ali, Lucinda O'Brien and Ian Ramsay, ''Short a Few Quid': Bankruptcy Stigma in Contemporary Australia' (2015) 38(4) *University of New South Wales Law Journal* 1575.
[34] Ibid. See also Leon Zwier, 'Insolvency Laws Punish Honest Failures' *The Australian* (online), 8 May 2017 <http://www.theaustralian.com.au/business/opinion/insolvency-laws-punish-honest-failures/news-story/9435a8eb8c2ac30a59818 40323f83067>.
[35] Annette Sharp, 'Jail Looks Good to Me, Says Skase Runaway' *The Sun-Herald* (online), 20 October 2002 <http://www.smh.com.au/articles/2002/10/19/1034561354221.html>.
[36] Jason Harris and Michael Murray, 'Innovation Statement's Significant Insolvency Changes are Well Overdue' *The Conversation* (online), 8 December 2015 < https://theconversation.com/innovation-statements-significant-insolvency-changes-are-well-overdue-51908>.
[37] *Bankruptcy Act 1966* (Cth) pts IX, X.
[38] *Corporation Act 2001* (Cth) pts 5.1, 5.3A.
[39] Harris and Murray, above n 5.
[40] Australian Government, *National Innovation and Science Agenda Report* (2015) <https://www.innovation.gov.au/page/national-innovation-and-science-agenda-report>.
[41] *Bankruptcy Act 1966* (Cth) s 58.
[42] Ibid s 116.
[43] Ibid ss 77(1)(a)(ii), 272(1)(c).

[44] *Corporations Act 2001* (Cth) ss 206B(3), (4).
[45] *Bankruptcy Act 1966* (Cth) s 269.
[46] Harris and Murray, above n 36.
[47] Jason Harris, 'Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?' (2009) 23(3) *Australian Journal of Corporate Law* 266, 267.
[48] Ibid.
[49] *Corporations Act 2001* (Cth) s 588G.
[50] Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 (Cth) sch 1.
[51] King & Wood Mallesons, *Let's Optimise the Opportunity for Reform: KWM Responds to the Turnbull Government's Proposed Insolvency Laws* (2016) <http://www.kwm.com/~/media/SjBerwin/Files/Knowledge/Insights/au/2016/06/02/kwm-response-australian-government-insolvency-laws-bankruptcy-reform.ashx?la=en>.
[52] Harris and Murray, above n 36.
[53] Productivity Commission, above n 21.
[54] Malcolm Turnbull, 'Launch of the National Science and Innovation Agenda' (Speech delivered at the CSIRO, Canberra, 7 December 2015) < https://www.malcolmturnbull.com.au/media/launch-of-the-national-innovation-and-science-agenda1>.
[55] Harris and Murray, above n 5.
[56] Terjesen, Bosma and Stam, above n 31, 231.
[57] See, eg, Claire Martin, 'Wearing Your Failures on Your Sleeve' *The New York Times* (online), 8 November 2014 <https://www.nytimes.com/2014/11/09/business/wearing-your-failures-on-your-sleeve.html>.
[58] Rita Gunther McGrath, 'Falling Forward: Real Options Reasoning and Entrepreneurial Failure' (1999) 24(1) *Academy of Management Review* 13; F. A. Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *The American Economic Review* 519.
[59] Sim B. Sitkin, 'Learning Through Failure: The Strategy of Small Losses' (1992) 14 *Research in Organizational Behavior* 231.
[60] Dean A. Shepherd, 'Learning from Business Failure: Propositions of Grief Recovery for the Self-Employed' (2003) 28(2) *Academy of Management Review* 318.

4. Wrongful Convictions

[1] *Crimes (Appeal and Review) Act 2001* (NSW), ss 76-79.
[2] *Statutes Amendment (Appeals) Act 2013* (SA), s 353A.
[3] See Ken Crispin, *The Chamberlain Case*, (2012, Scribe Publications) for more information on Lindy Chamberlain's exoneration and *R v Keogh* [2014] SASCFC 20 for Henry Keogh's exoneration.
[4] *Mallard v R* (2005) 224 CLR 125, [89].
[5] Commissioner Elliott Johnston, QC, *Royal Commission into Aboriginal Deaths in Custody*, (1991), National Report Volume 1, Canberra.
[6] 'Marginalisation, Managerialism and Wrongful Conviction in Australia', *Current Issues in Criminal Justice*, (2016, 27:3), 304.
[7] See Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications', *Current Issues In Criminal Justice*, (2006, 20:2).
[8] *Gibson v The State of Western Australia* [2017] WASCA 141, [26].
[9] Ibid, [10]. See [76] where a neurophysiologist testified to Gibson's cognitive capacity.
[10] Ibid, [160]-[210].
[11] See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand', *Sydney Law Review*, (2012, 34), for more information regarding Battered Woman Syndrome.
[12] *The Queen v Robyn Kina* [1993] QCA 480, 16.
[13] Diana Eades, a sociolinguist expert, was called in Kina's case and reported Kina's reluctance to communicate, particularly about matters of a sexual nature was entirely consistent with Kina's Aboriginality, *The Queen v Robyn Kina* [1993] QCA 480, 34. See Diana Eades, 'Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications', *Current Issues In Criminal Justice*, (2006, 20:2) for more information regarding cross-cultural communication between Indigenous and non-Indigenous individuals.
[14] *The Queen v Robyn Kina* [1993] QCA 480, 21.
[15] Ibid, 23.
[16] Ibid, 53.
[17] Ibid.
[18] Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics December 2016* <http://www.bocsar.nsw.gov.au/Documents/CCS-Annual/New%20South%20Wales%20Criminal%20Courts%20Statistics%202016.xlsx>.
[19] David Hamer, 'Wrongful Convictions, Appeals, and the Commission', *UNSW Law Journal*, (2014), 37(1), 271.
[20] Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia*, (LexisNexis Butterworths, 2015), part II.
[21] *Judiciary Act 1903* (Cth), s 35A.
[22] Hamer above n 20, 280.
[23] *Crimes (Appeal and Review) Act 2001* (NSW), s 76.
[24] Ibid, s 77.
[25] Ibid.
[26] Hamer, above n 20, 287-288.
[27] *Crimes (Appeal and Review) Act 2001* (NSW), s 78.
[28] Ibid, s 79.
[29] Hamer, above n 20, 288; citing *GAR v The Queen [No 1]* [2010] NSWCCA 163, [16].
[30] *Crimes (Appeal and Review) Act 2001* (NSW), s 79.
[31] Hamer, above n 20, 290.
[32] Australian Human Rights Commission, Submission to Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, (2011) cited in Sangha above n 21, 169.
[33] *Statutes Amendment (Appeals) Act 2013* (SA), s353A. See Sue Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry', *Adelaide Law Review*, (2015), 36, for more discussion on this new legislation.
[34] See Hamer, above n 20, 295. See Sangha above n 21, 169.
[35] *R v Keogh* [2014] SASCFC 20.
[36] CCRC <https://ccrc.gov.uk/about-us/> .
[37] Innocence Project, 'About' <https://www.innocenceproject.org/about/> .
[38] Innocence Project, 'Policy Reform' <https://www.innocenceproject.org/policy/>
[39] Lynne Weathered, 'Reflections on the Role of Innocence Organisations in Australia', *Flinders Law Journal*, (2015), 17(2), 524.
[40] Sangha above n 21, 175, citing Hon A Bressington, SA *Hansard*, Legislative Council, 19 March 2013, 'Statutes Amendment (Appeals) Bill'.
[41] Sangha above n 21, 174.
[42] Hamer above n 20, 274.

5. Manslaughter by Suicide: *Carter* in NSW

[1] (Mass. Juv. Ct., No. 15YO0001NE, June 16, 2017).
[2] Ellie Hall and Tasneem Nashrulla, 'It Looks Like The Woman Accused of Urging Her Boyfriend To Kill Himself Stole A Quote From 'Glee', 10 June 2017, *Buzzfeed News Online*, <https://www.buzzfeed.com/ellievhall/michelle-carter-text-messages-glee?bftwnews&utm_term=.bawLbnMjE#.xaQjJ0vp8>.
[3] *Commonwealth v. Michelle Carter*, 474 Mass. 624, 625, 52 N.E.3d 1054 (2016).
[4] Ibid 626-9.
[5] Ibid.
[6] Ibid 629.
[7] Ibid.
[8] A recording of Judge Moniz's reasons, from *ABC Action News*, is available in Dan Glaun, 'Michelle Carter trial: Watch guilty verdict being read by Judge Lawrence Moniz', 16 June 2017, *MassLive.com*, <http://www.masslive.com/news/index.ssf/2017/06/verdict_reached_in_michelle_ca.html>.
[9] Carla Zavala, 'Manslaughter by Text: Is Encouraging Suicide Manslaughter?' (2017) *Law School Student Scholarship Paper* 891, 9 <http://scholarship.shu.edu/student_scholarship/891>.
[10] Ibid 10.
[11] Ibid.
[12] Mass Gen Laws Ann ch 265, § 13 (West 2015).
[13] Glaun, above n 8.
[14] *Crimes Act 1900* (NSW), s 31C.
[15] *Wilson v The Queen* (1992) 174 CLR 313.
[16] See, eg, *Burns v The Queen* (2012) 246 CLR 334 ('Burns').
[17] On their relationship, Ibid 340-1 [9] (French CJ).
[18] See, eg, *Burns* (2012) 246 CLR 334; *R v Kennedy* (No 2) [2008] 1 AC 269.
[19] *Commonwealth v. Michelle Carter*, 474 Mass. 624, 634-6, 52 N.E.3d 1054 (2016).
[20] See, eg, *Persampieri v Commonwealth*, 343 Mass. 19, 175 N.E.2d 387 (1961); *Commonwealth v Atencio*, 345 Mass. 627, 189 N.E.2d 223 (1963).
[21] This case is not one of victim fright or self-preservation, in which case one would merely ask whether the victim's acts were a 'reasonable' or 'natural consequence' of those of the accused. See *Royall v The Queen* (1991) 172 CLR 378; *McAuliffe v The Queen* (1995) 183 CLR 108.
[22] *Justins v Regina* [2010] NSWCCA 242 at [363]-[365] per Simpson J; [269] per Johnson J. Despite terminological differences, the discussion in *Burns* (2012) 246 CLR 334, 364 [86]-[87] is to the same effect.
[23] Cf *Burns* (2012) 246 CLR 334, 364 [86]-[87] per Gummow, Hayne, Crennan, Kiefel, and Bell JJ.
[24] [2008] 1 AC 269, 275 [14].
[25] (2012) 246 CLR 334, 362 [81].
[26] G Williams, 'Finis for Novus Actus?' (1989) 48(3) *Cambridge Law Journal* 391, 392.
[27] In cases of drug supply, see D Ormerod and R Fortson, 'Drug Suppliers as Manslaughterers (Again)' [2005] *Criminal Law Review* 819, fn. 54; for a more measured discussion, G Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: *R v Evans*' (2009) 6 *Criminal Law Review* 631.
[28] *Commonwealth v. Michelle Carter*, 474 Mass. 624, 630, 52 N.E.3d 1054 (2016).
[29] See *R v Taktak* (1988) 14 NSWLR 226, 240-1.
[30] See, eg, *R v Taktak* (1988) 14 NSWLR 226; *R v Stone & Dobinson* [1977] QB 354; *R v Nicholls* (1874) 13 Cox CC 75.
[31] [1983] 2 AC 161; see also *R v Evans (Gemma)* [2009] 1 WLR 1999; [2010] 1 All ER 13.
[32] *R v Taktak* (1988) 14 NSWLR 226, 246; *Burns* (2012) 246 CLR 334, 369-70 [107]-[108].
[33] Cf *R v Taktak* (1988) 14 NSWLR 226.
[34] It is merely a relevant factor. Cf *The Queen v Instan* [1893] 1 QB 450.
[35] *R v Evans (Gemma)* [2009] 1 WLR 1999, at [31].
[36] *Burns* (2012) 246 CLR 334, 369 [105] (Gummow, Hayne, Crennan, Kiefel, and Bell JJ); 354-5 [45]-[48] (French CJ).
[37] See, eg, Katharine Q Seelye and Jess Bidgood, 'Guilty Verdict for Young Woman Who Urged Friend to Kill Himself, 16 June 2017, *New York Times Online*, available at: <https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html?_r=0>.
[38] Matt Rocheleau, 'Appeal in Michelle Carter case may take years to resolve, experts say', 3 August 2017, *Boston Globe*, available at: <https://www.bostonglobe.com/metro/2017/08/03/appeal-michelle-carter-case-may-take-years-resolve-experts-say/GaXXZYfvCRSXpzJG9j5raI/story.html>.
[39] Katharine Seelye, 'Michelle Carter Gets 15-Month Jail Term in Texting Suicide Case', 3 August 2017, *New York Times Online*, available at: <https://www.nytimes.com/2017/08/03/us/texting-suicide-sentence.html>.
[40] Marco della Cava, 'Texting suicide verdict could set bad precedent, experts say', 17 June 2017, USA Today Online, available at <https://www.usatoday.com/story/news/nation/2017/06/17/texting-suicide-verdict-could-set-bad-precedent-legal-experts-say/102956784/>.
[41] Glaun, above n 8.
[42] Katharine Q Seelye and Jess Bidgood, above n 37; Marco della Cava, above n 40.
[43] American Civil Liberties Union of Massachusetts, 'ACLU of Massachusetts statement on Michelle Carter guilty verdict' (Media Release, 16 June 2017) <https://aclum.org/uncategorized/aclu-massachusetts-statement-michelle-carter-guilty-verdict/>.
[44] Marco della Cava, above n 40.

6. Law and Disorder

[1] Lisa Davies, 'First person jailed under new consorting laws', *Sydney Morning Herald* (online), 5 July 2012, <http://www.smh.com.au/nsw/first-person-jailed-under-new-consorting-laws-20120705-21iw6.html>.
[2] Ava Benny-Morrison, 'Rebels bikie club in "disarray" as members "patch out" at record rate, police say', *Sydney Morning Herald* (online), 10 January 2016, <http://www.smh.com.au/nsw/rebels-bikie-club-in-disarray-as-members-patch-out-at-record-rate-police-say-20160108-gm1py4.html>.
[3] Dylan Welch, Les Kennedy, and Ellie Harvey, 'Bikie killed in Sydney Airport Brawl', *Sydney Morning Herald* (online), March 23 2009, <http://www.smh.com.au/national/bikie-killed-in-sydney-airport-brawl-20090322-95xc.html>.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] See generally Senthoran Raj, 'Disturbing Disgust: Gesturing to the Abject in Queer Cases' in Angela, Dwyer, Mathew Ball, Thomas Crofts (eds.) *Queering Criminology* (Palgrave Macmillan UK, 2016) 83; Christopher Neff, 'Human Perceptions and Attitudes Towards Sharks: Examining the predator policy paradox' in Erika Techera & Natalie Klein (eds.) *Sharks: Conservation, Governance, and Management* (Taylor and Francis, 2014).

[8] See, eg, Dylan Welch, 'Religious divide drives bikie war', *The Sydney Morning Herald* (online), 16 February 2009, <http://www.smh.com.au/national/religious-divide-drives-bikie-war-20090215-887l.html?>; Dylan Welch, Rick Feneley, Bellinda Kontominas and Arjun Ramachandran, '"Come on boys, let's go" – battle cry that led to a brutal killing', *The Sydney Morning Herald* (online), 24 March 2009, <http://www.smh.com.au/national/come-on-boys-lets-go-battle-cry-that-led-to-a-brutal-killing-20090323-97gg.html>; ABC, 'Gang war fears rise as Angels farewell victim', *ABC News* (online), 27 March 2009, < http://www.abc.net.au/news/2009-03-27/gang-war-fears-rise-as-angels-farewell-victim/1633272>; Les Kennedy, 'The rise and rise of new gangs', *The Sydney Morning Herald* (online), 29 March 2009, < http://www.smh.com.au/national/the-rise-and-rise-of-new-gangs-20090328-9eri.html>; Nicole Cox, 'Police link 5kg methamphetamine haul to Comancheros bikies', *The Daily Telegraph*, 27 February 2010 < http://www.dailytelegraph.com.au/police-link-5kg-methamphetamine-haul-to-comancheros-bikies/news-story/350783d76eb7c43b60bf8285cc35c466>.

[9] Luke McNamara and Julia Quilter, 'The 'Bikie Effect' and Other Forms of Demonisation: The Origins and Effects of Hyper-Criminalisation' (2016) 34(2) *Law in Context*, 6.

[10] NSW, Parliamentary Debates, Legislative Assembly, 15 February 2012, 8318 (Michael Daley) quoted in Ibid 12.

[11] *Crimes Act 1900* s 93X(1).

[12] Ibid ss 93X(2)-(3).

[13] See especially Terry Goldsworthy, 'Criminalising conversations: Australia's damaging love affair with consorting laws', *The Conversation* (online) 8 February 2016, <https://theconversation.com/criminalising-conversations-australias-damaging-love-affair-with-consorting-laws-53633>; Natasha Robinson and Meredith Griffiths, 'Anti-consorting laws under scrutiny, with claims NSW Police targeting groups other than bikies', *ABC News* (online), 26 May 2016 <http://www.abc.net.au/news/2016-05-26/claims-anti-bikie-laws-used-in-nsw-to-target-other-groups/7449642>; Candice Sutton, 'Secret Report reveals anti-bikie laws are "useless" to control gangs and recommends law abolished', *News.com.au* (online), 15 March 2017 <http://www.news.com.au/national/courts-law/secret-report-reveals-antibikie-laws-are-useless-to-control-gangs-and-recommends-law-abolished/news-story/daeb98153e8eb21b240dfed4f81b4f41>; Tim Vines, 'Anti-consorting laws make rogues of us all', *The Sydney Morning Herald* (online), 22 February 2015, <http://www.smh.com.au/comment/anticonsorting-laws-make-rogues-of-us-all-20150219-13jnxs.html>; Michael Slezak, 'NSW anti-protest laws an attack on democracy, say legal experts', *The Guardian Australia* (online), 15 March 2016, <https://www.theguardian.com/australia-news/2016/mar/15/nsw-anti-protest-laws-attack-democracy-law-groups>; Naomi Hodgson, 'Mike Baird's anti-protest laws risk turning NSW into Bjelke-Petersen's Queensland', *The Sydney Morning Herald* (online), 15 March 2016, <http://www.smh.com.au/comment/mike-bairds-anti-protest-laws-risk-turning-nsw-into-bjelke-petersens-queensland-20160315-gnj4to.html>.

[14] New South Wales Ombudsman, 'Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force' (November, 2013) 2-3.

[15] Law Society of NSW, 'Calls to repeal consorting provisions: Act undermines freedoms', (2014) 52(4) *Law Society Journal* 6; The Law Society of NSW, Submission No. 16, *Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force*, 10 March 2014, cited in New South Wales Ombudsman, *The Consorting Law Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900*, (April, 2016) 134.

[16] Luke McNamara and Julia Quilter, above n 9, 5.

[17] New South Wales, *Parliamentary Debates*, Legislative Council, 8 March 2012, 65-68 (Michael Gallacher).

[18] Ibid 9.

[19] Ibid 12.

[20] *R v John O'Brien* (Unreported, Manly Local Court, Magistrate Brydon, 7 November 2012) cited in New South Wales Ombudsman, above n 14.

[21] Ibid.

[22] New South Wales, *Parliamentary Debates*, Legislative Council, 8 March 2012, 65-68 (Michael Gallacher).

[23] New South Wales Crime Commission, *Annual Report 2015-2016*, (2016) 18 <http://www.crimecommission.nsw.gov.au/files/Annual_Report_2015-2016.pdf>.

[24] *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* (2014) 254 CLR 508.

[25] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 13 November 1980) art 22.

[26] *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* (2014) 254 CLR 508, at [93] (Hayne J), [133] (Crennan, Kiefel, and Bell JJ).

[27] Michael Organ, 'New tactics see coal seam gas protests gain the upper hand', *The Conversation* (online), 28 May 2014, <https://theconversation.com/new-tactics-see-coal-seam-gas-protests-gain-the-upper-hand-26645>

[28] New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 March 2016, 46 (Anthony Roberts – Minister for Industry, Resources and Industry).

[29] Ibid.

[30] *Inclosed Lands Protection Act 1901* (NSW), as amended by *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) sch 1; *Crimes Act 1900* (NSW), as amended by *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) sch 2; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), as amended by *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) sch 3.

[31] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) div 7, as amended by *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) sch 3.

[32] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss200(3)-(4), as amended by I*nclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) sch 3.

[33] Ibid.

[34] *Inclosed Lands Protection Act 1901* (NSW) s4.

[35] *Inclosed Lands Protection Act 1901* (NSW) s4B(1), as amended by *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) sch 1.

[36] Ibid.

[37] *Crimes Act 1900 (NSW)* s 201.

[38] Ibid s 201(1).

[39] New South Wales Council of Civil Liberties, 'Anti-Protest Bill' Explained', *New South Wales Council of Civil Liberties* (online), 6 June 2016, <http://www.nswccl.org.au/_anti_protest_bill_explained>.

[40] Kathleen Gerguson, 'Court case dubbed as first test against NSW anti-protest laws', *ABC News* (online), 17 May 2017, <http://www.abc.net.au/news/2017-05-17/protestors-to-challenge-nsw-anti-protest-laws-in-court/8534528>.

[41] Ibid.

[42] Ibid.

[43] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[44] See generally *O'Flaherty v City of Sydney Council* (2013) 210 FCR 484, 491-492, [33] (Kazman J); *Levy v State of Victoria* (1997) 146 ALR 248, 251-252 (Brennan CJ).

[45] *Levy v State of Victoria* (1997) 146 ALR 248, 268 (Brennan CJ).

[46] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 13 November 1980) arts 21, 22; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 23 March 1976) art 8(1)(a).

[47] *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW), s201.

[48] Emily Howie, 'Anti-protest legislation and the chilling of free speech', (2016) 136 *Precedent* 27.

7. Vigilante Litigants

[1] Allyson Horn, 'Here's what we know about Adani and the Carmichael mine project', *ABC News* (online), 6 April 2017 <http://www.abc.net.au/news/2016-12-05/what-we-know-about-adani-and-the-carmihael-mine-project/8094244>; Adani Australia, 'Adani Project Gets Green Light' (Media Release, 6 June 2017) <http://www.adaniaustralia.com/>.

[2] Allyson Horn, above n 1.

[3] The Australia Institute, *Carmichael in Context: Quantifying Australia's threat to climate change* (November 2015) <http://www.tai.org.au/content/carmichael-vs-world>. See also Lenore Taylor, 'Coal from Carmichael Mine will create more annual emissions than New York', Guardian Australia (online), 12 November 2015 <https://www.theguardian.com/environment/2015/nov/12/coal-from-carmichael-mine-will-create-more-annual-emissions-than-new-york>.

[4] *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042 (29 August 2016) (Griffiths J) ('*ACF v Minister for the Environment*').

[5] Jo Jarvis, 'Coalition pledges to remove red, and green, tape', *ABC* (online), 8 July 2013 <http://www.abc.net.au/pm/content/2013/s3798398.htm>.

[6] Cristy Clark, 'The government vs the environment: lawfare in Australia', *The Conversation* (online), 18 August 2015 <https://theconversation.com/the-government-vs-the-environment-lawfare-in-australia-46205>.

[7] World Commission on Environment and Development, *Our Common Future – Brundtland Report* (Oxford University Press, 1987) 44,<http://www.un-documents.net/our-common-future.pdf>.

[8] *Rio Declaration on Environmental and Development*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev 1 ('Rio Declaration') <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

[9] Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 4.

[10] *Rio Declaration*, Principle 4. For instruments articulating similar views, see the 2002 *Plan of Implementation of the World Summit on Sustainable Development* (United Nations (2002), *Plan of Implementation of the World Summit on Sustainable Development*, A/CONF.199/L.1, 26 August – 4 Sept. 2002, <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>) and the 2012 *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability* (United Nations (2012b), 'The future we want', *Outcome document of the United Nations Conference on Sustainable Development*, Rio de Janeiro, 20-22 June, <www.un.org/ga/search/view_doc.asp?symbolA/RES/66/288&LangE>). In particular, the former was cited in *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at 266 as highlighting the need to 'promote the integration of', rather than competition between, 'the three components of sustainable development – economic development, social development and environmental protection – as *interdependent and mutually reinforcing pillars*.'

[11] *Rio Declaration*, Principle 15.

[12] *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC') <https://unfccc.int/resource/docs/convkp/conveng.pdf>

[13] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005) ('*Kyoto Protocol*') <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

[14] *Paris Agreement*, opened for signature 16 February 2016, UN MTDSG C.N.92.2016.TREATIES-XXVII.7.d (entered into force 4 November 2016) ('*Paris Agreement*') <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>.

[15] Above n 9, Alan Boyle and David Freestone, 16.

[16] Ibid, 14.

[17] Paris Agreement, Article 2(1)(a).

[18] Charlotte Streck, 'The Paris Agreement: A New Beginning' (2016) 13 *Journal for European Environmental and Planning Law* 1, 5.

[19] See, for example, Daniel Bodansky, 'The Legal Character of the Paris Agreement' (July 2016) 25 *Review of European, Comparative, and International Environmental Law* 2, 35; Raymond Clémençon, 'The two sides of the Paris Agreement: Dismal failure or historic breakthrough?' (2016) 25(1) *Journal of Environment and Development*, 3–24; Tharmalingam Jayaraman and Tejal Kanitkar, 'The Paris Agreement – Deepening the climate crisis' (2016) 51(3) KPW *Economic & Political Weekly*, 10–13.

[20] *Nulyarimma v Thompson* (1999) 96 FCR 153. Note also: The Commonwealth's capacity to make laws implementing treaty obligations is found under the 'external affairs' power in s 51(xxix) of the Australian Constitution, per *Commonwealth v Tasmania* (1983) 158 CLR 1 (*The Tasmanian Dams Case*); *Victoria v Commonwealth* (1996) 187 CLR 416 (*The Industrial Relations Act Case*).

[21] Commonwealth, *Parliamentary Debates*, Senate, 12 November 1998, 202 (Robert Hill, Minister for the Environment and Heritage).

[22] *EPBC Act 1992* (Cth), s 3(c).

[23] *EPBC Act 1992* (Cth), s 3(b). See also ss 3A and 528 for definitions of ecologically sustainable development and ecologically sustainable use respectively.

[24] *Tarkine National Coalition Inc v Minister for the Environment* [2015] FCAFC 89; 233 FCR 254 at [20], quoted in *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042 at [22].

[25] *EPBC Act*, ss 136(1)(b), 136(2)(a).

[26] *EPBC Act*, ss 136(4).

[27] See, eg, Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 *Environment and Planning Law Journal* 165, 177; Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 *Environment and Planning Law Journal* 288; Susan Tridgell, 'Evaluating the effectiveness of the Environment Protection and Biodiversity Conservation Act 1999 (Cth): 2008-2012' (2013) 30 *Environment and Planning Law Journal* 245.

[28] See generally Australian Law Reform Commission (ALRC), 'Standing in pubic interest litigation' [1985] ALRC Report No 27; *ALRC*, 'Beyond the Door Keeper – Standing to Sue for Public Remedies' [1996] ALRC Report No 78.
[29] Above n 28, ALRC, *Beyond the Door Keeper*.
[30] Ibid [2.33].
[31] Ibid [2.35].
[32] *EPBC Act*, s 487.
[33] Rachel Baird, 'Public interest litigation and the Environment Protection and Biodiversity Conservation Act' (2008) 25 *Environment and Planning Law Journal* 410, 410. See, e.g, *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (30 July 2004) (*The Nathan Dam Case*); *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (*The Wielangta Forest Case*); *Human Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 3 (15 January 2008) (*The Japanese Whaling Case*).
[34] *Mackay Conservation Group Inc v Minister for the Environment* [QUD118/2014]; *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042 (29 August 2016).
[35] Senator the Hon George Brandis QC, Attorney General for Australia, 'Government acts to protect jobs from vigilante litigants' (Media Release, 18 August 2015) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/18-August-2015-Government-acts-to-protect-jobs-from-vigilante-litigants.aspx>.
[36] *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (Cth) (*'Repeal Bill'*)
[37] Samantha Hepburn, 'Brandis' changes to environmental laws will defang the watchdogs', *The Conversation* (online) 19 August 2015 <http://theconversation.com/brandis-changes-to-environmental-laws-will-defang-the-watchdogs-46267>; Gareth Hutchens, 'Labor opposed to Turnbull's controversial 'green lawfare' changes', *Guardian Australia* (online), 26 October 2016 <https://www.theguardian.com/australia-news/2016/oct/26/labor-opposed-to-turnbulls-controversial-green-lawfare-changes>.
[38] Samantha Hepburn, 'Turnbull wants to change Australia's environment act – here's what we stand to lose', *The Conversation* (online), 31 October 2016 <http://theconversation.com/turnbull-wants-to-change-australias-environment-act-heres-what-we-stand-to-lose-67696>.
[39] Peter Hannam, 'Australian Conservation Foundation loses Federal Court case on Adani coal', *Sydney Morning Herald* (online), 29 August 2016 <http://www.smh.com.au/environment/climate-change/australian-conservation-foundation-loses-federal-court-case-on-adani-coal-20160828-gr3au2.html>.
[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015 (Greg Hunt, Minister for Environment and Energy).
[41] Attorney General George Brandis, 'Government acts to protect jobs from vigilante litigants' (Media Release, 18 August 2015) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/18-August-2015-Government-acts-to-protect-jobs-from-vigilante-litigants.aspx>.
[42] Ibid.
[43] EDOs of Australia, *Submission on EPBC Act Amendment (Standing) Bill 2015* (11 September 2015) Environmental Defender's Office NSW <https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2241/attachments/original/1442298845/150911_EPBC_Amendment_Standing_Bill_2015_-_EDOA_sub_FINAL.pdf?1442298845>.
[44] Gareth Hutchens, 'Labor opposed to Turnbull's controversial 'green lawfare' changes', *Guardian Australia* (online), 26 October 2016 <https://www.theguardian.com/australia-news/2016/oct/26/labor-opposed-to-turnbulls-controversial-green-lawfare-changes>.
[45] *ACF v Minister for the Environment* at [62] – [65].
[46] *ACF v Minister for the Environment* at [4].
[47] *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature on 16 November 1972, 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (entered in force 17 December 1975)('WHC') <http://www.austlii.edu.au/au/other/dfat/treaties/1975/47.html>.
[48] *WHC*, Article 5(d).
[49] *WHC*, Article 4.
[50] *ACF v Minister for Environment* at [188].
[51] *ACF v Minister for Environment* at [112].
[52] *ACF v Minister for Environment* at [200].
[53] *ACF v Minister for the Environment* at [189], quoting *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [96] (per McHugh, Gummow, Kirby and Hayne JJ)
[54] This refers to the emissions predicted to result from combustion of the coal produced at the Carmichael Mine, after it has been shipped overseas.
[55] *ACF v Minister for the Environment* at [158].
[56] *EPBC Act*, s 527E(1)(b).
[57] *ACF v Minister for the Environment* at [157].
[58] *ACF v Minister for the Environment* at [163].
[59] *ACF v Minister for the Environment* at [138].
[60] *ACF v Minister for the Environment* at [58], citing [138] in the Minister's statement of reasons.
[61] *ACF v Minister for the Environment* at [163].
[62] *ACF v Minister for the Environment* at [163].
[63] Geoff Egan, 'ACF to challenge 'drug dealer's defence' of Adani', *Sunshine Coast Daily* (online), 3 March 2017 <https://www.sunshinecoastdaily.com.au/news/acf-to-challenge-drug-dealers-defence-of-adani/3149890/>.
[64] *EPBC Act*, s 391.
[65] *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256 at [128], cited in *ACF v Minister for the Environment* at [80], [178]
[66] *ACF v Minister for the Environment* at [163].
[67] AAP, 'Federal Court reserves Adani decision' (3 March 2017) *Sydney Morning Herald* (online), <http://www.smh.com.au/business/mining-and-resources/federal-court-reserves-adani-decision-20170303-guq2gd.html>.
[68] Above n 33, Rachel Baird, 423.
[69] Helen Davidson, 'Environmental Defenders Office lashes out at George Brandis over funding cuts', *Guardian Australia* (online), 31 March 2015 <https://www.theguardian.com/australia-news/2015/mar/31/environmental-defenders-office-lashes-out-at-george-brandis-over-funding-cuts>; 'Funding cut to Environmental Defender's Offices described as 'barbaric'', *ABC News* (online), 19 December 2013 <http://www.abc.net.au/news/2013-12-18/funding-cut-to-environmental-defenders-offices/5164934>.
[70] Westpac AU, 'Westpac launches updated Climate Change Action Plan' (Media Release, 28 April 2017) <https://www.westpac.com.au/about-westpac/media/media-releases/2017/28-april/>.
[71] AAP, 'Westpac refusals a blow for Adani', *SBS* (online), 28 April 2017 <http://www.sbs.com.au/news/article/2017/04/28/westpac-coal-refusals-blow-adani>.
[72] Peter Hannam, 'Desperate: Commbank rules out lending to Adani's Carmichael coalmine', *Sydney Morning Herald* (online), 11 August 2017 <http://www.smh.com.au/environment/climate-change/desperate-commbank-rules-out-lending-to-adanis-carmichael-coal-mine-20170811-gxughp.html>.

[73] AAP, 'Westpac refusals a blow for Adani', *SBS* (online), 28 April 2017 <http://www.sbs.com.au/news/article/2017/04/28/westpac-coal-refusals-blow-adani>.

8. Disruption's In The Air

[1] Riley Stewart, 'Drone pilot fined $900 for 'hazardous' flight at Sylvia Jeffreys and Peter Stefanovic's wedding', *ABC News* (online), 10 July 2017 <http://www.abc.net.au/news/2017-07-10/drone-pilot-fined-after-jeffreys-stefanovic-wedding-flight/8694042>..

[2] April Glaser, 'The FAA just issued the largest fine ever against a company for flying drones illegally', *Recode* (online), 17 January 2017 <https://www.recode.net/2017/1/17/14298180/faa-largest-fine-flying-drones-illegally-skypan>.

[3] Sophia Sleigh, 'I didn't know it was a crime' says film-maker fined more than £1,000 for flying drone over Hyde Park', *Evening Standard* (online), 8 October 2015 <http://www.standard.co.uk/news/london/i-didnt-know-it-was-a-crime-says-filmmaker-fined-more-than-1000-for-flying-drone-over-hyde-park-a3085411.html>.

[4] Ron Bartsch, et al, *Drones in Society* (Routledge, 2017) 20

[5] *International Civil Aviation Organization (ICAO), Convention on Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947), art 3.

[6] Kristian Bernauw, 'Drones: The Emerging Era of Unmanned Civil Aviation' (2015) 66(2-3) *Zbornik* PFZ 231.

[7] See generally Pam Stewart, 'Drone danger: Remedies for damage by civilian remotely piloted aircraft to persons or property on the ground in Australia' (2016) 23(3) *Torts Law Journal* 290.

[8] Paul Stephen Dempsey, 'All Along the Watchtower: *Forum non Conveniens* in International Aviation' (2011) Vol. XXXVI Annals of Air and Space Law 2.

[9] See, eg, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

[10] Tom Madge–Wyld, 'Germany plans new damages' regime', *Aviation Law News Weekly* (29 June 2017) <https://gettingthedealthrough.com/article/5678/germany-plans-new-damages-regime>.

[11] Steve Gorman, 'Lufthansa reports near miss with drone over Los Angeles', *Reuters* (19 March 2016) <http://www.reuters.com/article/us-california-drone-lufthansa-idUSKCN0WL01B>.

[12] Telegraph Reporters, 'Drone hits British Airways plane as it prepares to land at Heathrow' (18 April 2016) *The Telegraph* <www.telegraph.co.uk/news/2016/04/17/drone-hits-british-airways-plane/>.

[13] David Hambling, 'Russian Drones Attack With Grenade Weapons', *Warrior* (8 July 2017) <www.scout.com/military/warrior/Article/Small-Russian-Drones-Do-Massive-Damage-WIth-Grenade-Weapons-103103172>.

[14] Kukil Bora, 'UK Military Video Shows ISIS Armored Vehicle Destroyed By RAF Reaper Drone With Hellfire Missile', *IB Times* (7 October 2015) <www.ibtimes.com/uk-military-video-shows-isis-armored-vehicle-destroyed-raf-reaper-drone-hellfire-2002751>.

[15] Zeeshan-ul-hassan Usmani and Hira Bashir, 'The Impact of Drone Strikes in Pakistan' (2014) *Brown University Watson Institute for International Studies* 1.

[16] DLA Piper, *Drone strikes – a look at liability* (15 February 2017). <https://www.dlapiper.com/en/uk/insights/publications/2017/02/drone-strikes-a-look-at-liability>.

[17] Anna Masutti, 'Drones for Civil Use: European Perspective on Third-Party Liability and Insurance' (2016) *Journal for International Trade and Transport Law* 10.

[18] Department of Infrastructure, Transport, Regional Development and Local Government, *Review of Carriers' Liability and Insurance Discussion Paper* (2009) 13-14.

[19] *Convention on Compensation for Damage caused by Aircraft to Third Parties*, opened for signature 2 May 2009 ICAO Doc. 9919 (not yet in force), art 16(1).

[20] Fujita Katsutoshi, 'Some Considerations for the Modernization of the Rome Convention, in case of Unlawful Interference' (2008) 23 *Korean Journal of Air and Space Law* 59.

[21] See above n 13, 2.

9. The Right to Assembly and Protest in Columbia

[1] All translations are by the author.

[2] César Rodríguez Garavito and Sebastián Lalinde Ordóñez, *Demanda de inconstitucionalidad contra los artículos 53, 54, 55, 56 y 57 de la Ley 1801 de 2016* (7 October 2016) Dejusticia <https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_867.pdf>.

[3] Mauricio Albarracín, *Control Constitucional al Código de Policia* [Constitutional Control of the Police Code] (27 April 2017) Dejusticia <https://www.dejusticia.org/control-constitucional-al-codigo-de-policia/>.

[4] Caracol Radio, Bogotazo, *el Día que Explotó la Lucha Bipartidista* [Bogotazo, the Day that the Bipartisan Fight Began] (9 April 2014) <http://caracol.com.co/radio/2014/04/09/bogota/1397028480_169500.html>.

[5] See, for example: Edwin Cruz Rodríguez, *Lecciones de Memoria. El Recuerdo de 1971 en las Protestas Estudiantiles de 2011 en Colombia* [Memory Lessons. The Memory of 1971 in the Student Protests of 2011 in Colombia] (30 November 2013) <https://www.researchgate.net/publication/304397248_Lecciones_de_memoria_El_recuerdo_de_1971_en_las_protestas_estudiantiles_de_2011_en_Colombia>; Carol Malaver, *Los Estudiantes Tras las Marchas por la Paz que Movieron el País* [The Students Responsible for the Peace Marches that Moved the Country] (16 October 2016) El Tiempo [The Time] <http://www.eltiempo.com/bogota/estudiantes-tras-las-marchas-por-la-paz-49570>.

[6] CINEP (Centro de Investigación y Educación Popular) [Centre of Investigation and Popular Education], *Luchas Sociales en Colombia 2013* (Bogotá: CINEP), as cited in Edwin Cruz Rodríguez, *El Derecho a la Protesta Social en Colombia* [The Right to Social Protest in Colombia] (22 June 2015) Pensamiento Jurídico [Legal Thought], 49 <http://revistas.unal.edu.co/index.php/peju/article/view/55404/pdf>.

[7] Escuela Nacional Sindical (ENS), Sistema de Información de la Dinámica de la Acción Colectica

Sindical y Laboral [System of Information about the Dynamic of Collective Unions' and Workers' Actions] (SISLAB), as cited in Viviana Colorado López, Mariana Ortiz Usma, Sandra Milena Muñoz, *Para Hacer Posible la Paz, Más Garantías para la Protesta Social. Contexto de la Protesta Laboral y Sindical en Colombia, 2015-2016* [To Achieve Peace, More Guarantees for Social Protests. The Context of Workers' and Unions' Protests in Colombia, 2015-2016] (2016) Anuari del Conflicte Social, 121 <http://revistes.ub.edu/index.php/ACS/article/download/19267/21694>.

[8] Medófilo Medina, *El Paro Nacional Agrario: Cuando el Mundo del Trabajo Se Levantó* [The National Agrarian Strike: When the

Working World Rose Up] (2 September 2013) Razon Pública [Public Reason] <http://www.razonpublica.com/index.php/politica-y-gobierno-temas-27/7053-el-paro-nacional-agrario-cuando-el-mundo-del-trabajo-se-levanto.html>.
[9] Edwin Cruz Rodríguez, *El Derecho a la Protesta Social en Colombia* [The Right to Social Protest in Colombia] (22 June 2015) Pensamiento Jurídico [Legal Thought], 50 <http://revistas.unal.edu.co/index.php/peju/article/view/55404/pdf>.
[10] Ibid.
[11] See, for example: EFE Verde, *Video: Fuerte Enfrentamientos entre Policía y Antitaurinos en el Regreso de las Corridas a Bogotá* [Forceful Confrontations between Police and Anti-Bullfighting Protestors at the Return of the Running of the Bulls to Bogotá] (24 January 2017) https://www.youtube.com/watch?v=KhyE99TuufI; Daniel Garzón, *Fuerte Enfrentamientos entre Policía y Antitaurinos en Bogotá* [Forceful Confrontations between Police and Anti-Bullfighting Protestors in Bogotá] (23 January 2017) https://www.youtube.com/watch?v=EsApCo4tSgw.
[12] Andrea Acosta, *Video: ESMAD Le Disparó a un Perro en la Marcha Antitaurina* [Video: ESMAD Shoots at a Dog during the Anti-Bullfighting March] (January 2017) Publimetro <https://www.publimetro.co/co/noticias/2017/01/25/video-esmad-le-disparo-perro-marcha-antitaurina.html>.
[13] *Universal Declaration of Human Rights*, art 20.
[14] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976), art 21.
[15] *American Convention on Human Rights*, signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, art 15.
[16] See, for example: Corte Constitucional de Colombia [Constitutional Court of Colombia] T-456/92, 14 July 1992; Corte Constitucional de Colombia T-571/08, 4 June 2008.
[17] *Constitución Política de Colombia (1991) [Political Constitution of Colombia]* (Colombia), art 2.
[18] Ibid art 86.
[19] Secretaría General de la Corte Constitucional de Colombia [General Secretary of the Constitutional Court of Colombia], *Procedimientos para Presentar Demandas de Inconstitucionalidad* [Procedures for Presenting Constitutional Challenges] <http://www.corteconstitucional.gov.co/secretaria/otros/procedimiento.php>.
[20] See, for example: Expediente Demanda 11604 (29 August 2016), 8 <http://www.corteconstitucional.gov.co/secretaria/AutosS/AUTO%20D-11604%20Y%20D-11611%20AC%20-%2029%20DE%20AGOSTO%20DE%202016.pdf>.
[21] César Rodríguez Garavito and Sebastián Lalinde Ordóñez, above n 2, 4-7.
[22] Carlos Alfonso Negret Mosquera, *Informe Especial de Riesgo: 'Violencia y Amenazas contra los Líderes Sociales y los Defensores de Derechos Humanos'* [Special Risk Report: 'Violence and Threats against Social Leaders and Defenders of Human Rights] (31 March 2017) Defensoría del Pueblo <http://www.defensoria.gov.co/es/nube/noticias/6236/156-l%C3%ADderes-sociales-y-defensores-de-derechos-humanos-han-sido-asesinados-en-los-%C3%BAltimos-14-meses-Defensor%C3%ADa-Defensor%C3%ADa-del-Pueblo-l%C3%ADderes-sociales-Defensor-del-Pueblo-Colombia-l%C3%ADderes-sociales.htm>.
[23] Corte Constitucional de Colombia, *C-223/17* (20 April 2017) Comunicado No. 21, 4 <http://www.corteconstitucional.gov.co/comunicados/No.%2021%20comunicado%2020%20de%20abril%20de%202017.pdf>.
[24] Ibid 3.
[25] Ibid 6-7.

10. The Silenced Majority

[1] *Shelby County v Holder*, 570 US 2 (2013).
[2] *Voting Rights Act of 1965*, 42 USC (1965).
[3] *Veasey v Abbott*, 830, F 3d 241 (5th Cir, 2016).
[4] *United States Constitution* amend XXIV, XXVI.
[5] James Cobb 'The Voting Rights Act at 50: How It Changed The World' *Time Magazine* (Online), 6 August 2015.
[6] *Voting Rights Act of 1965*, 42 USC, §5 (1965).
[7] Ibid, §4.
[8] Ibid.
[9] *Shelby County v Holder*, 570, US 2, 1 (2013).
[10] Amy Sorkin. 'The Court Rejects The Voting Rights Act – And History', *The New Yorker* (New York), June 25 2013.
[11] *Shelby County v Holder*, 570, US 2, 1 (2013).
[12] Ibid, 33.
[13] *Voting Rights Act of 1965*, 42 USC (1965).
[14] Thomas Lopez, 'Shelby County: One Year Later' (Research Paper, Brennan Center For Justice, June 24 2014).
[15] *Voting Rights Act of 1965*, 42 USC, §4 (1965).
[16] John Celock, 'Two Tiered Voting Proposed in Arizona and Kansas', *The Huffington Post* (Online), 9 October 2013.
[17] Leah Aden et al, 'Warning Signs: The Potential Impact of Shelby County v Holder on the 2016 General Election' (Research Paper, The Leadership Conference Education Fund, June 2016).
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Sharon LaFraniere and Matt Apuzzo, 'Jeff Sessions, a Lifelong Outsider, Finds the Inside Track,' *The New York Times* (New York), January 8 2017.
[23] Ibid.
[24] Tex. Elec. Code Ann. § 63.001 (2012).
[25] *Veasey v. Perry*, 71 F. Supp. 3d 627, 747 (SD. Tex. 2014).
[26] Vann R. Newirk II 'The Department of Justice Stands by Texas' Voter ID Laws,' *The Atlantic* (Massachusetts), July 8 2017.
[27] Thurgood Marshall Institute 'Democracy Diminished' (Research Paper, NAACP, 2016).
[28] Rebecca Lai, 'How Trump Won the Election According to Exit Polls,' *The New York Times* (Online), 8 November 2016.
[29] Ronald Brownstein, 'Can Millennials Save the Democratic Party,' *The Atlantic* (Massachusetts), 4 Mar 2017.
[30] Alyssa Galea 'Are Minority Voting Rights in Danger? The Aftermath of *Shelby County v Holder*' (Research Paper, Hartwick College, 2013).
[31] William Frey et al, 'America's Electoral Future' (Research Paper, Brookings Institute, February 2016).
[32] Ibid.
[33] Ibid.
[34] Laura Bassett, 'Minority Voters' Registrations Are Being Stalled In Florida And North Carolina' *Huffington Post* (Online), 8 November 2016.
[35] Ibid.
[36] Vincent Hutchings et al, 'Why do Black Americans overwhelmingly vote Democrat?' (Research Paper, Centre for Political Studies, 2012).
[37] Jamelle Bouie, 'Do Minorities Do Better Under Democrats' *Slate* (Online), 24 May 2014 <http://www.slate.com/articles/news_and_politics/politics/2014/05/democrats_are_good_for_minorities_minority_voters_are_making_a_rational.html>.
[38] Khalilah Brown-Dean et al, '50 Years of The Voting Rights Act', (Research Paper, Joint Center For Political And Economic Studies, 2015).

[39] Ibid.
[40] Ibid.
[41] Algernon Austin, 'Obamacare Reduces Racial Disparities in Health Coverage' (Research Paper, Center For Global Policy Solutions, 2014).
[42] Ibid.
[43] US Census Bureau, Quickfacts, Arizona; Alaska; Maine; United States (July 1 2016) United States Census (Online), <https://www.census.gov/quickfacts/fact/table/AZ,AK,ME,US/RHI225216>.

11. Negotiating The Boundaries of Acceptable Protest

[1] Seymour M Lipset, *Political man: The social basis of modern politics* (Doubleday, 1960).
[2] Andrew J Nathan, 'The Puzzle of the Chinese Middle Class' (2016) 5 *Journal of Democracy* 27, 15.
[3] Wen-Chin Wu, Yu-Tzung Chang and Hsin-Hsin Pan, 'Does China's Middle Class Prefer (Liberal) Democracy?' 347 *Democratization* 24, 348.
[4] Tyler Headley and Cole Tanigawa-Lau, 'Measuring Chinese Discontent: What Local Level Unrest Tells Us', *Foreign Affairs* (online), March 10 2016 <https://www.foreignaffairs.com/articles/china/2016-03-10/measuring-chinese-discontent>.
[5] Sebastian Heilmann (ed.), *China's Political System* (Mercator Institute for Chinese Studies, 2016).
[6] Carl F Minzer, 'Xinfang: An Alternative to Formal Chinese Legal Institutions' (2006) 42 *Stanford Journal of International Law* 103, 161
[7] He Huifeng, 'Thousands of Chinese parents take to the streets to protest university admission quotas', *South China Morning Post*, 15 May 2016, 3.
[8] Te-Ping Chen, 'Test Driven: Parents Protest Changes to University Entrance Exam', *The Wall Street Journal*, 15 May 2016, 4.
[9] OECD, *Education in China: A Snapshot* (2016), 46.
[10] Russell Leigh Moses, 'Why China's Street Protests Do Not a Revolution Make', *The Wall Street Journal*, 16 May 2016, 6.
[11] Austin Ramzy, 'Protests Return to Wukan, Chinese Village That Once Expelled Its Officials', *The New York Times* (online), 20 June 2016 <https://www.nytimes.com/2016/06/21/world/asia/china-wukan-protest.html?mcubz=3&_r=1#story-continues-1>.
[12] David Wertime, 'The Chinese Democratic Experiment That Never Was', *Foreign Policy Tea Leaf Nation* (Online), 14 September 2016 <http://www.chinafile.com/media/chinese-democratic-experiment-never-was>.
[13] Austin Ramzy, 'Protests Return to Wukan, Chinese Village That Once Expelled Its Officials', *The New York Times* (online), 20 June 2016 <https://www.nytimes.com/2016/06/21/world/asia/china-wukan-protest.html?mcubz=3&_r=1#story-continues-1>.
[14] Melanie Manion, 'Chinese Democratization in Perspective: Electorates and Selectorates at the Township Level', (2000), 163 *The China Quarterly*, 764.
[15] James Pomfret, 'Hundreds of Residents of South China 'Rebel' Village Protest, Poised for Showdown', *Reuters* (online), 20 June 2016 <https://www.reuters.com/article/us-china-wukan/hundreds-of-residents-of-south-china-rebel-village-protest-poised-for-showdown-idUSKCN0Z6159>.
[16] Tony Lin, 'End of the Line for Subway Ad Against Sexual Harassment', Sixth Tone (online), 28 April 2017 <http://www.sixthtone.com/news/1000123/end-of-the-line-for-subway-ad-against-sexual-harassment>.
[17] Sophie Beach, 'Five Women's Rights Activists Criminally Detained', *China Digital Times* (online), 13 March 2015, <http://chinadigitaltimes.net/2015/03/five-womens-rights-activists-criminally-detained/>.
[18] Sophie Beach, 'Feminist Group's Weibo Shuttered', *China Digital Times* (online), 22 February 2017 < http://chinadigitaltimes.net/2017/02/feminist-groups-weibo-shuttered/>.

12. Are Borders Set in Clay or Stone?

[1] Georg Jellinek, *System der subjektiven öffentlichen Rechte* (System of Subjective Public Laws) (Mohr: 1892), as explained by Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (London: Penguin Books, 2013) 361-362.
[2] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1(1); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514(XV), GAOR, 15th sess., 947th plenary meeting, Supp. No. 16, UN Doc. A/4684 (14 December 1960).
[3] *Arbitration Commission, EC Conference on Yugoslavia, Opinion n. 2* (11 January 1992), 92 ILR (1993) 167.
[4] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[5] Canada Parliament, House of Commons, Votes and Proceedings, 40th Parl., 3rd sess., No. 10 (March 16 2010), Private Members' Business M-505. See also SC Res. 2334 [*on cessation of Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem*], UN SCOR, 7853rd meeting, UN Doc S/RES/2334 (23 December 2016).
[6] *Arbitration Commission, EC Conference on Yugoslavia, Opinion n. 2* (11 January 1992), 92 ILR (1993) 167. In that case, the Serbian minority populations of Croatia and Bosnia-Herzegovina were not permitted to secede.
[7] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010.
[8] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[9] Asteris Huliaras, 'The unanticipated break-up of Sudan: causes and consequences of redrawing international boundaries' (2012) 50 *Commonwealth & Comparative Politics 3*, 257 – 270.
[10] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010 [83].
[11] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 1(1).
[12] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010 [83].
[13] Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders' (2006) 26 *SAIS Review of International Affairs* 1, 11 – 24.
[14] Ibid.

[15] Simone van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' (2015) 62 *Netherlands International Law Review* 329 – 363. See also Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) 2, 387.
[16] See eg, Helen Quane 'Self-determination and minority protection after Kosovo' in James Summers (ed) *Kosovo: a precedent? The declaration of independence, the Advisory Opinion and implications for statehood, self-determination and minority rights* (Leiden: Martinus Nijhoff Publishers, 2011) 200–209.
[17] See generally, Mike Bowner, 'Russia and Chechnya: the issue of secession' (2004) 10 *Nations & Nationalism* 4, 461 – 478; Marcelo G. Kohen (ed) *Secession: international law perspectives* (Cambridge: Cambridge University Press, 2006); Bilveer Singh, 'ASEAN, Myanmar and the Rohingya Issue' (2014) 18 *Himalayan and Central Asian Studies* 1/2, 5 – 20; Neil DeVotta, 'The Liberation Tigers of Tamil Eelam and the Lost Quest for Separatism in Sri Lanka' (2009) 49 Asian Survey 6, 1021 – 1051.
[18] See eg, Zekil Sarigil and Ekrem Karakoc, 'Who supports secession? The determinants of secessionist attitudes among Turkey's Kurds' (2016) 22 *Nations & Nationalism* 2, 325 – 346; Omar Dahbour, 'Self-Determination and Power-Sharing in Israel/Palestine (2016) 15 *Ethnopolitics* 4, 393 – 407.
[19] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 96; *Statute of the International Court of Justice* art 36.
[20] Adapted from *Accordance*, International Court of Justice, General List No. 141, 22 July 2010 (Separate Opinion, Judge Cancado Trindade) [228], available at: <http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-08-EN.pdf>.
[21] *Statute of the International Court of Justice* art 36.

SYDNEY
UNIVERSITY
LAW SOCIETY

PROVIDED BY
UNIVERSITY OF
SYDNEY UNION