*D*issent.

Possession

Sydney University Law Society
Social Justice Journal

Dissent
Possession 2012

ISSN 1839-1508

Board of Editors

Rachael Hyde
Editor-in-Chief

Kate Farrell
Lachlan Gell
Jeanne Hu
Clare Langford
Marina Lauer
Dennis Mak
Alistair Stephenson

Design

Lachlan Gell
Alistair Stephenson

With special thanks to

Gilbert + Tobin Lawyers
Dr Ghena Krayem, *University of Sydney*
Niamh Mooney, *SULS Vice-President (Social Justice)*

Printing

Vertifix Printing Australia

Contents

Editor's Foreword

We had an overwhelming amount of interest in Dissent this year, with an incredible number of abstracts submitted that spoke in innovative ways to the theme *Possession*. The twelve articles eventually published encompass a diverse range of social justice issues in both the domestic and international spheres.

Jessica Harwood looks within New South Wales, providing a detailed analysis of the threat of coal seam gas to rural landowners. So do Remona Zheng and Shoshana Robuck, who in their joint article, informed by their participation in the Sydney University Law Society initiative, the Juniperina Juvenile Justice Centre Mentoring Program, discuss custodial regimes for juvenile offenders in New South Wales. Ella Alexander's 'Fresher Futures' also speaks to disadvantaged Australians, providing a sophisticated and insightful discussion of the continuing problems around food security for Indigenous citizens living in remote communities.

Ellen Joy and Hannah Ryan discuss social injustices in federal government policy towards refugees. 'Complementary Protection: Bridging Gaps for Victims of Trafficking for Sexual Exploitation?' argues that Australia's complementary protection scheme provides inadequate protection for human trafficking victims. 'Contracting Custody: The Outsourcing of Immigration Detention Centre Management' brings concerns for asylum seekers' mental and physical wellbeing to the foreground in the continuing debate on border protection.

Devika Gupta, Karen Rauchle and Zoe Donlon instead look to social justice issues overseas, focusing on, respectively, forced labour practices in Nepal, slavery in contemporary North America, and the forced evictions of residents as Brazil prepares to showcase the modern city of Rio de Janeiro to the sporting world.

Melissa Chen's 'Out of Sight, Out of Mind' and Justin Penafiel's 'The Young and The Restless' both tell stories of university students caught in the crossfires of social injustice, although for very different reasons. Jonathan Hall Spence and Neha Kasbekar's articles look at who has proprietary rights to what we might assume as highly personal assets – what we share on social media, and our own human tissue.

Generous thanks go to our sponsor Gilbert + Tobin, and in particular to Emma Garmston. The continued support and facilitation of this journal that the firm provides is invaluable. I, along with the other editors of and contributors to Dissent, truly value the opportunity that Gilbert + Tobin provides to Sydney University law students to contribute to academic debate. In my view, the journal provides an important avenue for sophisticated discussion of important contemporary social justice issues which strain to be heard in the commercially-focused education a law school curriculum provides.

Thanks also to my committed editorial team, whose hard work and enthusiasm has been much appreciated and, hopefully, rewarded by the journal's publication this year.

I hope that reading the journal gives you as much food for thought as selecting and editing these articles did for me. This edition of Dissent should bring much hope and anticipation for the meaningful contributions that Australia's next young lawyers, commentators and advocates can make to discussion of and action on a wide range of social justice issues that are pertinent to our world in 2012.

Rachael Hyde
Editor-in-Chief

Patrick Parkinson, Foreword

Possession, as the old saying goes, is nine tenths of the law. That might have been true in the days when proof of common law title to property involved much more than simply looking up a Register of Land Titles. It remains central to the doctrine of adverse possession.

However, 'possession' can have significant negative connotations as well. Slave owners – and yes, in the sex trafficking industry amongst others, we still have them – may assert a right of possession over the body or labour of another human being. The internet service provider has a source of potential wealth and power because it 'possesses' the myriad disclosures we make in electronic communications; or more to the point, it can transfer power to dictators, to security services or to marketers by releasing the information that is in its possession. The western colonial power may assert a right of ownership for no other reason than that it does not recognise or understand concepts of possession in indigenous hunter-gatherer societies.

This issue of Dissent explores the theme of possession from a variety of angles. There are articles on such problems as sex trafficking, forced labour in Nepal, the need for food security in remote Aboriginal communities, the right to ownership and control of information and of human tissue, the rights of the mentally ill, the situation of those in immigration detention centres, and ownership of minerals and energy resources.

This issue illustrates the variety of concerns about human rights and social justice which flow from the lack of control many people have over their own destinies. All of us are, to a greater or lesser extent, influenced by or even captive to, forces beyond our control. Some are subtle influences, such as the control over our autonomous decision-making exercised by our sense of obligation to family; some are internal to us – psychological constraints arising from our past and from which it is difficult to break free; some arise from our circumstances. Freedom to control our destinies is a matter of degree.

However, there are those who lack almost any sense of control over their lives. Some of the articles in this issue concern situations where the law and the justice system can do something to give people back control over their destinies, or where respect for human rights gives us at least a moral obligation to assist them to do so. Other articles in this issue concern the legal position about things that we may think we ought to be able to control, but where our capacity to do so is limited.

The diversity of topics addressed is an indication of the different areas of life where questions of ownership, control or the lack of it make a great difference to people. Exploration of these topics can lead us to consider what change would offer greater social justice, particularly for the most vulnerable, and what efforts we might need to make in order to achieve that change.

Professor Patrick Parkinson
University of Sydney

The stars up close to the moon were pale; they got brighter and braver the farther they got out of the circle of light ruled by the giant moon

KEN KESEY

Out of Sight, Out of Mind?

An examination of the NSW mental health framework and its impact on the civil liberties of the mentally ill.

Melissa Chen
B.A./LL.B. III

Laws and policies concerning the mentally ill have always been highly contentious. A desire to preserve individual civil liberties as well as focus on the often complex needs of the patient are often balanced with the concerns of the community in terms of 'safety' as well as the paucity of options for those without family willing to assist.[1]

With this is mind, over the past decade, legislation regarding the admission and treatment of patients deemed to be mentally ill has been transformed significantly. This was a direct result of the 'de-institutionalisation' movement that prioritised community care of patients rather than their admission to psychiatric wards or asylums, wherever possible.[2] Such changes have been viewed as largely positive due to the greater emphasis placed on the individual needs of the patient and the increase in staff numbers for those most at risk and placed in institutions.[3] The Mental Health Review Tribunal was created under this legislation and given a range of powers to make orders and hear appeals about the treatment and care of people with a mental illness, in the hope that streamlining the process would allow patients better protections and grant the practice of involuntary admission greater transparency. Though well intentioned, the legislation, protections, and practices impacting on the rights of mental health patients remain concerning in a number of ways.

Accessing Rights...Without the Right to Access?

First, while patients theoretically have a number of different avenues of redress if they believe they have been wrongly admitted, access to these different avenues is severely restricted by the daily operations of psychiatric wards and their policies, including removal of mobile phones and a lack of access to the internet.

The legislation and information packets available online are upfront and clear about the rights that involuntarily admitted patients have, including the immediate right to review through the simple completion of an application form.[4] This indicates the very core of what the mental health legislation and Tribunal aim for – consistency and transparency behind an otherwise impenetrable system. In the eyes of a patient living the reality of involuntary admission, however, the process may seem less clear.

The problem can be explored by looking at the situation of Sarah,[5] an ex-Sydney Law student. She was involuntarily admitted at the beginning of 2012 and offers a different story of the avenues of redress open to her, as distinct from the open, transparent nature affirmed in any online publication. On admission, Sarah's mobile phone was taken from her, although she was allowed to write down a couple of phone numbers on a piece of paper and use the hospital's landline for a limited period of time. Without such contacts to call on the outside, the lack of access to a mobile and the internet would have been devastating. This separation from easily accessible sources of information has been detailed in previous published articles but do not garner the same attention as other

issues affecting the mental health system.[6] There appears to be a lack of communication between public health professionals ordering involuntary admission after a single appointment and those who have treated the patient for a longer period of time. Prior to her admission, Sarah was not only a victim of sexual assault but had an exceptionally difficult year after her mother passed away. Such distressing histories are not uncommon to other patients who have been involuntarily admitted.[7] Sarah was a long term user of the University's health service and was shocked by her admitting psychiatrist's disregard of previous opinion. As the NSW Mental Health Rights Manual states, it is 'good practice' to consult the patient's ordinary physicians, but not mandatory.[8] As Carney emphasises, this legal framework has not made much of a difference to how the system operates and in fact may obscure the true operation of the mental health system.[9]

Sarah was one of the lucky ones – with an astute mind and background as a law student she was able to navigate the process. However, for those with less support and conceivably less education, the stress of being placed into a foreign environment may deliver a decisive barrier to accessing the right kind of information. It should not be assumed that patients will readily seek out their different legal options and with a solicitor only visiting at certain times throughout the week, it is unclear whether existing protections are sufficient.

The Tribunal — First and Last Resort

Secondly, the decisions of the Mental Health Tribunal are conclusive, placing a high reliance on the evidence of government-employed mental health professionals. Moreover, their designation as Tribunals rather than courts of law may lead to the undesirable consequence of removing decisions from the discerning public eye.

The Tribunal was created in order to streamline the process of making a claim. The Tribunal determines whether or not a patient can be kept in involuntary detention and how long they should be there. A positive feature is the Tribunal's diverse membership, made up of legal, psychiatric and community members and independent from the hospital administering treatment. Regardless of the decision formally made, this ensures an open discussion of the patient's treatment and long-term plan.[10] It is fiercely debated whether or not this should be part of the Tribunal's role, but in the somewhat murky legal/medical context, this is an area that can be further utilised to protect rights.

Though decisions of the ordinary courts are well publicised and can lead to changes in the common law or at least legislative reaction from politicians, decisions from the Tribunal receive less scrutiny.[11] With open justice competing with the right to privacy, the need for the Tribunal to offer transparent and appealable judgments while protecting the applicant creates an uncomfortable situation without any real solution.

This lack of scrutiny is in counterpoint to the very real power that Mental Health Tribunals have on affected persons and their families. The tribunals are in charge of making and reviewing involuntary treatment orders and are also the court of appeal for such orders.[12] Only a small percentage are legally represented before these tribunals, despite the significant impact their decisions have on the lives of patients, as emphasised below.[13]

In addition, as the NSW Mental Health Rights Manual makes abundantly clear, even voluntary patients can be made involuntary with relative ease. This merely requires the hospital to argue that a release will put the patient at risk,[14] not the community as is often misunderstood.

Furthermore, it has been suggested that while medications are prescribed and enforced by the Tribunal, issues related to side effects such as weight gain or nausea are not given appropriate weighting by staff.[15] This was certainly Sarah's experience, where objections to medication were treated as deliberate attempts to be difficult rather than honest reactions towards individual treatment options.

The tribunals also place people in an adverse position that may exacerbate their conditions,[16] a common criticism in the ordinary courts where mental illness is not a factor. The imbalance of power may create an atmosphere of intimidation and powerlessness even when undertaken in more informal settings.

Finally, with hearings dealt with at an average of 20 minutes per case,[17] it is clear that the Tribunal still has a long way to go in addressing the needs of the most vulnerable in the most effective and open way possible.

Community Protection Orders — In Whose Best Interest?

The obligatory nature of Community Protection Orders has led to the ever-increasing scope of the state to determine treatment, which may not be in the best interests of psychiatric patients. Yet a corollary of the increased scope of Community Protection Orders is the ability of patients and their families to benefit by avoiding the infamous institutions once seen as the only solution to caring for the mentally ill.

The *Mental Health Act 2007* (NSW) may appear to have quite stringent restrictions on how an order is made. According to s 53 (3), the Tribunal can make a community treatment order where it will benefit the affected person, a declared mental health facility has made a treatment plan, or the person has been previously diagnosed as suffering from a mental illness and refuses to accept appropriate treatment. Community care is emphasised as a less restrictive form of order, and orders may be made in the absence of the affected person if he or she is given notice.[18]

Community Protection Orders often garner less criticism than admission to a psychiatric ward as they are deinstitutionalisation in action. But as Sarah's experience attests, this attitude may be misguided. Community Protection Orders though able to be undertaken within the community are still very much orders. Medications must be taken, and nurses and doctors can be sent to homes to ensure their administration. Even if medications cause severe side effects and impact on one's ability to seek employment, as in Sarah's case, there is little to no opportunity to question the doctor's orders. Of course, as is clear from the previous discussion, the situation is worsened under involuntary admission where patients have no say in the treatment that they receive. That the orders are implemented in the community creates a false sense that patients are free to take control over their own treatment and medication when clearly this is not the case and the power of the order to impact on the person's everyday life is no less real.[19]

Related to this issue is the onus placed on family and friends as carers. Though this is often viewed in a positive light, removing the heavy handed nature of the state taking charge of individual welfare, for those without a strong network there may be more severe consequences.[20] Without a stable family to go back to institutionalisation seems assured – as Sarah discovered.

The Mental Health Framework — Where to from Here?

Though concerns remain, there is reason to be optimistic about the NSW mental health framework. The NSW government recently released a statement celebrating the passage of the Mental Health Commission bill, promising to establish a Mental Health Commission as distinct from the Tribunal in order to provide that degree of collaboration, coordination and integration which is currently lacking.[21] Whether these outcomes will be achieved remains to be seen, but it is comforting to realise that the system is under constant revision in the attempt to address the individual/community

dichotomy that so easily dominates debates.

However, recent reports on the indefinite detention of those unfit to stand trial in the Northern Territory and general inadequacy of facilities have raised alarm bells about the mental health system as a whole,[22] and emphasise the constant need for vigilance and revision when dealing with the issue of freedom for one of Australia's most vulnerable communities. Legislation and policies regarding mental health and detention go to the very heart of the government's role in walking the line between protection and paternalism, with vigilant questioning and continual reform an absolute necessity to keep the treatment of patients, both voluntary and involuntary, at the forefront of the public's consciousness.

Possession

Forcing families out of their homes without adequate notice, prior consultation with those affected and without offering adequate alternative housing or provision of legal remedies flies in the face of the very values the Olympics stand for, and violates Brazil's laws and international human rights commitments

AMNESTY INTERNATIONAL AND WITNESS, 'BRAZIL: FORCED EVICTIONS MUST NOT MAR RIO OLYMPICS', 14 NOVEMBER 2011

There's Gold in Them There Hills

The IOC and FIFA rob the people of Rio de Janeiro.

Zoe Donlon
J.D. II

Rio de Janeiro: beaches wrap themselves around the city. Velvet green mountains stretch beyond the buildings and peek through the layers of cloud. The ocean laps at the city's feet. A patchwork of tiny dwellings perch on the hillsides. These dwellings – *favelas* – are as iconic as the scenery and The Statue. They have been a part of Brazil for over two centuries. They are home to more than 1.5 million people.[1] In the past these *bairros* were stricken with social and economic problems and were notorious hubs of drug-dealing and gang violence. The government's approach to them has ranged from forced exodus, to unlawful killings by police, to more recent cooperation between locals and police to establish peace and stability.

But there is a new problem. Rio de Janeiro is preparing to host the FIFA World Cup in 2014 and the Olympic Games in 2016. This is proving to be a double-edged sword. Advocates argue that these 'mega-events' place Brazil on the road to becoming a first world country. But before there is a road there are road works. To accommodate these events bulldozers are tearing through the *favela* communities. Inhabitants – *favelados* – receive minimal or no compensation. There are 'forced' evictions; the euphemism for 'bloody and violent'. *Favelados* are given just a few hours warning and as they walk away, belongings in hand, they spy the vehicles of mass destruction looming in the distance. Residents of the *favelas* lose more than their homes: almost every part of their lives is negatively impacted by forced eviction.

The rights of victims of forced displacement are protected under a range of international instruments, and Brazil recognises these through its domestic laws, particularly the *City Statute*[2] and the *Constitution of the Federative Public of Brazil 1988* ('Constitution').[3] However, problems inherent in Brazil's democratic make-up mean that no degree of legal rights can protect the *favelados*. The failure of the domestic government means responsibility now falls on the international community.

The International Federation of Association Football (FIFA) and the International Olympic Committee (IOC) gave Brazil the opportunity to host a mega-event. Considering such events are now widely recognised as a cause of mass population displacement and the abrogation of human rights, FIFA and the IOC should be held accountable. Suggestions have been put to these organisations about how to improve the damaging relationship that exists between their events and the human rights of host city populations. However, this somewhat naive approach assumes that FIFA and the IOC are motivated by altruism. A known history of corruption raises serious doubt over the motivations of the organisations' members and consequently the likelihood of them committing to this cause. This said, adopting social responsibility would be invaluable. FIFA and the IOC should see this as an opportunity to clean up their reputations and to prove to the international community that the promises in their Charters are more than lip-service.

The History of the Favelas

Throughout Rio de Janeiro there are more

than 600 *favelas*, which are occupied by over 40 per cent of the city's population.[4] They are essentially the 'slums' or 'shanty towns' of Brazil. These neighbourhoods emerged in the 1930s in response to the mass migration of civilians from rural areas to the city in search of work. The State's approach to these informal settlements has been characterised by 'selective presence and absence'.[5] Originally, eradication was attempted. Soon, however, they came to be appreciated as a solution to the urban housing shortage and as a source of cheap labour. During Brazil's military dictatorship (1964 -1985) more than 100 000 inhabitants were forcibly removed,[6] while over recent decades increased drug-trafficking and violence in the *favelas* placed the state actors in a dichotomy of aggressive elimination of these activities and forging corrupt alliances with the drug-lords.[7] In 2008, a new police force was created (Police Pacifying Units). They have established themselves in over thirteen favelas to date in Rio where they work with the locals to create peace and stability.[8]

The treatment of *favelas* from a legal property perspective has been equally uncertain. They were originally considered illegal as residents had built their homes on land they did not own and over which they had no official legal title. In light of recommendations from the World Bank and changes in Brazilian legislation, the government commenced giving *favelados* legal title to their land, influenced by the notion of 'squatter's title', ie title by adverse possession. The arrangement was recognised as a solution to poverty and urban housing shortages.[9]

But the situation in Rio is unique. Compared with other parts of Brazil, *favelas* occupy some of the most valuable land, with highly sought-after views, and in close proximity to upper class neighbourhoods. The government plans to develop this land for the World Cup and Olympic Games, which means forced evictions and the demolition of *favelados'* homes. This is testament to one of Adam Smith's economic maxims that, 'wherever there is great property there is great inequality'.[10] Forced evictions in preparation for mega-events are not a new phenomenon.

Forced Evictions: Same Story, Different City

In preparation for the 1988 Summer Olympic Games in Seoul, South Korea, approximately 720 000 people were forcibly displaced.[11] Research conducted by the Centre on Housing Rights and Evictions (COHRE) revealed that over the last twenty years the Olympic Games have been responsible for displacing over two million people.[12] Forced evictions have been defined as, 'an acquisition of homes and land against the resident's will without the provision of, and access to appropriate forms of legal or other protection…[and] without appropriate relocation measures.'[13] Evictees are often classified as 'illegal squatters' and so do not qualify for compensation, irrespective of the length of their occupation and the amount invested in their homes.[14] In mega-event host cities forced evictions occur not only due to the 'need' to develop venues and facilities, but also as part of a 'beautification process' to improve the overall appearance of the city by removing any signs of poverty.[15] One such sign is the inner-city slums. Forced displacement has been long associated with mega-events and yet FIFA and the IOC continue to be spectators – to watch from the sidelines, avoiding responsibility.

The Double-Edged Sword

Mega-events are double-edged swords. The benefits must be weighed against the detrimental factors to determine the true value of hosting. There are a range of motivations behind hosting a mega-event, yet the main advantages are intangible. It is the chance for the host to 'showcase its impressive rate of economic development, modernisation, and westernisation … [and to] forge a new identity as a progressive nation'.[16] This improves tourism both during the event and into the future. The Government of Rio is no different from other host nations – they are eager to focus on the city's natural and cultural wonders while concealing the social reality.

The IOC embraces the use of the Olympic Games to foster a country's reputation providing it does not lead to discrimination.[17] Similarly the FIFA Statutes include an article on anti-discrimination.[18] Yet hosting a mega-event entails a form of discrimination, at least in economic terms. It is the city's marginalised population who suffer due to forced evictions while the higher echelons in society reap the rewards. Is this not discrimination? If so, it may be asked why the IOC and FIFA, although claiming to condemn discrimination, remain silent observers.

Hosts of mega-events may also wish to demonstrate that their country upholds international legal requirements. This agenda originates during the host bidding process, as international organising bodies such as the IOC and FIFA essentially give their 'stamp of approval on the host country's legal and political institutions',[19] when they make their selection. This can only be considered a positive factor if the host nation does in fact meet certain standards as opposed to merely 'keeping up appearances'. The IOC and FIFA should show a greater commitment to ensuring that the selected countries legitimately uphold international standards of human rights, particularly in relation to forced evictions. Unfortunately, these organisations have so far adopted an 'appearance centred' approach to human rights.

The detrimental impacts of hosting a mega-event are many. Forced evictions amongst the lower class and minority groups is just one example. Hosting a mega-event can often cause the market value of land and houses to increase significantly. This occurred following the Seoul Olympics and the 1992 celebrations in Santo Domingo of the 500th Anniversary of Columbus' voyage to the Americas.[20] The cost of creating necessary infrastructure leads to a crippling national debt. Contrary to the hopes of host governments, these events often stunt the nation's economic growth.[21] By the time of the 2008 Olympics in Beijing, previous Olympic hosts Montreal (1976), Barcelona (1992), Sydney (2000), and Athens (2004) had not finished paying off their debt.[22] The difficulty stems partly from the fact that host nations build extensive venues and facilities which are of little use once the event is over. This begs the question: do the economic burdens outweigh the benefits of hosting a mega-event? To determine the true value of hosting a mega-event, its effect upon those worst off must be considered.

The Real Cost of Forced Evictions

In Rio, the *favelados* are the most adversely affected. The mega-event preparations have affected all aspects of their lives: social, cultural and economic. For one thing, the strong social ties and high level of trust and cooperation that exists amongst *favela* residents are renowned.[23] Accordingly, when *favelados* are forcibly removed they lose more than a physical house. Their living environment has led to the development of a strong culture expressed through music (rap, samba, and funk), street-slang dialect, art and craftwork, and fashion.[24] The destruction of these neighbourhoods threatens to erode longstanding traditions and impede future cultural prosperity. Economic potential is also hindered when *favelas* are destroyed as street vending and home-based businesses are prominent in these neighbourhoods.[25] Destroying the homes of *favelados* thus destroys their income. Furthermore, the health of evictees deteriorates through hunger and disease caused by homelessness, while personal injury and death occur throughout the violent eviction process.

Lastly, to be forcibly removed from one's home, particularly in a violent manner, without being provided with adequate solutions and support, undermines personal freedom and liberty. The

process of forced evictions breaches a range of human rights protected by international laws which Brazil have signed, ratified, and enacted into domestic legislation.

What Laws Are Being Breached?

Interestingly, many governments and private investors do not believe that slum clearance necessarily conflicts with the law, as the majority of evictees do not have official legal title over the land.[26] No international instrument deals directly with the right to possess land, although it is widely accepted that providing humans with land is essential to a range of other human rights. These rights are protected under the *Universal Declaration on Human Rights* (UDHR),[27] the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR),[28] the *International Covenant on Civil and Political Rights* (ICCPR),[29] and the *Guiding Principles on Internal Displacement* (GPID).[30] Some specify what rights are owed to forced evictees.

Many housing rights from these instruments are present in the *City Statute* of Rio, and the Brazilian *Constitution*. These domestic laws balance urban development against citizens' rights and ensure this 'balance will not be struck hastily or insensitively'.[31] In Rio this promise has been broken. The government's failure to provide legal support, formal warnings, adequate notice, the opportunity to dispute evictions, and satisfactory alternatives is a grave violation of the protections afforded by the *Constitution* and the *City Statute*.

When art 2 (3) of the *ICCPR* is combined with art 153 of the Brazilian *Constitution*, the Brazilian government is legally bound to provide just compensation to those forcibly displaced.[32] This said, a legislative instrument means little without the government's adherence to it and the ability of the people to enforce it. China and South Korea have just compensation clauses, but during the preparations for their Olympic Games this obligation was rarely upheld. Moreover, those forcibly removed from *favelas* lose more than a house, and many losses cannot be compensated monetarily. However, neither that fact, nor the fact that a country does not have the funds necessary to provide just compensation to all affected, provides an adequate excuse.[33] The reality is that rationality and legality often lose out to the chance to host a mega-event.

The problem in Rio is not a lack of formal legal protections. Through the *City Statute* and the *Constitution* municipal governments began '*usucapião*': the judicial transformation of rights of possession into a property title deed.[34] Rather, the problem is the inability of evictees to enforce their rights. Many factors contribute to this lack of enforcement capability. First, the Rio local government was slow to enact '*usucapião*', which has added to the *favelados*' difficulty in asserting their rights to the land in the face of forced evictions.

In addition, the nature of Brazilian society and government means that those from the lower classes usually lack the financial resources, local political alliances, and clientelist links with officials necessary to take advantage of their rights.[35] Brazil is also a nation notorious for police brutality and corruption. While the new Police Chief has made the eradication of corruption a priority, the problem is still rife.[36] On top of this, the country's judicial system has been described as 'obsolete'.[37] While the *Constitution* declares the existence of an independent judiciary, this is not the practical reality. The balance between judicial accountability and independence has not been achieved.[38] If a victim of displacement does get the chance to be heard, there is little guarantee that due process will ensue.

The Brazilian government's desire to put Brazil and its legal and political institutions on show to the world will be undermined by its regime of forced evictions. The international community is recognising that within Brazil there is a grave democratic deficit. When a state fails to protect human rights the international community must intervene. Can the IOC and FIFA prove that their charters are not merely lip service?

Where do FIFA and the IOC come into play?

The prevalence of human rights violations within mega-event host cities means organising bodies cannot continue to avoid responsibility. The United Nations Human Rights Council (UNHRC) has received information from COHRE and Human Rights Watch (HRW) about infringements of housing rights in relation to these events.[39] Recommendations have been made to the IOC and FIFA by the United Nations (UN), with whom both bodies have a strong relationship. While these recommendations are not legally binding the IOC and FIFA should be prepared to implement them.

The current charters of FIFA and the IOC, and their policies and contracts that bind the host nations, do not contain provisions specifically protecting the right to adequate housing for city residents.[40] The tendency of FIFA and the IOC to shy away from addressing human rights abuses associated with their events under the premise that they do not interfere with political issues is no longer viable. In fact, 'for better or for worse, international sports and politics have always been inseparable.'[41]

One aim of the Olympic Movement is to 'through sport … build a better and more peaceful world',[42] while FIFA asserts that 'unif[ication]' and 'cultural and humanitarian values' can be promoted through soccer.[43] The failure by the IOC and FIFA to prevent or protect against human rights abuses during host city preparations directly conflicts with these aspirations. Even though they are non-governmental bodies (and thus cannot compel government compliance), they are recognised as holding considerable legal power. For example, the United States Supreme Court in *San Francisco Arts & Athletics Inc v USOC and IOC* pronounced the IOC 'a highly visible and influential international body', and acknowledged its legal authority.[44] It is therefore highly appropriate, even expected, that the IOC play a more substantial role in protecting human rights. FIFA is one of the International Sports Federations endorsed and supported by the IOC. This establishes the expectation that FIFA maintain similar standards of international responsibility. Yet FIFA and the IOC fall short of international expectations.

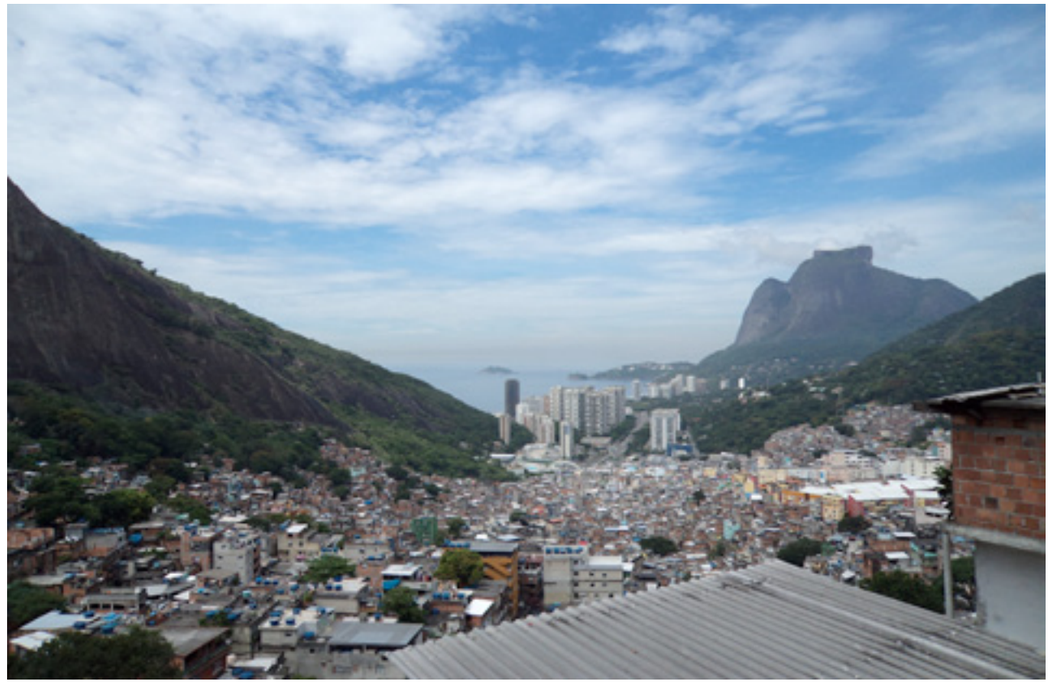
Both FIFA and the IOC have policies against the exclusion of nations based on political motives.[45] At the same time they have an obligation to protect human rights. The difficulty is in achieving a balance. The spate of human rights abuses associated with their respective events tips the balance in favour of human rights protection. There are many suggestions for how FIFA and the IOC could achieve this. They could establish human rights standards, which come into strict consideration during venue selection.[46] The contracts FIFA and the IOC make with host nations could include a Human Rights clause so the obligations are legally binding and legal remedies for breach are available.[47] Damages payable by host nations could compensate displaced residents if the local government has neglected this responsibility.[48] Host governments could be required by contract to accept resources and advice from the organising bodies on approaches to redevelopment that do not violate human rights.[49]

Committing to even one of these suggestions is a step towards improving protection of the human rights of citizens of host cities. In reality, it is difficult to see FIFA or the IOC making a genuine effort to adopt any of them, largely because they contain little or no economic incentive. The recommendations presume these organisations are comprised of sincere, socially conscious individuals. In light of their notorious instances of corruption this is placed

under question. But FIFA and the IOC should not reject the recommendations too quickly. They provide the bodies with an opportunity to clean up their image, to assume social responsibility, to practise what their (charters) preach.

Conclusion

The damaging effects of hosting a mega-event are undoubtable. Forced evictions breach the human rights protected under international law. In Brazil, the corresponding domestic legislation is proving inadequate due to the prevalence of corruption. Considering the detrimental impacts of their events, and their influential position in the global community, the IOC and FIFA should assume responsibility. The questionable motives of these organisations offer little hope of this occurring, even though it would prove invaluable to restoring their reputations. It is unknown who will win in the Olympic Games and the World Cup, but unless FIFA and the IOC commit to the protection of human rights, you can safely place your bets that it will not be the local *favela* communities.



Photographs by Zoe Donlon

Just as the myth of the orderly refugee queue continues to be peddled, the search for solutions perpetuates a gross distortion infecting the public debate, and ultimately impeding the development of sound policy

DAVID MANNE

Contracting Custody

The Outsourcing of Immigration Detention Centre Management.

H a n n a h R y a n
B.A./LL.B. IV

Scott Morrison, the Opposition's immigration spokesman, made headlines in February 2011 when he complained that flying the relatives of those killed in the Christmas Island boat tragedy to Sydney for their funerals was a waste of taxpayers' money. Morrison later apologised for the timing of his comment, but defended its content. This incident reveals the deplorable extent to which the politics surrounding asylum seekers forgets they are human. The problem of asylum seekers has been popular political fodder at least since at least 2001, when the fortuitous arrival of the *MV Tampa*, with its 483 desperate Afghans on board, turned John Howard's electoral woes around and delivered him a third term in office. Both major parties have used the rhetoric of border protection and 'stopping the boats' in an attempt to both feed upon and foster Australians' fears of those who come by boat to seek asylum. Political debate in this area is too heated and vitriolic to pay any attention to the realities of the lives of the asylum seekers and detainees. 'Boat people' are cast as a shadowy, nefarious threat to Australians' well-being and prosperity. It is difficult to remember that we are talking about human beings when the most important question seems to be which of the major parties is to blame. It is hard even to recall that the 'queue-jumpers' are applicants for refugee status. The more level-headed, non-partisan discourse around immigration detainees can be equally dehumanising in its jargon: IMAs (Irregular Maritime Arrivals) arrive in Australia on SIEVs (Suspected Irregular Entry Vessels) and are placed in IDCs (Immigration Detention Centres).

Conventional political discourse forgets that Australia's detention centres are places of discipline, despair, and disorder. While politicians use detention centres and the people detained in them as partisan battlefields, this overlooks the reality that the centres can constitute people's whole lives for years. Section 273 of the *Migration Act 1958* (Cth) gives the Minister for Immigration ("the Minister") the power to establish detention centres. Since the policy of mandatory detention was introduced in 1992, the perceived need for detention centres has escalated. At present, nine detention centres are operative in Australia, and they are home to over three thousand detainees.[1] The immigration detention network is a significant operation: the cost of administering and operating detention facilities across the network during 2010-2011 was $772.17 million.[2] Although the Minister owes all immigration detainees a non-delegable duty of care, the Minister and the Department of Immigration and Citizenship (DIAC) assume almost no practical responsibility for detainees. In December 2009, DIAC outsourced its management of all Australian detention centres to Serco, a for-profit corporation that specialises in providing government services. The five-year contract is valued at about $370 million,[3] and means that ultimately it is Serco who has possession of Australia's immigration detainees.

This article investigates what actually happens to detained asylum seekers, and what the key actors' legal responsibilities and liabilities are.[4] It argues that the present system is marred by dysfunction, miscommunication

and disorganisation, and that this is taking a heavy toll on the physical and mental health of detainees. In particular, it examines the 2012 Final Report ("the Report") from the Commonwealth Parliament's Joint Select Committee on Australia's Immigration Detention Network ("the Committee"), the contract between DIAC and Serco ("the Contract")[5] and other reports and reviews of incidents in Australia's detention centre. The article maintains a particular focus on incidents of self-harm and rioting at Sydney's Villawood Immigration Detention Centre. These incidents and the responses to them reveal the disorganisation and mismanagement of those in charge of detention centres, starkly evident in times of crisis. These incidents also illustrate the human cost of the current system of detention centre management.

I. DIAC and Serco

The present system of contracted detention centre management has created a situation in which key actors are uncertain about who is responsible and liable for different aspects of the detention system. Although the Contract runs to 729 pages, it sheds surprisingly little information on exactly how DIAC expects Serco to manage its detention centres. This has led to confusion of responsibility. For instance, under the Contract, Serco has to provide security services along with the Australian Federal Police. However, the *Migration Act* places strict limits on its powers. Serco has claimed that this leads to insufficient clarity.[6] In their review of riots at detention centres, Allan Hawke AC and Helen Williams AO similarly concluded there was a lack of clarity of the roles and responsibilities between DIAC and Serco in regard to the management of security and response to incidents.[7]

The Contract's generality is deliberate. According to the Secretary of DIAC, Andrew Metcalfe, the Department wished to set up a contract 'where the service provider would be held accountable for their results, rather than trying to tell them how to do their job.'[8] This attitude has influenced not only the drafting of the Contract, but also its administration: DIAC informed the Committee that it had contracted Serco to provide a service on its behalf, and that it considered Serco to be the experts in detention services and consequently did not attempt to intervene on matters of detail.[9] For instance, DIAC will not dictate staffing levels to Serco, even though the ratio of staff to detainees is a major concern in relation to the efficiency and security of detention centres.[10]

The Contract's generality can be explained by the context in which it was concluded. While it was concluded in late 2009, 2010 and 2011 saw a sharp increase in the number of detainees. Both the Report and the Hawke-Williams Review identify that the Contract was devised and entered into at a time when the detention population was much smaller, largely compliant and low risk.[11] According to Hawke and Williams, 'the emphasis was on establishing a physical and social environment that mitigated the risk of non-compliance. The contract is less helpful…in formulating management responses to critical incidents and in understanding roles and responsibilities in that context.'[12] With the quickly expanding number of detainees and increase in security incidents, the Contract fails to cater for the present-day immigration detention network.

The Contract delegates much of the discretion over the management of an important government service affecting thousands of lives to a private company. While this is consistent with the motivation for contracting out government services in the first place (to pay for a more efficient and expert service), it is inappropriate here. Serco has proved deficient in its fulfilment of its obligations to DIAC and to detainees, as will be discussed below, and the Contract itself is insufficient to cope with the dramatically changed circumstances in immigration detention over the last few years.

II. Disorder in Detention: Villawood

Upon its 2007 election, the Labor Government introduced seven Immigration Detention Values to form the foundations of its approach to detention. These included Value 5, which stated that detention is to be used as a last resort and for the shortest practicable time, and Value 7, that conditions of detention will ensure the inherent dignity of the human person.[13] Unfortunately, the dysfunction of Sydney's Villawood Immigration Detention Centre demonstrates that these so-called 'Values' remain mere words, and have yet to be implemented. As of January 2012, almost 400 people were detained at Villawood, including maritime arrivals and those who have overstayed their visa or failed to comply with its conditions.[14] Located just a 40-minute drive away from Sydney's CBD, it is a centre of co-existing discipline and disorder. Reports from the Human Rights Commission in 2008 and 2011 expressed concern about the physical environment of Villawood, describing especially the high security compound, Blaxland, as 'prison-like'.[15] Villawood epitomises a core problem of the detention centre system: unlike prisons, they are not punitive institutions. Yet although immigration detention is not consequent to a crime and instead precedes processing, confinement in a detention centre does bear punitive undertones.

Mental Health

The link between detention and poor mental health is well known.[16] According to Associate Professor Suresh Sundram, a psychiatrist with wide experience in detention centres, detainees suffer from 'the frustration, resentment and feelings of powerlessness and helplessness at being in immigration detention…These feelings have a potent capacity to exacerbate depressive disorders which in turn will exacerbate these feelings.'[17] Villawood saw three suicides in a three-month period at the end of 2010. The Coroner's Report into these deaths was highly critical of both DIAC and Serco. Josefa Rauluni, a Fijian man who leapt to his death on 20 September 2010, stood on a balcony threatening to jump for almost two hours before he finally committed suicide. The Coroner agreed with the psychiatrist Dr Michael Diamond's opinion that Serco's response to the situation lacked co-ordination and orderliness, and that those involved lacked the basic awareness, training and capability to handle a situation of that nature. A lack of communication between DIAC and Serco meant that Serco was for a long time unaware that the detainee David Saunders, a 29-year-old UK citizen, had previously threatened suicide. The Serco officer required to maintain sixty-minute observations of Mr Saunders failed to do so because he was not aware he was suicidal, and Mr Saunders was found hanged in a running shower. The Coroner concluded that neither DIAC nor Serco had fulfilled their duty of care to Mr Rauluni or Mr Saunders.[18] According to the Coroner:

> When a government chooses to maintain a detention system, it carries a heavy responsibility. Similarly, a company which contracts to shoulder a large part of that responsibility is under a major obligation to fulfil its contract, both to government and to those in its care.[19]

The Inquest and its recommendations did not put an end to suicides at Villawood. In October 2011, a Tamil refugee committed suicide in the centre, having been in detention for over two years. He had been accepted as a refugee seven months prior to his death but was awaiting an ASIO security assessment.

Rioting

Villawood, along with other detention centres, has also been the site of rioting. In April of 2011, three of Villawood's buildings were set alight in a protest involving up to 100 detainees. A dining room, a computer room and a medical centre were destroyed in the protest. This riot was reminiscent of an incident one month earlier at the Christmas Island detention centre, in which up to 300 detainees rioted and set fire to buildings. Five riots at the Villawood,

Christmas Island and Darwin detention centres during 2010 and 2011 had a combined estimated cost of $17.6 million.[20]

III. Evaluating Contract Performance

The incidents at Villawood show the extensive problems that have emerged from an unsatisfactory and mal-administered contract. The issues of mental health and rioting have been exacerbated by the delegation of responsibility to Serco. In the case of Mr Rauluni's death, the inadequacy of Serco's response is striking. Serco officers persisted with his removal by force despite his threats of suicide, and created a tense situation by laying out mattresses to soften his anticipated fall. Nobody with a detailed knowledge of his history was present during negotiations. He eventually jumped when officers proceeded towards him, attempting to seize him by force. This incident reveals a lack of training and foresight on Serco's part. Indeed, Serco staff receive only 4.5 hours of mental health training in the course of their four-week induction program.[21]

The quick escalation of the riots at Villawood similarly suggests Serco's incapability in dealing with major incidents. According to one report, when a building at Villawood caught fire during protests in April 2011, the Serco officers ran away, leaving the detainees to take care of themselves.[22] In its parliamentary report, the Committee also expressed a strong dissatisfaction with Serco's performance, concluding that the company had not 'performed to the standard expected'[23]:

> [T]he Committee cannot ignore the fact that Serco is being paid a very large sum of money to provide these services to the Commonwealth, and that payments are based on a contracted level of service. It is therefore disappointing and disturbing to learn of numerous shortcomings in service delivery. Staffing levels are inadequate, and place detainees and staff at serious risk…a significant proportion of officers on duty in centres are not adequately trained to perform the roles expected of them, in spite of the clear widespread existence of complex mental health issues, a and high rates of self harm.[24]

But if this inability to cope with the risks of detention centres represents Serco's failure to meet its duty of care, it also demonstrates that the Contract giving them this duty of care is inadequate. DIAC must share the responsibility for Serco's failures. The Report also suggests that DIAC is too hands-off in the carrying out of the Contract. For example, the Committee asked DIAC whether it had discussed the high rate of claims for compensation among Serco staff, and DIAC responded that it was a matter for Serco, not for DIAC.[25] Although Serco ought to meet its duty of care, DIAC must be more involved in defining how Serco ought to carry out its obligations.

Due to the Contract, both DIAC and Serco are responsible for detainees, and the prevalent issues of self harm and rioting demonstrate that both have failed in their duty of care. However, at present there seems to be few avenues to enforce this liability, as only DIAC can take action consequent to Serco's breaches of its Contract.

IV. Workplace Health and Safety

A possible avenue for challenging Serco and DIAC's fulfilment of their duties of care to detainees is through workplace safety legislation. The Commonwealth's occupational health and safety body, Comcare, already plays a prominent role in overseeing detention centres. DIAC officers are required to report all incidents that they are involved in or witness. However, it is possible that DIAC and Serco are not just responsible for harm to their employees, but also for harm to detainees. NSW and Commonwealth workplace health and safety legislation not only promotes the well-being of employees, but also of third parties present at the workplace. A person conducting a business must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business.[26] Employees must also take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons.[27] As detention centres are workplaces set up in order to hold detainees, these detainees are a highly foreseeable class of third party. Furthermore, Serco has a duty under workplace health and safety legislation to protect detainees' *mental* health as far as is reasonably practicable. According to the relevant legislation, 'health' includes both physical and psychological health.[28]

Serco must do what is reasonably practicable to ensure that detainees' health and safety, including mental health, is not put at risk from the work it carries out. Factors that determine what is 'reasonably practicable' in ensuring health and safety include the likelihood of the risk occurring, the degree of harm that might result, and what Serco knows or ought to know about the risk and the ways of eliminating or at least minimising it.[29] Given the prevalence of mental health problems and self harm in this particular type of workplace, Serco must be aware of the high likelihood of such risks. In the case of Mr Rauluni, it is clear that Serco failed to do what was reasonably practicable to address the risk of suicide, and it is likely that it has similarly failed with regard to other incidents of self harm. The difficulty, however, is in establishing that mental health problems arise from *the work Serco carries out*. Defined broadly as 'detaining people', the work that Serco carries out certainly causes mental health problems. However, it is possible to take a narrower view of Serco's work: that it ensures the security and day-to-day running of a government program. On this view, Serco would probably escape liability under workplace health and safety legislation for incidents of self harm amongst detainees.

V. Conclusion

It is clear that as long as asylum seekers remain in detention for the lengthy periods they do at present, self harm, discontent and violence will continue to be risks. The detention system itself is damaging, and so the Gillard Government's move towards facilitating more asylum seekers in community detention should be welcomed. Worryingly, the Coalition does not support a time limit on detention. According to the Shadow Immigration Minister Scott Morrison, 'we support the maintenance of detention for persons until their refugee status is determined.'[30] This position overlooks the damaging effects of longer-term and indefinite detention on detainees.

As this article has sought to show, the current method of managing detention centres is responsible for exacerbating the problems inherent in a system premised on mandatory detention. While the effective management of detention centres is no doubt a difficult issue, it is questionable whether such a task should be contracted out to a third party such as Serco. Contracting out this service leads to the risk of confusion as to what responsibilities lie with which body. It also makes it difficult to ascertain which body is liable for incidents in detention centres. Even if it is accepted that a specialist private company is better equipped than a government agency to take care of Australia's immigration detention network, it is clear that the Contract is not working well. The current system has led to disastrously bungled responses to detainees' mental health needs and disobedience. Given that it was negotiated at a dramatically different time in the history of Australia's detention centre network, the current Contract is no longer appropriate.

Every man has a property in his own person. This nobody has any right to, but himself

JOHN LOCKE

Proprietary Rights in Non-Reproductive Human Tissue

N e h a K a s b e k a r
B.A./LL.B. IV

Should we have proprietary rights in our own tissue? An affirmative answer to this question can enable the assertion of rights in a variety of situations that currently lack an adequate legal response. Such situations include cases where an individual seeks to recover severed body parts coming under the possession of another; where a museum seeks compensation for damage to unmodified human remains housed in the museum, and where a deceased person's next-of-kin endeavour to prevent the mutilation of body parts extracted from the deceased person.

In the present essay, I advance the argument that an explicit property law regime ought to be recognised in relation to non-reproductive human tissue; that is to say, human bodies, body parts such as organs or limbs, smaller cell structures like the human genetic sequence, and bodily fluids such as blood. I begin by considering the current state of property law in an Australian context. I then consider how the default position has emerged by exploring three primary reasons offered for the non-recognition of property rights: (1) the moral repugnance in reducing human tissue to the status of property, (2) the public policy implications (namely, the pragmatic consideration that a broad recognition of proprietary rights may result in a surfeit of human tissue to regulate, and the potential to fetter valuable medical research and biological inventions),and (3) how other areas of law may be better suited to regulating non-reproductive human tissue. I then advance a brief positive argument in favour of recognising property rights on the basis of the conceptual fit of property law to the domain of non-reproductive human tissue. I conclude by suggesting that the clear recognition of property rights in non-reproductive human tissue would not involve a radical overhaul of the current legal position.

The Current Legal Position

Determining what property rights ought to subsist in non-reproductive human tissue (NHT) requires a basic understanding of the conceptual scheme of property rights. To "have property" in something is not to fully own that thing but rather encompasses a variety of possible property rights, including the right to possess,[1] exclude, control, use, sell, donate, offer as security, or destroy.[2] These rights may be bundled together in relation to various objects. By way of illustration, Native Title to land is a right purely permitting use of the land, while ownership of a music system, which is a good, confers upon the owner the entire set of rights referred to earlier because "ownership" characterises the strongest of all possible proprietary rights.

In the context of human tissue, the present legal position is unclearly stated and piecemeal. Australian State legislation, in a limited range of settings, empowers acts and grants rights appearing consistent with property law without explicit recognition that proprietary rights do in fact inhere in NHT. Therefore, extracting and using tissue from corpses is permissible,[3] as is donation of tissue, such as blood and solid organs, from living persons,[4] although sale of such tissue is prohibited.[5] There are no civil remedies available for the infringement of these statutory provisions.

The common law position adopts the *res nullius* rule that there is no property in the human body.[6] This restrictive approach conforms to those of law reform bodies, which have expressed a reluctance to endorse NHT as falling under the ambit of property law; for instance, the Australian Law Reform Commission, in its last direct consideration of the question in 1977 categorically denied a role for property concepts, stating that "[t]here is no reason to endow [human] tissue with the attributes of property",[7] and has affirmed the position in its more recent Genetics inquiry.[8] The *res nullius* rule is paralleled in other Western common law nations. Relatively recent examples include *Moore v Regents of the University of California*,[9] a Californian Supreme Court case where the majority of the court denied the plaintiff's claim of conversion against the medical practitioner-defendants, who had patented a valuable cell line based on unauthorised research conducted on extracted samples of Moore's spleen. Additionally, in *Dobson v North Tyneside Health Authority*,[10] the English Court of Appeal held that no proprietary rights were held by the estate of a deceased woman in the deceased's brain, removed for coronial examination. It must be noted however that the homogeneity of Western law in relation to the non-recognition of property rights is fracturing.[11]

Two common law exceptions have arisen to the *res nullius* rule. The first exception is the recognition of the right of a deceased's estate to properly dispose of the deceased corpse;[12] the right here, while not explicitly characterised as such, has been regarded as a highly-circumscribed grant of possessory title or a right to custody. The second exception recognises the conditional existence of a proprietary right to possession or control in human tissue provided the tissue has been subject to an exercise of skill or labour, transforming it into an object with a different set of attributes from those previously held.[13] The classic, if technologically anachronistic, example is the seminal High Court case of *Doodeward v Spence*,[14] where the corpse of a stillborn two-headed baby placed in alcohol and exhibited by the appellant was regarded as sufficient application of skill to establish the appellant's proprietary interest in the object and thus recover it.

Responding to the Arguments Against Proprietary Rights in Human Tissue

An important interest to consider when advocating for law reform, particularly legislation likely to have broad sociological implications, is the ethical dimension of the proposed legislation. Applying these considerations to the property context, an oft-cited argument against recognising property rights in NHT is the moral repugnance many feel in commoditising human tissue,[15] the essential fear being that market exchange of tissue would devalue human personhood or, framed differently, reductively impose a solely-economic value on material that has profound non-economic value. The fear has its roots in former times when persons could be legally regarded as property, for instance the ownership of slaves,[16] and separately, wives by their husbands.[17] The concern is not simply an abstract one but has affected judicial decision-making, as expressed most eloquently by Arabian J in one of the majority judgments in the Californian case of *Moore* when he suggested that according property rights in human tissue would "commingle the sacred with the profane".[18]

Two rejoinders are pertinent here. Firstly, it is important to recognise that social understandings of particular legal issues are imperfect determinants of what the law ought to be since lay conceptions often conflict with one another. Consider that property rhetoric is embedded in ordinary language, implicit in terms such as "my hand", "her heart" or "your leg", in accordance with the liberal concept of autonomy. If the morality argument is a simple appeal to law's function to legitimate pre-existing social beliefs, this may give us good grounds to conclude, to the contrary, that lay understandings support property regulation of human tissue. More fundamentally, there is no necessary inconsistency between property and personhood; indeed, we accept pets as having the legal status of property without any implications for their moral status and the extent to which they are loved and valued.[19] We also accept other commercial transactions like life insurance that place an artificial price upon the ostensibly priceless – a person.[20] It is therefore difficult to see why human tissue, even more so given that it is an inanimate substance, is treated differently.

The potential public policy implications of the explicit recognition of proprietary rights in NHT provide additional reasons for negating possible property rights. As is widely accepted, biomedical and technological advances have significant social utility. It is uncontroversial that in order for these socially-beneficial advances to continue, some property rights ought to be recognised in order for intellectual property holders to derive economic value from their research by excluding others from capitalising on the gains. These property rights come under the skill exception, where property rights may attach to transformed human tissue appropriated by medical researchers and clinicians after a medical procedure on the tissue source rather than a right to the human tissue in its original form. If property rights in the non-transformed tissue were recognised and vested in the individual tissue source, it is argued that firstly, as a pragmatic matter, it would create an abundance of human tissue to regulate, placing an extremely onerous regulatory burden on hospitals and research facilities dealing with NHT.[21] The second concern is that an overly broad construction of property rights in human tissue would fetter valuable medical research and biological inventions.[22] The rationale here, as Mahoney and Clark state, is that extending property rights to tissue sources implies "[g]iving tissue sources powers to restrict uses of excised tissue or allowing them to destroy tissue [which] can have the deleterious effect of preventing human biological materials from being put to productive use".[23]

In relation to the pragmatics concern, it is difficult to see how this claim has application beyond the medical research context. Furthermore, it is debatable whether the claim is even true considering that hospitals and research facilities are already subject to a similar administrative burden in terms of record-keeping of patient consent in relation to medical procedures. To the extent that increases in regulatory responsibility are experienced, the countervailing argument is that such responsibility would be in line with best-practice requirements in any case.[24] In relation to the concern about fettering scientific progress, it is critical to note that no evidence has been provided to substantiate the claim that medical research would necessarily suffer through a reduction in available tissue if tissue sources were granted property rights in tissues.[25] Even if both the public policy concerns were taken at their highest, the arguments do not necessitate that property rights in NHT should never be recognised but rather point to the difficulty in establishing a balance point between the tissue source's right to control use or share in the profits of research conducted using their tissue where the tissue has been non-consensually obtained, as in *Moore*, and the public good in facilitating scientific research. It may be that the solution lies in admitting the tissue source's right to control use while curtailing the property right to destroy the tissue, without negating property rights completely[26] (although more analysis of the precise content of the applicable property right is required). Ultimately, what goes unconsidered by public policy arguments of this kind is that the uncertainty arising from the absence of express recognition of property rights in human tissue may inhibit medical research given uncertainty as to the

legalities of particular forms of research.

The third principal objection to relaxing the *res nullius* rule is that other areas of law may be better suited to regulating tissue. There are two main situations where remedies are sought in relation to bodily infringement: where people's right to control access to their own or their next-of-kin's bodies and body parts is at issue and where people seek to have some part in determining what use is made of their human tissue, predominantly arising in the context of medical practitioners non-consensually using tissue extracted during a medical procedure for research and patenting purposes. Numerous potential substitutes for property law have been identified to deal with these situations. In relation to the first situation, tort law, through the tort of battery and corresponding criminal sanctions, have the capacity to protect people from unwanted access to their bodies.[27] In relation to the second situation, the majority in *Moore* ruled against a finding of property in part because it regarded the doctrines of fiduciary care and informed consent as sufficient to protect individual rights in tissue extracted during medical procedures. Alternatively, academics have suggested that the provision of consent in the context of extracting tissue from oneself or one's next of kin can be conceptualised as the operation of the law of guardianship or agency,[28] and that remedies for inappropriate conduct by medical professionals, such as wrongful acquisition of tissue, are available in tort through the doctrine of negligence or in privacy law where the initial acquisition was not wrongful but later use is.[29]

While the above are valid instances of law extending to NHT without requiring recourse to property concepts, the *exclusive* application of non-property concepts to the domain of human tissue is unsatisfactory since there may be *sui generis* situations of infringements that lack remedies unless a more comprehensive regime is devised, as the situations outlined by way of introduction to this essay illustrate. The fact that the law is incoherent is itself good grounds for altering conceptual approaches rather than maintaining the status quo. There is a significant body of criticism taking the view that the law regulating human tissue lacks any centralising legal principles,[30] with both legislature and common law jurisprudence taking a reactionary approach and dealing with human-tissue-related problems as they arise and confining them to those particular contexts. For instance, in cases arising out of very similar facts in relation to the issue of whether the fixing of tissue in paraffin was sufficient for the tissue to come under the *Doodeward* skill exception, judicial opinion has taken polar opposite views, when contrasting the English Court of Appeal decision in *Dobson v North Tyneside Health Authority*[31] and the NSW case of *Pecar v National Australia Trustees Ltd*.[32] It is therefore necessary to consider how property law may be a better conceptual fit for NHT.

Argument in Favour

The unique capacity of property law to bring clarity and consistency to the regulation of human tissue is an important rationale for the explicit recognition of property rights in human tissue. Critical consensus has long been that the function of property law is to create a regulatory nexus between people and things since a potential for conflict arises in situations where more than one person might interact with a thing.[33] Where human tissue is detached from the body, has a physical reality, and is valuable, there is a clear property aspect, and obfuscation of this fact prevents the law from addressing the range of conflicts that will continue to emerge.[34] Property law, by virtue of encompassing a number of possible legal and equitable proprietary rights, permits a number of interest-holders to claim an interest in a particular object. Further, in determining the relative merits of competing claims to an object, property law has developed a consistent body of law known as 'the priority rules' that articulate how the matter ought to be settled. Upon application of the priority rules, property law may award more broad-ranging, conceptually-suited remedies for infringement of human tissue, such as detinue and conversion, than other legal areas. Detinue is an action to recover possession of wrongfully-taken property, enabling the plaintiff to obtain either damages or, crucially, the property itself.[35] Conversion compensates the plaintiff having actual possession or the right of possession to some property for damage to or loss of that property where the defendant intentionally deals with the property in a manner seriously inconsistent with the plaintiff's interests.[36] Although there have been challenges to the utility of property law remedies, particularly conversion, in the NHT context,[37] there is good reason to think these challenges can be met by slight conceptual extension.[38]

The extension of a more expansive property regime to NHT would not demand a significant departure from the current state of the law. As several commentators have noted,[39] much of the reason that existing case law denies property rights in the body is based on an antiquated conflation of ownership rights with other forms of proprietary interests; however, precluding ownership in NHT is perfectly compatible with recognition of some form of proprietary interest. Similarly, it could be said that there is an existing basis in legislation for recognising proprietary rights in NHT. Applying the analogy of Native Title cases, where a popular line of argument has been that the absence of a statutory prohibition against exercise of a particular right is prima facie evidence in favour of the right's existence,[40] it could be said that the human tissue legislation impliedly contemplates the existence of a full proprietary right, the right to alienate tissue, in the very act of imposing a prohibition against sale.[41]

Conclusion

The often acrimonious debate surrounding the appropriate legal regime for human tissue is a reflection of the moral and cultural significance accorded to material derived from the human body. The case against property rights in non-reproductive human tissue relies consequently on the moral concern generated by recognition of property rights as well as the public policy implications of recognition and the notion that other areas of law are more appropriate for regulating the human-tissue domain. The case for explicitly recognising property rights in non-reproductive human tissue lies in refuting the above arguments and relying on the particular conceptual aspects of property law that make it the ideal legal vehicle to accommodate human tissue. Ultimately, the explicit recognition of the possibility of creating and allocating property rights in non-reproductive human tissue is merely the first step. The question that must drive future legal developments is the precise content of the proprietary rights that attach to each kind of non-reproductive human tissue in order for the wider community to undertake dealings with non-reproductive human tissue with greater certainty.

Young people must be included from birth. A society that cuts itself off from its youth severs its lifeline

KOFI ANNAN

Custodial Sentences for Juvenile Offenders in New South Wales

Do juveniles reoffend to return to a safe haven?

Shoshana Robuck B.A. IV

Remona Zheng B.A./LL.B. III

In a recent Sydney Morning Herald (SMH) investigation into juvenile offending rates, long-term data was cited showing that over half of the juveniles who came into contact with police in 1999 were re-convicted within 10 years. With Juvenile Justice NSW, as part of the NSW Department of Attorney General and Justice, mandated to reduce the proportion of reoffending by 10 per cent by 2016, focus must now firmly shift to ways to approach and evaluate juvenile justice in New South Wales: its rehabilitative value, the nature of reoffending, and the qualities of young people who reoffend.

Custodial sentences, for many disadvantaged young offenders, can mean access to educational opportunities and support in a more stable environment than they experience at home. In addition to psychological support, counselling services, and the shelter of (albeit barbed-wire enclosed) roofs and walls, a wealth of educational and training opportunities and courses are made available. However the SMH investigation implied a possibility which raises more questions than answers: it may be that the very stability and support provided by more well-resourced juvenile justice centres encourages juveniles to reoffend.

Another prevalent theme in earlier research and new legislation brought in, was the issue of leaving custodial sentences as a matter of last resort. Justification for such argument includes the potential detainees' retainment of strong social relationships and improved prospects for future employment. It has also been found that custodial sentences have no effect on the encouragement of deterrence. It is on these points that this article turns, essentially evaluating the effectiveness of the current juvenile justice system in NSW.

Recent Trends and Data

In order to come before the Children's Court of NSW, juveniles must have been accused of committing an offence while above the age of 10 years and below the age of 18 years, and must have been apprehended by the police for that offence before they are aged 21.[1] Juvenile Justice NSW is then responsible for administering youth conferencing or supervising young offenders who have received custodial sentences or community-based orders.[2] Along with reducing levels of crime and anti-social behaviours, reducing reoffending is one of Juvenile Justice's primary objectives.[3]

In surveys conducted over the last decade, several risk factors have been identified as correlating with offending behaviour. Both the NSW Young People in Custody Health Survey[4] and the Young People on Community Orders Health Survey[5] revealed that youth with disadvantaged backgrounds, disrupted families, poor academic achievement, and those who regularly partook in risk-taking behaviour, were amongst the most frequent offenders. In 2007, BOCSAR[6] data showed that school attendance and behaviour and past contact with the criminal justice system were both key factors which increased the likelihood of reoffending. Similar findings

were uncovered in the 2010 NSW Juvenile Justice Policy Review[7] in relation to factors indicative of reoffending. Also identified in that report were accommodation problems and lack of structured recreational and engaging leisure activities. This data suggests that the rehabilitative aims of Juvenile Justice NSW are largely unachieved and that the current methods are not comprehensively addressing the factors that seem to be contributing to reoffending.

Custodial Sentences as Deterrent or Incentive to Reoffend

Subsequent to the mandate of Juvenile Justice NSW, to reduce the proportion of juvenile offenders who reoffend within 24 months by 10 per cent by 2016,[8] a wealth of research has attempted to discover why juveniles reoffend. In comparison to adults, studies have shown that juveniles are, proportionately, both more likely to reoffend,[9] and more likely to do so more frequently,[10] than adults.

A recently published study, however, focused on assessing intention to reoffend amongst young offenders sentenced by the Children's Court of NSW.[11] While 22.8 per cent of the young offenders interviewed indicated their intention to reoffend,[12] the results interestingly revealed that for young offenders receiving a custodial order, the odds of intending to reoffend were 2.8 times that of a person on a non-custodial order.[13] This finding, in particular, seems to suggest that for many juvenile offenders, the option of whether or not to reoffend is a decision one considers almost immediately after conviction, far before the actual opportunity to reoffend presents itself again. A number of reasons have been suggested for the high rate of recidivism amongst young people, and it may largely account for this premeditated intention to reoffend, which is 'borne out of feelings of disenfranchisement' and marginalisation from society.[14]

The recent SMH series on juvenile justice instead suggested that the rehabilitative, supportive atmosphere of well-resourced custodial facilities for juvenile offenders may, in fact, encourage recidivism due to its relative stability compared to home life, by presenting an attractive model of living to young people who are not used to the 'safety' juvenile justice centres inherently provide.[15] Lee Bromley, a Chaplain at Reiby Juvenile Justice Centre told SMH that she is aware of instances where juveniles have reoffended 'so they can come back to Reiby because … [they] feel that it's a safe environment'.[16] Bromley's remarks were echoed by the Manager of Reiby, Michael Vita, who added that the function of the centre was to be rehabilitative rather than purely punitive; a supportive environment rather than 'a place like a jail or an institution'.[17]

Bromley and Vita's comments seem to be indicative of the danger presented by a custodial model for juvenile justice where custody is viewed by juveniles as safer and more supportive than home. Amongst underprivileged young people who have not received support, either from their families or their teachers, to be successful in their studies at school, it may be that the facilities offered by juvenile justice centres are preferable. Within seven of the nine juvenile justice centres in NSW, the Department of Education and Training provides courses to inmates. Barista courses have been offered, targeting young offenders who have, for some reason, disengaged from mainstream education.[18]

More light will be shed in the 2016 government reviews on whether these strategies are working towards discouraging subsequent intention to reoffend or whether in fact, the system and its various sources of support are in a way, paternalistically possessing juveniles into recidivism. Should it be found that reoffending rates have not been reduced as much as hoped through these measures and that juveniles are still re-entering detention solely to seek the support and safety that lacks in their home environment, it will certainly be questionable whether such services should still be provided at JJCs. However, that is not to say that these support systems should not be made available to juveniles. Perhaps a better outcome would be achieved were the government to provide these aids through a different outlet, such as through community settings or with strong family involvement, thus addressing the source of the problem through more rehabilitative means.

The Importance of Family and Community in the Rehabilitation Process

Earlier research, informed by the welfare model of sentencing, likely prompted the inauguration of the *Children (Criminal Proceedings) Act 1987* (NSW). This model of sentencing considered detention and rehabilitation to be synonymous, and that, through institutionalisation, young offenders would be rehabilitated due to the discipline and freedom from a negative environment. This new legislation highlighted the importance of detention as a last resort measure to be used in the circumstance that there was no other suitable method to deal with the offence, falling in line with Australia's obligation under art 37(b) of the *Convention of the Rights of the Child* which states:

> The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[19]

Other rationales for utilising incarceration only as a last resort include the damaging impact custodial sentences have on the young offender's relationships, as well as their future employment prospects due to the stigmatism attached. As noted by the National Youth Affairs Research Scheme report,[20] detention removes positive social contacts and is not particularly effective when it comes to deterrence. Furthermore, it has been found 'that a prisoner without family support is six times more likely to reoffend in the first year than one who has maintained family ties'.[21] Thus, the NSW Juvenile Justice Advisory Council has been encouraging the increased use of s 24(1)(c) of the *Children (Detention Centres) Act* 1987, a provision permitting outings and leave for detainees, which would ultimately foster family and community relationships during the period of detention. Institutionalising support of these relationships could potentially develop the stability that the young offender's home environment lacked, and which would be further aggravated by the time spent in incarceration, whilst also making reintegration into society post-release a smoother transition, and reducing the likelihood of premeditated reoffending.[22]

Conclusion

The recent suggestion in the media that youths may be choosing to reoffend in order to return to the safe and well-resourced confines of juvenile justice centres is a daunting implication to swallow. Whilst there may be many other reasons why young offenders are choosing this path, the implication is integrally concerned with the juvenile justice system's possession over detainees, as well as a possibility that our criminal justice system is just not well-catered towards properly resourcing youths who have spent time in detention, with the skills required to properly integrate back into the community, as well as the maintenance of solid relationships with familiar outside contacts. Perhaps the strategies employed by the various juvenile justice centres throughout the state in the provision of courses may provide a possible solution to the current situation. Likewise, the NSW Juvenile Justice Advisory Council may also be correct in their mission to encourage greater use of the outings and leave provision under s 24(1)(c) if it means that young offenders will be able to maintain solid relationships with the community from which they have been incarcerated. Only time will tell.

The authors are the Co-Chairs of the SULS

Juvenile Justice Mentoring Scheme at Juniperina. Born in semester 2, 2011, the program has thrived on the generosity of the law student volunteers. Riding on the success of Juniperina, the program is expanding in semester 2, 2012, to Cobham, the all male remand centre. If you would like to participate in the program or are interested in more information, visit the SULS website, www.suls.org.au, or email the Co-Chairs at juvenilejusticementoring@suls.org.

All human beings have three lives: public, private and secret

GABRIEL GARCIA MARQUEZ

#doiownthat?

Possession, Information and Social Media

Jonathan Hall Spence
B.A./LL.B. V

The corollary of possession is the right to exclusive use and control. With this in mind, in what sense can we be said to possess the various types of information we upload, post, blog, and generally disseminate through social media sites? This article considers some of the ways we might assert control over this information to prevent misuse or disclosure of anything from our visionary photography to banal status updates about the mischief of the weekend.

The general position in Australian law is that there is no property right in information,[1] and hence none of the bundle of rights to possess and control that accompany the recognition of a right as proprietary. This article considers three bases on which we might protect the information we disclose into the realms of social media: intellectual property rights, the equitable duty of confidence, and rights under privacy and telecommunications statutes. It may well be the case that we need not resign ourselves to the consequences of the ill-considered or improper decisions to subject our information to the vagaries of the internet.

Intellectual Property

If we can establish that what we have released onto social media constitutes intellectual property, a strong set of rights accompanies ownership. Of the protections discussed in this article, only this action involves the assertion of a proprietary right. The intellectual property that is most likely to be created on social media, whether advertently or otherwise, is copyright. Copyright is a proprietary right in the expression of ideas in certain artistic, literary, musical and dramatic forms known as 'works' or in sound recordings and cinematograph films, often referred to as 'other subject matter'. It is important to keep in mind that copyright does not protect *ideas* only their *expression* and in that sense does not create property rights in facts or information.[2]

Copyright is slightly different to other proprietary rights in that the author (works) or maker (other subject matter) of the copyright material is bestowed with certain exclusive rights by statute. These include the right to reproduce the material, the right to perform the material in public, and the right to publish the work, among others.[3] If any person not the owner does an act comprised in the copyright they will be infringing the copyright,[4] and may be subject to damages or injunctive relief to remedy the infringement.[5] In this way a social media user may have substantial ability to limit the uses made of such material.

The key limitation of copyright is that it protects certain materials much better than others. There are two factors which substantially limit the types of user-generated material which will be afforded protection. These are the requirements of originality and substantiality.

Originality

It is a precondition to the protection of works that they be 'original'.[6] Originality is a difficult concept to define, and has recently seen a significant revision in *IceTV v Nine Network Australia*,[7] a decision which has left the law somewhat unclear. Prior to *IceTV*, for a work to be 'original' it was enough that the author exerted significant effort in the creation of the

material. So long as there was 'sweat of the brow' the material could be protected by copyright.[8] Neither novelty nor creativity was required. So it was that phone books,[9] a collation of University past examination papers,[10] and betting slips have all been held to be original, and ultimately copyright,[11] works. Under this formulation almost any material uploaded to the internet, so long as it took effort to produce, and so long as it can be described as artistic, literary, musical or dramatic, could potentially be a work of copyright.[12]

As has been touched upon, the law has recently undergone a change that has significantly reduced the scope of material in which copyright will subsist. In *IceTV*,[13] the High Court overturned a decision by the Full Federal Court in which the orthodox position had been applied to a TV programme guide. The Full Federal Court held that because selecting and arranging programming involved significant 'skill and labour', the guide could be the subject of copyright.[14] On appeal, the 'skill and labour' test was explicitly rejected by French CJ, Crennan and Kiefel JJ, holding that originality for the purposes of copyright required that the work originate with some 'independent intellectual effort'.[15] Gummow, Hayne and Heydon JJ did not adopt this language but similarly held that the actions of Channel Nine in putting together the final expression of the programming decisions, the programme guide, were insufficient to be 'original'.[16] The skill and labour here was 'extremely modest' and the facts and information (the programme titles and times) were inseparable from their expression (the programme guide).[17]

While French CJ, Crennan and Kiefel JJ stipulated that 'independent intellectual effort' did not mean a requirement of 'novelty or inventiveness',[18] it appears that significant effort, or 'skill and labour', on its own will no longer be sufficient for the subsistence of copyright. The consequence of this decision is that information which we may consider valuable due to the considerable time and effort that went into its production, will not be protected if it does not involve the requisite 'intellectual' exertion. For example, material closer to bare facts such as descriptive or instructive blogs may not be protected, even though they took significant time and effort to produce.

Substantiality

In the social media context, the second very relevant limiting factor is the requirement of substantiality. The leading case on this point is *Fairfax Media v Reed International*,[19] involving the creation by LexisNexis of summaries of articles published in the Australian Financial Review. In creating these summaries, written by an employee, LexisNexis used exact copies of the headline and by-line of the original article. Fairfax asserted that, among other things, this service was infringing copyright in the *headlines* as a separate work of copyright. The court held that, while the creation of headlines may involve a significant amount of creative effort, the headings were simply too insubstantial to constitute a literary work in which copyright subsists.[20] In coming to this decision, Bennett J noted that:

> While the use of devices such as puns and double entendres may be clever, evoke admiration and attract attention … denial of copyright protection to 'works' that are simply too slight have long been invoked … the mere fact that a word or sequence of words provides information or pleasure is not necessarily sufficient to constitute a literary work for the purposes of the Act.[21]

These comments have substantial ramifications for social media content. It may well be that status updates or blogs, no matter how brilliantly witty, insightful, soulful or satirical, will not be protected by copyright as they are simply too insubstantial to constitute a literary work. This is likely however to be a contentious issue going forward. When does a blog become a short story, a status update a poem? Literary merit is not the test,[22] it is when we can say that these things have a literary *nature* that the law of copyright is attracted. That is an issue fraught with uncertainty.

User Agreements

The above two issues have been flagged as factors which limit the scope of the material that is likely to be considered copyright. There is one final and very important issue however which limits the assertion of copyright. This is the issue of user agreements. Section 35(3) of the *Copyright Act* makes clear that the ownership rules in the Act may be excluded or modified by agreement. This means that, even if a user can show that what has been uploaded is a substantial, intellectually independent expression of an idea, the copyright in that work may not belong to the user, or their rights to use that copyright material may be limited, if the agreement between the user and the social media service so stipulates.

Sites such as Facebook, Twitter and Tumblr all have user agreements with provisions dealing with copyright. The Twitter policy is an illustrative example:

> You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).[23]

Other social media terms of service are effectively identical. The user retains ownership of the copyright but grants an unconditional licence for the social media site to make unrestricted use of the copyright material.[24] The significant implication of this agreement is that, while a user will still be able to enforce rights against *other users* to prevent misuse, they will have no such rights against the social media site itself. The site, as an unconditional licensee, has the right to do any of the works consisting in the copyright. The only rights the user may enforce are their moral rights, which are unassignable.[25] These include the right to have their authorship attributed to the work[26] and the right to prevent its derogatory treatment.[27]

Confidential Information

The protection of confidential information, unlike copyright, does not rely on the creation of any proprietary rights. In equity, where information is imparted in circumstances of confidence, the person to whom information is disclosed is said to be bound by conscience not to misuse or disclose that information.[28] The equitable obligation arises out of the *relationship* between the parties rather than any objective value of the information.[29]

As the action for breach of this duty of confidence arises in equity, a wronged party is entitled to injunctive relief as of right, available quia timet to restrain an actual or apprehended breach.[30] Additionally, Meagher, Heydon and Leeming posit that the equitable duty is analogous to a fiduciary duty, such that a third party who knowingly receives information in breach of confidence may become a constructive trustee to the person to whom the duty was owed.[31] This latter point is particularly important in the social media context, significantly extending the range of persons against which protection of confidential information can be enforced. This may go some way to counteracting the 'viral' nature of social media as each person receiving the information with knowledge may become liable as a constructive trustee, subject to the range of equitable remedies including an account of any profits made out of unauthorised use of the information. The equitable duty is perhaps the most comprehensive means for protecting secrets and other sensitive information placed on the internet.

There are four requirements to establish breach of the equitable duty:

1. the information in question must be identified with specificity;
2. the information must have the

necessary quality of confidence;
3. the information must be received by [the defendant] in circumstances importing an obligation of confidence; and
4. there exists an actual or threatened misuse of the information, without [the plaintiff's] consent.[32]

The significant limitation for user-generated material is the third requirement. While most instant or private messaging systems would probably be protected,[33] it is highly questionable whether material posted on the internet 'for all to see' could be described as circumstances of confidence.

There may well however be some scope for this issue to be overcome. The recent UK case of *Douglas v Hello!*[34] illustrates that imparting information to a large number of people may still be considered circumstances of confidence. That case concerned the unauthorised taking of photographs at the wedding of Michael Douglas and Catherine Zeta Jones. While confirming that once information is in the public domain it cannot be the subject of confidence, the court did not think that the wedding should be considered to have occurred in 'public' and hence was protected by the duty of confidence. The court was of the opinion that:

> To the extent that privacy consists of the inclusion only of the invited and the exclusion of all others, the wedding was as private as was possible consistent with it being a social event.[35]

There is a clear analogy here with certain social media sites and internet forums where information is imparted in a 'closed' environment, in that only certain persons can view or receive the information. The prime example is Facebook. A Facebook user can control the individuals who see their information and how much of that information is seen. In that sense it is an environment consisting of the inclusion 'only of the invited'. It may well be that a Facebook profile with appropriate privacy settings may be considered a 'closed' environment such that any information there imparted, even if it is to the user's substantial number of 'friends', would be considered circumstances of confidence. The equitable duty may be imposed upon all of those friends in respect of appropriate subject matter.[36]

Under Privacy and Telecommunications Statute

Given that the law regarding a direct tort of invasion of privacy in Australia is currently somewhat ambiguous,[37] the final recourse of a social media user may be to statutory protections of privacy. There are two key statutes in this regard, the *Privacy Act 1988* (Cth) and the *Telecommunications (Interception and Access) Act 1979* (Cth).

The Privacy Act regulates the use that can be made of personal information by requiring private organisations to comply with the National Privacy Principles (NPPs).[38] This includes requiring information to be collected lawfully and fairly,[39] prohibiting misuse or disclosure without consent,[40] and requiring that reasonable steps be taken to prevent loss or disclosure.[41] Complaints regarding breach of the NPPs can be made to the Privacy Commissioner, but any determinations are not binding upon the parties.[42] This is a weakness that has been criticised by the ALRC.[43]

Aside from the remedial weakness, the main limitation for the *Privacy Act* is the type of information it protects. The NPPs only apply to 'personal information', a term defined in s 6 of the Act as:

> information or an opinion … whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.[44]

This definition has the effect of excluding much of what is uploaded to social media from the application of the Act, as the user's identity may not be apparent. With that said however, the Act would cover most of the information provided when creating an account with social media sites.

The protection provided by the *Telecommunications (Interception and Access) Act* is slightly stronger than that in the *Privacy Act*. Section 7 of the Act prevents the interception of a communication passing over a telecommunications system[45] from the moment it is sent or transmitted until it is accessible to the intended recipient. Interception is defined as listening to or recording a communication without the knowledge of the person making it.[46] Anyone who has intercepted a communication in breach of s 7 is prevented from disclosing or misusing it by s 63. Contravention of these provisions has both criminal[47] and civil[48] penalties. Civil remedies include damages, injunctive relief, and an account of any profits made out of the contravention.[49] The Act provides protection similar to the equitable duty of confidence, giving wronged users substantial power to limit the use of information obtained in contravention.

The downside of the Act appears to be its limited applicability in the context of social media. In particular, its characterisation of interaction as point-to-point, consisting of 'senders' and 'recipients', seems inadequate to address the generally undefined, large audiences of more recent, one-to-many forms of social media interaction. It will be interesting to see how, if at all, the provisions of the Act will be adapted to the newer 'forum' nature of most social media.

Conclusion

The above discussion has revealed that there are a surprising number of ways in which information or material disclosed on to social media sites, and even the internet more generally, can be controlled. The way in which this is done depends very much on what it is that is sought to be protected. Copyright law will be better at protecting 'art' — creative photos, literature and multimedia. The equitable duty protects more intangible information — secrets, both commercial and personal, being the key purview of the action. Statute, different again, will be useful for protecting more traditional forms of communication, like email and traditional forms of information, such as a user's 'details'. Together these actions constitute a useful set of tools for a social media user concerned to protect the material they place online.

While is it accepted that the State Government wishes to encourage onshore petroleum mining, it is submitted that it should not do so at the expense of the landholder's existing operations, the wider public interest in preservation of fresh water or so as to pit a landholder against a substantially greater resourced and sophisticated miner

MARYLOU POTTS

Possession that only scratches the surface?

Jessica Harwood
B.Int.St/LL.B. V

While 'possession is nine tenths of the law,' in the case of mining grants over private land, possession is only one tenth deep. A recent surprise to many Australian urban dwellers is that the Crown owns the minerals and petroleum under private property.[1] Those living rurally have known this for a long time. As farmers have clashed in the past with coal mining companies, a struggle personified by the blockade of farmers and environmental activists on the Liverpool plains, now they face the extra threat from coal seam gas (CSG).

The Landholder's experience of CSG expansion in NSW has left many feeling railroaded into a resource management system that does not adequately protect their individual interests nor the wider public interest in preserving groundwater, prime agricultural land, biodiversity and the climate. The public outcry through the groundswell movement Lock the Gate Alliance has seen farmers and rural landholders join with environmental groups and the Greens to demand stricter protections for land and water as well as a fairer balance of power in the Act.

New South Wales is at a critical stage in the development of its CSG regulatory framework. With the conclusion of the Inquiry into Coal Seam Gas and a suite of new reforms and policies on the negotiating table, the NSW Government has the opportunity to right the current imbalances in the *Petroleum (Onshore) Act 1991* (NSW). The question is how far these reforms go to give landholders a voice and whether they protect landholder's interests at a strategic planning level as well as individually during the negotiation of an access arrangement.

While the new policies make important steps towards protecting prime agricultural land and groundwater at a strategic planning level, there are significant exemptions for CSG operations and not enough support for those living on land subject to petroleum grants, especially while negotiating an access arrangement.

However, there is a positive story to tell; that of organised communities protecting their land where the system is failing them. While possession may not have the legal clout desired by many Landholders in the CSG regulatory regime, 'locking the gate' has more power than merely a symbolic act.

1. Environmental Implications of CSG

The CSG debate came to prominence after the release of the homemade documentary *Gaslands*,[2] which highlighted the health consequences of CSG contamination in the USA. There are a multitude of potential impacts from CSG, of primary concern to landholders in NSW are the threat of contamination to land and water, the depletion of groundwater and irreparable damage to aquifers.

1.1 CSG extraction process

CSG is found in coal seams deep beneath Landholders properties, below aquifers that store groundwater that may be relied upon by gaziers and farmers.[3] Core holes are drilled down through these layers to reach the coal seams where the coal bed methane is trapped. Wells do not always require fraccing (the use of a mixture of chemicals, water and sand to fracture the coal seam and release the methane gas).[4] Regardless of the use of fraccing, the methane is pumped to the surface and separated from the produced water that is highly saline

and likely to be contaminated with chemicals,[5] or natural toxins such as heavy metals.[6]

1.2 Environmental Consequences

The National Water Commission's position statement on CSG identified three main areas of concern: the extraction of large quantities of groundwater, production of large quantities of waste-water and contamination by chemicals, both naturally and through fraccing.[7]

With the CSIRO reporting that each well in Queensland produces 20 000 litres of waste water a day,[8] the potential depletion of groundwater is a significant concern. With large amounts of highly saline and potentially contaminated produced water, how this byproduct is treated and stored is vital. Evaporation ponds have been banned in NSW and Queensland,[9] however alternative methods of disposal and treatment require stringent regulation. In the case of AGL's Gloucester Project, produced water diluted by river water is planned for discharge onto pastures,[10] raising considerable questions about health and safety.

The potential for contamination through spills, as occurred at drill sites in the Pilliga forest where heavy metals such as arsenic and lead were leaked into the soil and surrounding water,[11] is a particular concern for landholders whose own health and livelihoods depend upon the health of their properties. There is a moratorium on fraccing in NSW pending the consideration of NSW's Chief Scientist. There is uncertainty whether the moratorium will be continued after this. In Queensland, fraccing continues, now with the requirement that Landholders are notified beforehand.[12]

There are also significant unknowns with regard to the impact of cumulative drilling due to the complexity of groundwater modeling,[13] a particular concern as impacts may be irreversible.

Finally, due to the fact that CSG requires a greater density of wells to conventional gas sources,[14] the footprint of the associated infrastructure, particularly access roads, carves up the landscape and may interfere with agricultural purposes. Penny Blatchford, a farmer and organiser in the Bellata-Gurley Action Group Against Gas in Northern NSW believes that mining and agriculture can co-exist because of this. Stating, 'the gross margins for cropping are tight and therefore productivity and efficiency is crucial to profitability,' Penny highlights, 'any disruption to this efficiency affects our bottom line and therefore CSG infrastructure in fields will disrupt our profitability.'

Aerial Shot: South of Chinchilla in Queensland, near Tara residential estate. A network of roads to all drill sites carves up the landscape. 2010.[15]

2. The NSW Regulatory Framework: the Two Levels of Protection

As mentioned above, the Crown owns the petroleum reserves in NSW and therefore the key question is how the resource management system administers mining tenements and whether the push for this new industry overpowers strategic considerations of agricultural land and groundwater protection.

2.1 The Strategic Planning Level

At a strategic planning level, certain areas of land should be protected from consideration for mining exploration and production. Strategic agricultural land (a particular concern for the NSW Farmer's Association and Lock the Gate), areas of sensitive or environmental significance and aquifers need to be protected for future generations according to the principles of ecologically sustainable development.

The NSW Government, wanting to signal a change from the previous Labor Government, is in the process of adopting three new policies – the *Strategic Regional Land Use Plans*, *Aquifer Interference Policy* and the *Code of Practice for CSG Exploration*. These policies are designed to ameliorate the problems arising from the current regulatory imbalances, which are skewed towards mining companies and exploration/production on agriculturally productive land. However, the reaction from the NSW Farmers Association and many environmental groups has been that they do not go far enough to protect landholders, the environment or our agricultural land.

The first thing to note is that these protections are contained in policy documents and not legislation. They are subject to change at the whim of the executive, bypassing parliament, thereby excluding vital debate on the issues,[16] and are not legally binding. They are not perfect systems and while they go some way to address the problems with planning CSG, there are significant exemptions and ministerial discretions that must be recognised as potential loopholes for CSG mining.

2.2.1 Agricultural Land

While Queensland has introduced the *Strategic Cropping Land Act 2011* (Qld) commencing January 2012, legislating for certain protections to highly productive land through a complex zoning system, NSW is looking at introducing a Gateway Panel to screen CSG production activities on agricultural land.

While currently in the *Petroleum (Onshore) Act 1991* in NSW, there is a definition for cultivated land,[17] there is no definition for agricultural land as there is in the *Mining Act 1992* (NSW).[18] There are exemptions for 'cultivated land' under s 71 of the same Act, but this is not defined in the Act however vinyards, orchards, gardens, dams and soil conservation works are mentioned in s 72. Mining operations are restricted over these areas but the burden falls to the Landholder to enforce these restrictions.

As proposed by the Draft Strategic Regional Land-use Policy, strategic agricultural land will be identified by a Gateway Panel, mining projects need to pass the Gateway test before they can be approved on strategic agricultural land. However, continuing the tradition of executive overriden powers in NSW planning legislation, this assessment may be bypassed if cabinet declares the project to be an 'exceptional circumstances project'.[19] This is a considerable concern to NSW farmers and the wider public as this exemption denies certainty of protection for strategic agricultural land, especially where there are known reserves of CSG.

While the Gateway Assessment adds another layer of scrutiny, the potential for the process to be overridden by political considerations is a concern.

2.2.2 Protections for Groundwater

The submission period closed in May for the *Draft Aquifer Interference Policy* which will significantly affect the need for aquifer interference approvals for CSG Projects.

With a shift towards assessment by the Gateway Panel, one of the considerations at this stage being impacts on aquifers, the Policy provides that where a development has a Gateway certificate an aquifer interference license is not required. This not only cuts the Office of Water and all their relevant expertise out of the assessment process but allows certain CSG projects on strategic agricultural land to undermine the system of licensing this precious and finite resource.[20]

Other considerations for groundwater, such as

the need for baseline testing prior to drilling operations and for ongoing monitoring which needs to be made public, are currently left for negotiation for the landholder. Baseline data and ongoing monitoring and testing are vital to assess the health of the property and environment but specifically for water relied on by the Landholder. They are also essential to establish causation in claims for damages. The necessity of independent environmental assessment needs also to be recognised; having the same entity undertaking (or hiring environmental consultants) that will be liable to pay if there is contamination is an evident conflict.

monitoring for groundwater should be a requirement for inclusion in the Access Arrangements. However, under pt 4A of the *Petroleum (Onshore) Act* there is no such stipulation. The *Draft Code of Practice* for CSG exploration states that CSG companies are required to undertake baseline assessments however the recent *NSW Inquiry into CSG* pointed out that these studies are not publicly available and therefore of little use to those living on the land. As for ongoing monitoring, the *Code* states that water monitoring should be a key feature of the access arrangement but provides that monitoring should be completed

consultant.[21] By and large, ensuring independent and ongoing monitoring and testing falls unfairly on the Landholder to negotiate into the Access arrangement.

2.2.3 Individual Protection: The Access Arrangement

Strategic planning for CSG in NSW makes it clear that the Government intends to push forward with the industry. Landholders therefore have one main protection for their land and that is to negotiate a thorough access arrangement that addresses all their concerns and interests where the regulations fail to. As a significant legal document in which a Landholder may write off their entitlements to environmental testing or rehabilitation, Landholders need support through the negotiation process and certainly require legal advice before signing an access arrangement.

An idea floated by Marylou Potts, a NSW solicitor with particular expertise in CSG, is that legal advice for the Landholder be paid for by the Miner,[22] thereby ensuring Landholders do not forgo legal counsel due to expense. Landholders, involuntarily placed in the situation of having to negotiate these agreements, deserve this support considering mining companies are inevitably better resourced. The onus should be on the Mining company which stands to benefit from exploration or production on the land to provide funds for the Landholder to secure adequate protection for their property.

Part 4A of the Act[23] also needs to be expanded to include a tougher range of conditions that must be legally included in the Access Arrangement to right the current imbalances. The conditions should benefit the Landholder and not allow Mining companies to get away with negotiating access with scant conditions attached. Specifically, requiring the miner to provide financial assistance so the Landholder can engage legal representation, independent specialists to undertake monitoring and testing and even valuations in order to accurately determine figures for compensation or rehabilitation measures should there be contamination or depletion of bores. Additionally, allowing the landholder to exclude the miner from the property if there are any breaches of the environmental conditions contained within the exploration licence would also empower the landholder to put the health of their property first.

2.3.1 Enforcing the Access Arrangement

Under the Act, if an Access Arrangement has not been agreed upon after 28 days of notice being served by the Miner,[24] the Miner may request that the matter be brought to arbitration. With widespread opposition to CSG and farmers 'locking the gate' on approaches by CSG companies, we could expect this provision would be utilised frequently. However CSG companies have been hesitant to use this option, Landholders are not being dragged to arbitration across the state. The following section may shed some light on why this is.

3. Communities Organise: Bellata-Gurley Show the Way Forward

If by this point you are questioning whether communities and individual landholders could ever protect the land in which they have vested so much, there is some good news from up North.

Penny Blatchford, her husband and three kids live on their family farm east of the Newell highway in Bellata-Gurley, 2 hours South of the Queensland border. Farming is in the blood for the Blatchford family, their livelihood dependent on the health of their property and ability to run their farming operations efficiently. Currently farming dry-land cotton, Penny is proud of the highly productive nature of Moree Shire and is passionate about locally grown produce. Recently however, the Blatchfords have been engaged on a different front.

After Landholders in the local area were

approached by Leichhardt Resources, seeking access arrangements with landholders, the local community (over 80 families) who were united in their opposition to CSG organised a single response from their legal representative, the Environmental Defender's Office. The letter detailed the community's intention to lock their gates due to their concern with protecting their agricultural land and groundwater. This letter was sent in October 2011.

So far the community has not been taken to arbitration and, despite being sent an information package from Leichhardt Resources, not one Landholder has signed an access arrangement. This not only demonstrates outstanding organisation on behalf of the Bellata-Gurley community but that mining companies may not be willing to enter into a direct conflict with Landholders who are united and organised in their opposition to CSG.

3.1 A Social Licence to Drill?

The intense public outcry over CSG has at least made CSG companies and the government realise that they cannot simply ride over the top of Landholders in NSW. Mining companies do not merely require a legal licence to explore on private land, they require a social one as well. Forcing Landholders to yield to prospecting activities where they are opposed to them destroys this social licence.

In particular, businesses like AGL who have marketed themselves as 'Australia's leading integrated renewable energy company' are aware that their association with CSG taints this brand and the image of a clean, green, innovative company. They are wary of their public image and aware that public opinion is currently stacked against them.

3.2 United in Possession

This is a small but significant glimmer of hope. While protections at the strategic planning level do not go far enough to protect the land and water that is so important to rural landholders and the wider public, communities around the state are mobilising to lock their gates against CSG. While individually, possession of the land may mean little and a mining company may find it acceptable to force itself onto the property through legal means, taking on a whole community of Landholders would be a daunting task. Perhaps possession and the willingness of communities to stand their ground to blockade their land against mining interests is the biggest strength Landholders have.

You do not necessarily need a PhD to write an appeal letter on human rights violations or to organize a demonstration. What you need is knowledge. Then watch the ripple effect

LAURYN OATES

To Possess is to Control

Forced Labour Practices in Nepal

D e v i k a G u p t a
J.D.II

Background

Nepal, a country rich in resources and culture, is one of the 48 least developed countries in the world.[1] Amidst its political transition and uncertainty, socio-cultural and economic issues, including the prevalence of forced labour practices, come to light. Forced labour is a severe form of control and possession, and it is a problem that looms large in Nepal. Labour regulations are enforced both internationally and domestically through a series of legislation that dictates practices to be conformed to. This paper examines the extent to which Nepalese laws, policies, and practices conform to Nepal's international labour obligations, looking at the *Haliya* and *Kamaiya* labour practices as well as child labour. Such examples will indicate the gaps between domestic legislation and international obligations. Unfortunately, the turbulent transition of politics creates vast issues in achieving such goals. Nepal has taken steps to ratify many core treaties which deal with forced labour, and has made strides in enforcing them through domestic legislation; however, as this paper concedes, there are weaknesses in enforcement of this legislation.

Introduction

Lack of resources, customary beliefs, and an uncertain political future hold doubts for Nepal in its commitment to international obligations for labour standards. For these reasons, gaps in enforcement of such obligations continue to facilitate practices such as forced labour. The International Labour Organization ('ILO') defines forced labour, for the purpose of international law, as 'all work or service which is exacted from any person under the menace of any penalty and for which said person has not offered himself voluntarily'.[2] Nepal ratified the *ILO Convention No 29* in January 2002.[3] Forced labour arises from, and persists due to, situations encompassing debt, restrictions on freedom of movement and violence, threats, intimidation, and vulnerability.[4] Nepal is aware of the prevalence of forced labour and has attempted to address this by implementing domestic legislative instruments. Both s 9(2) of the *Human Rights Commission Act 1997*[5] and art 132(2) of the *Interim Constitution*[6] have explicitly mandated the National Human Rights Commission (NHRC) to review [the] implementation status of the International Human Rights Treaties to which Nepal is a party and make recommendation to the Government of Nepal to take necessary actions for the effective implementation of human rights enshrined in such treaties.[7]

Nepal's steps in ratifying international conventions have not been useless, but have been limited in success. Nepal's customs and beliefs are a key reason for this. Traditional forms of labour tend to be 'embedded in older beliefs, customs or agrarian and other production structures, sometimes as a legacy of colonialism'.[8] In many instances, there is also a 'duty to be obedient and respectful to elders and to take responsibility to contribute to the household maintenance',[9] regardless of whether such practices are forced. Such 'communal customs and familial interdependence have precedence over national laws' and the Government of Nepal has not considered

these factors in its implementation of Nepal's international obligations.[10]

Discrimination in Labour Practices: *Haliya* and *Kamaiya* Systems

Poverty is a direct consequence of forced labour practices 'and the poorest can be compelled to work or be induced into debts which they or even their descendants find impossible to repay despite long hours of work'.[11]

One of the key reasons for poverty amongst less privileged groups is the discriminatory caste hierarchy. The *Constitution of Nepal 1990* guaranteed equality in the legal system and had called for sanctions to protect fundamental human rights, and the 'right to enjoy human rights without discrimination'.[12] Nonetheless, discrimination against disadvantaged groups in Nepal continues to be manifested. The *Kamaiya* and *Haliya* labour systems are largely constituted by Dalits, known as 'untouchables'. Dalits find it hard to find 'white-collar jobs — clerical or professional — [these jobs] are largely unavailable for Dalits mainly because of their relatively low educational status'.[13] Dalits are engaged in many traditional based occupations, and are asked to perform casual and irregular jobs with little or no wages. In many cases, they have to work for 'upper caste' households and/or also send their children to work to repay for their loans … [t]hey are often told to carry out odd jobs or run errands at the beck and call of 'upper castes'.[14]

Nepal has 'between 300 000 and two million bonded labourers' under these systems.[15] The *Haliya* system is translated to '"one who ploughs"' and is an agricultural labourer.[16] Such 'workers find it hard to support their large families all year round by working mainly during the farming seasons … [and] are forced to take loans' with high interest rates, and are therefore indebted to the families to work for no or little sum.[17] The *Kamaiya* system is similar, but in Nepali, it means 'hard-worker'.[18] This is:

> an agriculturally based bonded labour system … [where the *Kamaiya* make] a verbal contract with a landlord or a moneylender to work for a year … [and the] family will be forced to borrow money from landlords in times of crop failure or family hardships … [thus t]he loan must be paid by working.[19]

The families in both systems may fall into 'a vicious circle of debt' and, given the lack of education and resources, are then compelled to send in their children to work as labourers.[20] These communities have been pushed to the margins of society 'due to their alleged "contamination" effects'.[21]

International Obligations

Despite this, Nepal has been a signatory to the *UN Slavery Convention* since 1963, which ensures 'that its citizens are free from bonded labour practices'.[22] Nepal is also a signatory to the *International Covenant on Civil and Political Rights* ('ICCPR'), in which art 2 expresses an 'equality of rights and protection of rights ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[23] Article 8 of the ICCPR also enshrines '[f]reedom from slavery, the slave trade or forced labour ... [guaranteeing] that no one shall be held in slavery … no one shall be held in servitude and shall be required to perform forced or compulsory labour'.[24] Other international obligations which have been ratified include: the *Forced Labour Convention (1930)*, the *European Convention on Human Rights (1950)*, the *Convention concerning the Abolition of Forced Labour (1957)*, the *Convention on the Worst Forms of Child Labour (1999)*, and the *UN Commission on Human Rights (2005)*.[25] Nonetheless, the caste system and traditional practices have continued to persist, fuelling discrimination and poverty in Nepal.

Domestic Obligations and Response

Nepal's response to these obligations is enshrined by the *Interim Constitution* which aims to achieve equality of rights. Article 13 of the *Interim Constitution* guarantees:

> ... the right to equality for all citizens. The state cannot discriminate citizens amongst the citizens on grounds of religion, race, sex, caste, tribe ... No person can, on the basis of caste, be discriminated against as untouchable, be denied access to any public places, or be deprived of the use of public utilities.[26]

In response to ICCPR art 8 above, art 29 of the *Interim Constitution*[27] 'has prohibited forced labour or servitude … Every citizen is provided with the right against any form of exploitation … The *Constitution* aims at establishing an economic system based on social justice by preventing economic exploitation of any class or individual'.[28]

In addressing Nepal's international obligations, the government of Nepal has published a strategic document, the Tenth Plan (2002–07), which 'deals specifically with the issues pertaining to the uplift of the living standards of Nepal's Dalits, and lays down a long-term vision for the promotion of empowerment and self-esteem of Dalits by mainstreaming them'.[29] The *Legal Aid Act 1998* is also a direct response, and it 'seeks to apply the principle of equal justice for the socially and economically underprivileged and other disadvantaged groups … providing necessary legal aid'.[30]

After much lobbying, the Nepali government in 2002 also banned the *Kamaiya* system, and many *Kamaiya* families were removed from their landlord's homes and given land in an effort to eradicate the bonded relationships that characterise the forced labour system. However, this did not eradicate the problem but rather transferred employment to children.[31] The *Kamaiya System (Prohibition) Act 2002* was also enacted in 2002 in an attempt to move away from the *Haliya* system and, 'in September 2008 the Government … declared the *Haliya* system as illegal though no concrete legal documents or rehabilitation plans have been published so far'.[32] In addition, '[t]he Government of Nepal ratified the 1989 *UN Convention on the Rights of the Child* in 1990',[33] and took steps to create a separate department focused on women and children, which allowed for '"a comprehensive national legal framework for the rights of a child" … [and] prohibits the employment of children under the age of 16 in hazardous sectors'.[34]

Education is the Way Forward

Discrimination also occurs due to lack of formal education or technical skills. In the first place, '[d]iscrimination leaves people excluded from access to jobs, education, healthcare and other services … [but] it also makes it more difficult for minority groups to enforce their legal rights'.[35] There are also concerns about facilitating caste systems, especially in terms of providing assistance to the *Kamaiya* people. This may create a stronger feeling 'of discrimination among other disadvantaged groups when looking at allocation system of land, and the delays due to political uncertainty which opens a window to revert back to the old system'.[36]

Nepal needs to work towards changing the mentality of caste systems and traditions. It is hard to break this cycle when attempting to enforce new laws and legislation, which are linked to customary practices and beliefs. There should be 'appropriate mechanisms for the identification, release, protection and rehabilitation of forced labour victims'.[37]

Lack of education is a key factor in such practices, and 'the general attitudes, including vague future prospects of parents and children is also prevalent in the *Haliya* and *Kamaiya* communities'.[38] The government of Nepal:

> should review the implementation status of relevant UN and ILO conventions as well as the domestic laws pertaining to discrimination in labour, forced labour, child labour and the worst forms of child labour. Also needed is the creation of a monitoring unit to see that enforcement is taking its due course.[39]

The *National Dalit Commission* was created to protect and 'promote the rights of the Dalits … [including] performance of necessary functions for creating [an] environment that ensures unhindered exercise by Dalits of their rights and privileges'.[40] There has been significant progress and it has been noted that '45 per cent of adult former *Kamaiyas* are now registered trade union members; 80 per cent of agricultural labourers in project districts (both women and men) are paid at least minimum wage; the literacy rate has increased from 38 to 55 per cent'.[41] Progress is a continuing spectrum, and the case study of forced child labour points to this as well.

Forced Child Labour

'The exploitative practice of child labour … jeopardizes children's potential to become productive adults, robbing them of their health, their education and their prospects for a better future'.[42] Child labour exists due to the nature of industries in Nepal, which are typically 'unorganized and … [do] not require a skilled and trained labour force'.[43] Many children and their parents are 'pulled by the lure of promises of good employment, and with hopes of economic improvement', but this was never really the case, and such employment were in forced and dire circumstances.[44] The carpet sector in Nepal is one of the worst forms of child labour, employing 'about 250,000–300,000 labourers during its "Gold Rush" period in the early 1990s … [when] carpet entrepreneurs sought cheap labour to maximize their profit'.[45] At this time, there is a strong involvement by the NGO community in Nepal, including trade unions, which indicate that many people are aware of such issues.

International Obligations

Nepal is a signatory to the following international treaties: the *ILO Worst Forms of Child Labour Convention No 182*, the *ILO Minimum Age Convention No 138*, the *ILO Forced Labour Convention No 29* and the *UN Convention on the Rights of the Child (CRC)*.[46]

Within the *ILO Convention No 182*, 'child labour amounts to forced labour not only when children are forced, as individuals in their own right, by a third party to work under the menace of a penalty, but also when a child's work is included within the forced labour provided by the family as a whole'.[47] These conventions require that children under the age of 18 not perform work under any hazardous conditions or against their will, however '[i]nspection and law enforcement is poor because of lack of resources, including inadequate knowledge of child labour'.[48] In Nepal, there was a recording of a total of 22 981 cases 'of the worst forms of child labour in 59 districts'.[49] Some domestic laws, as will be seen in the next section, indicate gaps between international ratification and domestic legislation, specifically in the case of the *ILO Conventions No 138* and *No 182*, and while some progress is being made, these gaps still remains a critical issue.

Domestic Laws and Regulations

Nepal's *Constitution* 'seeks to protect the interests of children by conferring on them certain fundamental rights'.[50] There are four domestic laws which also contain important provisions protecting the rights of children in response to Nepal's international obligations. First, the *Children Act 1982* purports to protect 'the rights of children to ensure physical, mental and health … a child is defined as below the age 16 and under the age of 14 [and] shall not be employed to work as a labourer'.[51] Further, the *Labour Act 1992* and the *Labour Rules 1993* prohibit 'employment of children below the age of 14 years and … admission to hazardous work for minors (aged between 14 and 18 years)'.[52] Finally, in 1999 Nepal passed the *Child Labour (Prohibition & Regulation) Act*, which 'followed Nepal's ratification of the *ILO Minimum Age Convention (No 138)*'[53] which requires that children are not to work from 6pm to 6am.[54]

The *Labour Rules 1993* and the *Labour Act 1992* are particularly important because these define the term 'child' and set out standards relating to children. In addition, ch 5 of the *Labour Rules 1993* indicates a commitment to enforcement by employing a Labour Officer (s 53), a Factory Inspector (s 54) and a Central Labour Advisory Committee (s 46).[55] Character 3 of the *Labour Act 1992* additionally specifies limitations on working hours:

> No worker or employee shall be employed in work for more than eight hours per day or forty eight hours per week and they shall be provided one day as weekly holiday for every week.[56]

Although the domestic instruments are in place, the gaps are still present.

Need for Enforcement and Articulation of Minimum Wage

Child labour is rooted in 'illiteracy, unemployment, sexual abuse, domestic violence, poverty [and] low incomes'.[57] It is recognised 'almost universally as a crime; however, it is hardly ever prosecuted, in part because of the difficulties in articulating the various offences that constitute forced labour in national laws and regulations'.[58] The challenges in enforcement are garnering a universal concept, and recognising safeguards 'against coercion, while at the same time permitting individual countries to legislate on the issues of particular concern to them in the light of their economic, social and cultural characteristics'.[59]

Nepal has not conformed its domestic laws to international obligations in some areas, specifically to the ILO conventions. For example, under the *ILO Convention No 182*, Article 2, 'the term "child" shall apply to all persons under the age of 18'.[60] However, in the *Labour Act 1992*, Section 2(h) defines a 'child' as below the age of 14.[61] This inconsistency indicates the extent to which Nepal abides to its obligations regarding labour standards, in that there is no universal concept and therefore has not been enforced. Moreover, according to the *UN Convention on the Rights of the Child* and the *ILO Conventions No 29*, *No 138* and *No 182*, the worst forms of child labour exist if a 'child is sold, … bonded, … works without pay, … works excessive hours, … [or] is at risk of sexual and physical violence at a young age'.[62] Such issues are still very much prevalent given Nepal's customary beliefs and traditional practices, dealt with above.

In moving forward, there needs to be management of the labour market and determination of a minimum wage across the board. Children under the age of 14 should not be working in hazardous conditions.[63] The term 'child' should be amended to that of international human rights and labour treaties. Monitoring and evaluation by both a Labour Committee, and Factory Inspectors, also need to be enforced in factories across the nation. Furthermore, the government of Nepal must 'ensure that persons admitted to hazardous work younger than 16 years of age need to comply with the strict conditions of [the international conventions outlined by the ILO], … which comprise special training and protection'.[64]

Conclusion

Accountability is crucial. 'It is not uncommon for governments to pass a law against forced labour and then consider that they have complied with their [international] obligations without devoting any resources to ensuring that this law is properly understood and enforced.'[65] Thus, it is critical that there are proper mechanisms in place to better monitor labour practices and inform public policy. Nepal has been in constant political transition, creating socio-cultural issues and uncertainty which make it much harder for a nation to abide by its international obligations. 'Ratification is not an empty gesture. It is the beginning of a process that drives national efforts against child labour'.[66] This exchange of information and cooperation on the domestic and international front, pave the way forward for improved action. Until then, Nepal has done much for what it is working with.

Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy

PROVERBS 31:8-9

Stars, Stripes and Slavery

Karen Rauchle
J.D.II

In 1865, the Thirteenth Amendment to the United States Constitution was passed, the purpose of which was the abolition of state-sanctioned slavery.[1] Many Americans, however, remain unaware that, while Congress passed laws against slavery and the slave trade, it did little to enforce these laws; indeed slavery continues to exist even today.[2] Where do these slaves come from and how are they enslaved? Where do they exist? What is being done to address the issue? And how can the United States prevent its continuation?

The United Nations defines 'trafficking in persons' as:

> the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.[3]

Like modern conceptions of slavery, human trafficking is considered to be an antiquated activity, forced out of existence by modern notions of 'rights' and 'liberties'. The reality, however, is disturbing. Trafficking in humans has not only reappeared in recent times, but has become 'the fastest growing criminal enterprise in the world … stripping [its victims] of liberty and visiting upon them humiliation, suffering, torture, and other outrageous violations of human rights'.[4] Humans are trafficked into nearly every country in the world.

Globalisation has meant an increase in trafficking of humans from poor to wealthy countries, and trafficking is particularly prevalent where rich, industrialised nations share borders with developing countries, such as the border between the United States and Mexico.[5] The increase in global economic disparity has led to increased frequency of all kinds of transnational crimes, however the negative effects of globalisation have been particularly difficult for women living in the developing world.[6] It is women who are the bulk of victims trafficked for the purposes of prostitution and domestic service,[7] with the largest number of victims trafficked into the United States arriving from Mexico and Central America.[8] Although most trafficking victims are women, many men are trafficked to provide inexpensive labour and agricultural work.[9]

In addition to being kidnapped, many victims of trafficking travel willingly. They are lured with job offers as au pairs, models, waitresses or dancers and only after they arrive at their destination are they charged exorbitant fees for their transportation, forcing them into debt bondage.[10]

Over 10 million people currently reside illegally within the United States, around seven million of those people due to trafficking.[11] Worldwide, 'more than twice as many people are held in bondage in the world today than were taken from Africa during the entire 350 years of the Atlantic slave trade'.[12] This is due in large part to the decreased cost of ownership. In 1850, on average a slave would have cost the equivalent of around US$40 000 in modern money, while slaves today can be purchased for

just a few hundred dollars.[13] The United States State Department estimates that 14 500–17 500 people are trafficked into and enslaved in the United States annually,[14] however some reports estimate that as recently as the late 1990s that number was as high as 50 000.[15]

Human trafficking has become one of the largest and fastest-growing criminal enterprises not only globally, but particularly in the United States. Left unattended, the consequences could be 'detrimental to both economic and political stability of entire regions'[16] thus increasing transnational threats to security.[17] Many organised criminal enterprises have begun human trafficking not only due to the huge profits it creates but also because the risk of being caught and incarcerated is significantly lower.[18] The international drug trade, estimated by the United Nations to make around US$500 billion per year (two per cent of the global economy) is by far the most lucrative criminal enterprise, followed closely by trade in illegal arms.[19] Human trafficking, by contrast, a few years ago generated around US$6 billion annually, while current estimates are around US$9 billion or higher and climbing.[20]

Not only is there a high demand for sex workers, but also for labourers, agricultural workers, nannies, and domestic servants.[21] Most who are trafficked for sex are young women, sometimes as young as seven years old.[22] These women are forced into submission through beatings, starvation, and forced drug use, and when they require medical care, become infected with HIV, or develop AIDS, they are almost never provided with medical care, and are often killed.[23] Those forced into labour are often '"hidden" in plain sight' as workers in fields, in meat packing plants, as maids and nannies, and in restaurants.[24]

The United States government provides three main types of visas which enable domestic slavery:

> The A-3 visa is for household employees of diplomats. The G-5 visa is given for domestic workers attached to the households of employees of international agencies such as the United Nations, the World Bank, and the International Monetary Fund (IMF). The B-1 visa … covers the domestic workers who 'belong' to businesspeople, foreign nationals, and American citizens with permanent residency abroad.[25]

These servants are linked to their employers, however once they enter the United States, there is little or no follow up as to their employment or living conditions, and moreover, most foreign dignitaries and diplomats hold diplomatic immunity.[26] The easiest way to end the problem of domestic slaves being brought legally into the United States is to end the issuance of such visas, and to require diplomats to hire their domestic servants from within the United States.[27]

In 2000, the United States passed the *Victims of Trafficking and Violence Protection Act*.[28] The Act, through coordination of federal and state agencies, has the principal purpose of eliminating human trafficking in the United States. Subsequently the United States has also become a signatory to the United Nations protocol on human trafficking, committing itself to prevention of the transnational crime.[29] 'In addition, approximately US$28 million has been allocated to anti-trafficking enforcement, programs for victims of trafficking, and increasing awareness among the public.'[30]

However victims of trafficking often find it difficult to find help and protection. Even the United States has only very recently begun to offer substantial assistance to those victims of severe forms of trafficking,[31] Defined in the something Act as:

> (a) sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person has not attained 18 years of age; or
> (b) the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[32]

In order to receive assistance, victims must be willing to help prosecute their traffickers, however many argue that this is too high a standard to impose and often means that special victims, such as children, remain unprotected.[33] In conjunction, in 2002, the United States introduced a special 'T' visa whereby victims who assist law enforcement and can prove they have a reasonable and well-founded fear of persecution if they return home, may remain in the United States.[34]

Although slavery was outlawed in the United States over 150 years ago, it still continues to flourish today. The increase in the profitability and the decrease in accountability of the trafficking of human life has provided many with the incentive to engage in the practice. Humans who are trafficked often have no idea of the circumstances which they are entering, and have little or no hope of escaping. Although the United Nations and countries like the United States are implementing programs and policies to curb the issue of human trafficking, it will only be through providing assistance to the victims and strongly enforcing the laws against traffickers that the trade in human life within the United States, and globally, can be eliminated.

Governments cannot guarantee that their citizens will be healthy – that involves individual choice and freedom. But they can guarantee that every opportunity has been provided to facilitate this outcome … At present there is not a level playing field – an Indigenous child born today does not have the same life chance as a non-Indigenous child

TOM CALMA

Fresher Futures?

A human rights perspective on the issue of food security in remote Indigenous communities.[1]

E l l a A l e x a n d e r
B.A./LL.B. IV

According to the Food and Agriculture Organisation of the United Nations ('FAO'), food security exists 'when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'.[2] Food security is a 'precondition' for the enjoyment of the right to food.[3] Many community stores in remote Indigenous communities across Australia fail to provide food security for their residents, raising issues of human rights violations.

Remote Indigenous Communities and Community Stores

Remote Indigenous communities are defined as those communities with clear physical or legal boundaries that are inhabited predominantly by Indigenous residents. Significant numbers of Indigenous people live in these communities: the 2006 Census revealed there to be over one thousand discrete Indigenous communities in remote or very remote localities, with nearly 100 000 Indigenous residents (85 per cent of these communities had fewer than 100 residents).[4]

Indigenous people in remote communities are highly dependent upon their community stores. With European settlement, Indigenous people were moved off their lands into missions and reserves where traditional food gathering practices were often forbidden and food handouts became the dominant source of food. With the advent of policies of self-determination in the 1970s and consequent withdrawal of missions, these hand-outs (along with mission-run community gardens)[5] disappeared, and community stores became the primary source of food.[6] Indigenous people in remote communities continue to hunt and gather food traditionally, though these activities only generate enough food to 'supplement' their diets.[7]

Furthermore, due to the small populations of the majority of communities, most are serviced by only one store, the alternative store being hundreds of kilometres away; inaccessible to those without a car.[8] While many non-Indigenous people purchase their food outside communities, relying on 'bush orders' for their food, which allow them to order by internet in bulk from urban centres at near-urban prices, this is not possible for Indigenous residents, many of whom cannot access the internet or the English literacy required to make the purchase.[9]

Food security: the Availability, Quality and Affordability of Food in Remote Indigenous Stores

In remote community stores, nutritious, perishable foods such as fresh fruit, vegetables and dairy products are often unavailable for significant periods of time. For example, a 2008 survey of remote communities in the Northern Territory found that 55 per cent of communities did not have access to *any* fresh food for extended periods.[10] Similarly, close to one in five remote Western Australian communities had no regular access to fresh food,[11] and anecdotal reports from Queensland (in 2011),[12] South Australia (in 2011)[13] and

New South Wales (2012)[14] suggest comparable trends apply to remote communities in these states.

Even when food is available, consumers in remote Indigenous communities pay more for food than anywhere else in Australia.[15] For example, a 'yellow and ageing bunch of broccoli' cost $9 at one store in a remote Torres Strait community.[16] Incomes of Indigenous people in remote areas are among the lowest in Australia, averaging around $219 per week.[17] As such, 'healthy food is the most expensive for a population group that can least afford it.'[18] Unsurprisingly, the Red Cross has been called to make numerous emergency food drops in remote communities in South Australia and Queensland at times when food is available in stores but is at a price that is unaffordable for the residents.[19]

It is important to note that food security is an issue in all remote areas.[20] However, Indigenous people in remote communities are disproportionately affected, constituting 49 per cent of the population of very remote Australia but only 2.4 per cent of Australia's total population. Moreover, many of the non-Indigenous residents living in remote areas work in mining or agriculture, and thus would be in a better financial situation to cope with the high food prices.[21]

Effects of Food Insecurity

Issues of affordability and availability of nutritious food are a major cause of the high rates of malnutrition and diet-related diseases in remote Indigenous communities.[22] In conformity with low-income earners the world over, residents buy and consume foods that provide the most calories for the least cost, with over 50 per cent of food comprising white bread and flour, sugar and milk powder.[23] Recently, a Red Cross representative noted rates of malnutrition among children in remote Indigenous communities to be 'significantly worse than many of the least developed countries in the world,'[24] where Indigenous children suffer malnutrition at a rate of 120 times that of non-Indigenous children.[25] Consequently, children as young as seven are breaking into community stores and households to steal food,[26] and 'turning to drugs to avoid hunger pains'.[27]

It must be noted that high food prices and the lack of healthy foods are not the only factors identified as contributing to poor health and nutrition in these communities. Nutrition awareness is generally low, with various authors reporting that because traditional foods that were sweet were high in nutrients, community members assume sweet junk foods to also be good for them.[29] There is a lack of basic 'health hardware' such as fridges and stoves. Low demand for fresh and other healthy foods is therefore a significant contributor to the reticence of store owners to stock a range of healthy foods in Indigenous communities. However, any interventions in relation to these factors will have minimal impact if community members cannot access a reliable source of affordable healthy foods.

Proposed Solutions

Numerous factors affect food security in remote Indigenous communities, and hence there is no single solution. The high cost of food is often attributed in part to freight costs,[30] as many remote communities are located away from major transport routes and may be inaccessible by road during the wet season.[31] These costs are passed on to consumers as inflated prices on food items. Store managers are reluctant to order healthy foods, as many have a short shelf life and if not sold, must be 'writ[ten] off as wastage'.[32] This problem is directly related to the lack of infrastructure (such as refrigerators) needed to cheaply transport and store healthy food.[33]

Furthermore, questionable store management practices in combination with an absence of competition mean that stores often mark up their prices beyond that needed to make a profit.[34] The Australian Consumer Law regulators have recently announced an investigation into 'unfair trading practises' in remote areas with the 'National Indigenous Consumer Protection Project'.[35] The investigation will involve 'education and compliance action'. It remains to be seen if this initiative will have a substantial effect on food prices in remote stores. Another mechanism with which Government has attempted to regulate store practises has been through a store licensing regime operating in the Northern Territory whereby managers must stock an adequate range of healthy foods to keep their license.[36] This initiative has improved the range of healthy foods, though has done little to ameliorate high food costs.[37]

Secondly, the Government has funded a program providing meals to children in remote Indigenous schools to address issues of childhood malnutrition.[38] However, this scheme is limited in its benefits as meals are unavailable during lengthy school holiday periods and are not available to non-school age children and adults. Furthermore, these schemes only operate in a number of communities, though food security is an issue in communities throughout Australia (as discussed above).

Finally, the Government supports 'community garden' projects aimed at providing a local source of food.[39] This solution has been 'rubbished by respected Aboriginal leaders'[40] and the gardens have been largely unsuccessful due to the difficulties in growing food in inhospitable environments and cultural issues affecting the gardens' upkeep.[41] A 2012 review of gardens in South Australia's APY lands downplayed the role of food gardens in achieving food security, stressing instead the importance of improving freight services.[42]

The Government has failed to implement a number of popular recommendations from the 2009 Inquiry into Remote Indigenous Stores ('the Inquiry').[43] Firstly, it was recommended that the Government establish an 'infrastructure fund' to finance refrigeration and air conditioning in the transport and storage of food, thereby improving the quality and availability of healthy food.[44] It was also recommended the Government introduce a freight subsidisation scheme, under which Government would subsidise transport costs in order to reduce the cost of food for consumers. Such a scheme has been suggested in many government reports,[45] and has been championed by numerous state and federal MPs.[46] Support has been almost unanimous among NGOs and community organisations,[47] as well as Indigenous academics[48] and prominent individuals such as Social Justice Commissioner Mick Gooda.[49]

The proposed scheme draws inspiration from a number of programs. Firstly, the 'Tasmanian Freight Equalisation Scheme' ('TFES') has operated since 1976 to offset shipping costs of all goods across the Bass Strait.[50] The purpose of this scheme is 'to provide Tasmanian industries with equal opportunities to compete in mainland markets,'[51] however its effect is to ensure 'Tasmanians can predict the prices and availability of goods'.[52] Secondly, a similar scheme also operates in Canada.[53] The 'Nutrition North Canada' program subsidises the transportation of nutritious food to remote Indigenous communities in Canada. Studies indicate the scheme has had a significant positive effect on the purchase of healthy food.[54] In the Australian context, a subsidisation scheme is believed to be capable of achieving an 'immediate' effect on the price of food in remote Indigenous communities.[55] However, state and federal Governments have continually rejected this proposal.[56]

Admittedly, a number of design issues must be addressed before implementing a subsidy scheme. Firstly, it must be decided at which level the scheme would be implemented (ie to subsidise costs for the consumer, retailer or

freighter). Subsidies at the level of the freighter or retailer raise concerns about ways of ensuring the benefit of the subsidy is actually passed on to the consumer, as it would be easy for freighters or retailers to claim that the extra money is 'absorbed' by costs in the free market.[57] This could be addressed through stricter regulation of transport and store management practices. At the level of the consumer, subsidies could be implemented through the introduction of 'food cards' providing extra money to consumers to buy healthy food.[58] This would be an extension of the FOODcard system used in stores in Arnhem Land, whereby consumers consensually arrange for a proportion of their pay to go directly onto a card that can only be used for purchasing healthy food.[59] In any case, it is imperative that the government take immediate action to address an issue that has serious consequences for Indigenous health and equality of access to resources.

Human Rights Implications

Analysing food security concerns in remote Indigenous communities from a human rights perspective could add weight to arguments compelling Government to take action on the issue. The right to food, one of the most basic requirements for life, is enshrined in numerous international human rights instruments to which Australia is a party.[60] Soft law documents recognise this right as placing 'legal obligations on States to overcome hunger and malnutrition and realise food security for all'.[61]

Under most instruments, States are obliged to fulfil the 'progressive' realisation of this right. For example, under the ICESR, States are obliged 'to take steps…with a view to achieving progressively the full realisation' of the right to food.[62] However, this provision is most applicable to those countries with significant resource constraints, and it would be difficult to argue that Australia, as a wealthy developed country, has used 'the maximum of its available resources' in addressing food security issues in remote Indigenous communities.[63]

While some aspects of the right to food entail progressive obligations, others are to be implemented immediately. Under the ICESR, states must 'immediately prohibit discrimination in access to food … on the basis of race'.[64] As outlined above, Indigenous people in Australia face greater issues with regards to food security than non-Indigenous people, raising issues of discrimination. The right to food is said to impose an obligation on states to take positive measures to address inequality of access to food, for example by 'devoting greater resources to traditionally neglected groups'.[65] Furthermore, the FAO Voluntary Guidelines on the Right to Food recommend that States give 'special consideration … to the situation of indigenous communities', who are recognised as a group less likely to enjoy the right to food.[66]

The right to food is not the right to be fed, but instead 'a right to feed oneself in dignity'.[67] This distinction is important in light of historical paternalistic approaches to Indigenous welfare which are in part responsible for the current situation. In effect, the right presupposes that the environment in which individuals live enables them to grow food or to buy it.[68] Environmental factors, such as dispossession and enforced dependency, combined with low wages, little opportunity for employment and high food prices, have created an environment in which it is impossible for Indigenous residents of remote communities to procure steady access to adequate food.

However, in the absence of legislation implementing these rights into domestic law, they are unenforceable in Australia. At most, a complaint could be made against the Commonwealth Government to the Australian Human Rights Commission (AHRC) by an 'aggrieved' Indigenous resident.[69] They may be able to argue a breach of their right to food as contained in the international instruments attached as schedules to the *Australian Human Rights Commission Act 1986* (Cth). However, human rights investigations by the AHRC merely result in conciliation and/or reports to the government, and cannot compel the government to take action on the issue. Nonetheless, individual complaints about human rights issues arising from the poor state of water and sanitation provisions in remote Indigenous communities resulted in the AHRC (then HREOC) undertaking an inquiry into the issue, which resulted in considerable public outcry and subsequent government action.[70]

The international arena also provides no mechanism for enforcing the right to food. It may be possible to make a complaint to United Nations Special Rapporteurs for the Rights of Indigenous Peoples (James Anaya)[71] and the Right of Food (Olivier De Schutter).[72] However, at most this would result in a report to the Australian government. Although the right to food is contained in numerous instruments, Australia has only accepted the competency of the Human Rights Committee to hear allegations of breaches of the ICCPR.[73] The right to food is said to arise from art 6, which provides that 'every human being has the inherent right to life.' This has been found to encompass an obligation of the state to take positive measures to prevent death,[74] including death from malnutrition.[75] However, even if the Australian government is found to have breached this right, the Human Rights Committee's findings and recommendations would be non-binding, though may give rise to international pressure and shaming which could influence the government to take action on the poor state of food security in remote Indigenous communities.

Conclusion

Remote Indigenous communities in Australia are faced with significant issues in relation to food security that contribute to the malnutrition and poor health of their residents. A number of solutions have been proposed, including, most significantly, the suggestion that the Government implement a freight subsidy scheme to offset the cost of transporting healthy foods across vast distances. The failure of the government to take appropriate steps to address this issue may constitute a breach of the right to food, as contained in numerous international instruments. However, in the absence of implementing domestic legislation, this right is unenforceable. In any case, human rights arguments provide a compelling case for government to take further measures to ensure this most basic of rights for all residents in the wealthy, developed nation of Australia.

Youth is wasted on the young

OSCAR WILDE

The Young and the Restless

Youth Migration in the Face of Joblessness and Social Immobility

Justin Penafiel
J.D. III

Almost every other week, a new statistic is published telling us just how economically marginalised young people are today. Youth unemployment is more than triple the national average,[1] and one in five Australians aged 15 to 24 are experiencing 'housing stress', defined as a needing to spend more than 20 per cent of income on payment for housing or accommodation.[2] It has only been recently, however, that the gloss of youth in art has finally started rubbed off just as much as the paint on our credit cards has faded away from overuse. Not only has the *Sex and the City* franchise gone down the way of its abominable sequel, but the story of four high-powered successful career women has been replaced by Lena Dunham's four slightly overweight and seriously underemployed 'Girls'. Dunham's new series recently debuted on HBO in the United States with her story of four females in their early twenties, trying to make it big in New York while working in unpaid internships, travelling the world paid for by credit cards, rich men and au pairing, and living in Brooklyn apartments begrudgingly paid for by their parents. The pilot begins with Dunham's central character – played by Dunham herself - facing her parents' threat to cut off the financial umbilical cord. Although relatively few Australians have seen the series, the story of struggling college graduates steadfastly refusing to work a McJob is one that resonates across seas and captures the age-old zeitgeist of the new decade – no matter how many degrees in hand, 2012 is not a good year to be young, poor and inexperienced. But when has it ever been a good year to be young, poor and inexperienced?

Poverty and labour market marginalisation or even outright exclusion is neither novel nor recent, and as the young ones of the Central Coast demonstrate, not limited to urban sub-cultures. A year ago, the Federal Budget expressly targeted youth unemployment on the Central Coast,[3] but local Central Coast MP Craig Thomson recently claimed that youth unemployment in February 2012 dipped to as low as 10.5 per cent from previous figures over 40 per cent. Based on such figures, and in light of Australia's shining economy, anyone would instinctively believe that long-term youth unemployment was worse in Europe than in Australia. However, the OECD reported in March 2012 that the 1 per cent of 15-19 year old Australians actually exceeds the less-than-1% of long-term (more than one year) unemployment for the same age group in most OECD countries, including Greece (0.9 per cent), Turkey (0.9 per cent), Portugal (0.8 per cent), Iceland (0.6 per cent) and the OECD average of 0.6 per cent.[4] The same report indicates Australia fares better with long-term unemployment amongst individuals aged over 20, but we've got it just as bad. Indeed, the accompanying malaise has been so serious that delegates from Sydney University Law Society in recent history have been compelled to take road trips to high schools in both Western Sydney and NSW to stir up motivation to attend law school, let alone our university, let alone university at all. The spatial and class inequality is so stark that Sydney University has proposed admission quotas based in localities outside of Sydney's East and North.[5]

What the statistics fail to reveal, however, are the individual responses to the seeming economic

malaise and sheer uncertainty of our material futures. Rates of unemployment may capture the degree of economic marginalisation, but the numbers alone don't tell us that the unemployed from Paris' *banlieues* are using European social security benefits to flock to Australia (the census may and should have told us that French is the most widely spoken second language in Paddington). Politicians have been exhorting the idle young to 'go west', but little do they realise that at least the youth of Newtown have stopped short of the Great Dividing Range. Indeed, a range of hip-cafes, op-shops, boot stores and galleries are transforming Katoomba in the Blue Mountains into a satellite-Newtown. What will emerge in the following stories are the motifs of parental support and geographical mobility as a response to diminishing inter-generational social mobility.

From Newtown to Katoomba

For Newtown residents, a visit to Katoomba in the Blue Mountains and a walk down its main street – the aptly named Katoomba Street – has suddenly became all too similar to a saunter down King Street. Janice[6] has been living in the Blue Mountains for over two years, but only moved to the bright lights of Katoomba in 2011 after a year with her partner as the youngest people in the village elsewhere in the Mountains. She'd formerly been an Inner West girl, and even did a stint of warehouse living in St Peters, 'but it doesn't feel any different – the shops are almost like King Street, and a lot of the "locals" seem to have moved up from Sydney'. With the end of tertiary education, and the loss of many a Centrelink benefit, Janice found that she 'just couldn't afford [the lifestyle]', no matter how convenient it would have been. This would be no surprise to the director of the Australians for Affordable Housing campaign, who gave us the bleak economics of it all in an interview with the Sydney Morning Herald in April 2012:

> For example - Youth Allowance for a young person living independently is $201 per week plus a maximum rate of rent assistance at $60 per week giving a total income of $261 per week. If you could find a place to rent at 30 per cent of that income (which is $78 per week - and I suspect you can't) - you'd have just $26 a day to live on.[7]

At a house party earlier this year, an inordinate number of Sydney friends finally made the trek to Janice's humble-yet-expansive abode – her yard backs onto a reserve, and probably covers an entire block in Newtown. Many Sydney friends had typically mourned the seeming social suicide Janice had committed in leaving Sydney's Inner West, let alone moving to the Blue Mountains. But Janice's April house party this year unexpectedly transformed the views of these Sydney sceptics. They too were surprised at Katoomba Street's hipster vibe. 'I even went op shopping,' says Alison, who announces around a massive bonfire that she and boyfriend Ken are moving up the Katoomba after she's done with her Honours thesis in November. For now, she's camping out in the 'luxury' of her parents' home, enjoying their cooking and hospitality like only a return exiled-child can: 'I couldn't possibly do it without them, write a thesis and work enough to pay for rent in Newtown, let alone feed myself'. As a non-native Sydneysider, she's over the big smoke anyway: 'I can breathe gum trees here rather than car exhaust'.

Alison's excitement about the Blue Mountains, however, hasn't won Samantha over. Sam wasn't exactly too keen to return to what she had left behind after high school in order to study at Sydney Uni. 'Marrickville is great, I love it', she exclaims, 'I think other people underestimate just how massive a change it is to move from Sydney to the Blue Mountains. I know Katoomba is becoming a lot more hip, but it still isn't King Street'. The pressure of keeping up with the rent is eased by Sam's boyfriend and her sister, who recently followed in almost her exact footsteps. Does Sam resent that she doesn't have the luxury of ending her self-imposed exile and returning to the parental fold whenever the going gets tough in both reality and lyric? 'Not really, it's hard. But I had a great childhood, and went to a close knit high school'.

From Camping Outside of Sydney to Living in it

Others are less sanguine. 'Everyone at law school seems to have these ready-made networks from family or high school', observes Henrietta, 'it's like they never left'. Henrietta has moved interstate from Melbourne, where she stayed completed her initial undergraduate degree:

> People move up to Sydney from Melbourne because there are supposed to be better career prospects here. Melbourne is a lot more 'homely'. But had I known that the name of your law school doesn't count for much these days in the industry, I would have done law where it was easier.

Like Henrietta, James, from Canada, also fears for his future in an increasingly cutthroat labour market. 'Most of my friends back home aren't doing anything too "professional" in terms of their careers,' he says. 'If it wasn't for my parents, I'd be out on the streets'. Henrietta is adamant that she still would much prefer to make it on her own but she admits that rejections for clerkships and graduate offers have made her wish she had it just 'a little bit easier'. During our conversation, Diana, from the same year at law school, chimes in: 'I'm just going to jump ship to New York and start all over again. I think my cousin has a house there.'[8]

If there's one person to alleviate Henrietta's and James' fears about a long lost future, it certainly isn't Jane. Jane is one year out from finishing a Masters degree, and has yet to secure and remain in long-term gainful employment. She hasn't been completely idle – she's had the odd short-term contract or two in procurement and accounting, one of which was a stint at Macquarie Bank. Jane even managed a European sojourn during the depths of her bank account's lows. Although her dream job is to work in Afghanistan or Pakistan, but somehow she couldn't hack Canberra during a short stint in marketing: 'It wasn't thrilling enough for me', she laments. Her inability to land an ideal job isn't for want of trying – though Jane admits she's been picky – she shudders at the thought of yet another rejection: 'I physically can't bring myself to start an application and stare rejection in the eye'. She continues to live at home in the Eastern Suburbs.

The French Exodus to Paddington

While in Australia Jane dreams of returning to London and sleeping in her relatives' lounge room, many young Europeans, if not already gallivating around Australia in a campervan, are desperately applying for working holiday visas, or perhaps even finding an Australian to marry. Elodie first made the trek to Australia in 2007. She first came for three weeks, then three months the following year. The cost of living in Paddington during a year-long university exchange at the Sydney Law School in 2009-2010 could have easily turned her off Australia, but she came back for more in 2011. Currently living in the South of France, Elodie has been desperately searching for work in these trying times, to no avail. 'I can't get a legal job unless an existing worker literally dies', Elodie sighs. 'Even the local "Carrefours" [a supermarket chain] has refused to hire me, they don't care that I worked in retail in Sydney'. In the recent elections, Elodie couldn't bring herself to vote for any of the candidates, but her friend Annabelle begged her to vote for Francois Hollande. 'Hollande promised to hire more teachers,' Elodie tells us, 'and Annabelle is desperate to use her teaching degree and get out of her retail job that she only got because her mother already works there'.[9]

Of her numerous visits to Sydney, Elodie most vividly recalls the constant feeling that she never really left France. 'Every time I took the Eastern Suburbs train, there'd be French talk somewhere in the carriage', Elodie recounts rather regretfully. She shows me a website,

'australia-australie.com', where thousands of French migrants exchange resources, information and even contacts to meet other French travellers and migrants in Sydney.[10] One thread is a dedicated outlet for returned French people to pine collectively for their time in Australia and wallow in despair at their inability to get residency. Elodie counts her lucky stars that her mother is a New Zealand citizen. 'I was able to get a New Zealand passport', she smiles. Elodie has yet to actually visit New Zealand.

'A lot of them would talk about how life in Sydney is so much easier than life in *les banlieues*'. Elodie doesn't know how the French underclass fund their Australian voyages, but she supposes they saved up social security benefits or took out a loan: 'they boast about how much they earn in Australia just to work in retail'.[11] Indeed, Elodie recounts many a French news feature on the French economic exodus to Australia. 'They even featured someone who was working at Boost Juice and earning $20 an hour. That money is a big deal for French people'. Elodie has since stopped her French equivalent of Practical Legal Training and plans on doing College of Law in London later this year. 'I struggled to find a placement anyway', Elodie says. She entertained the possibility of doing it in Sydney, but would have had to spend at least two more years studying a graduate entry law degree. In the meantime, she continues to spam recruitment agencies with her résumé and photograph, from the comfort of her mother's apartment. I tell her that she at least takes a decent photo, but Elodie's hopes fail to rise like a stubborn soufflé. 'If only', she sighs. 'Everyone else in France is really pretty too'.

To Meander or Not to Meander?

If these stories of youth migration in the face of social immobility seemed to meander throughout the article, meandering isn't too far-fetched from what these young people have been doing in their lives through some of the worst global economic conditions in decades. The phenomenon of the meandering youth was the very subject of an extensive feature article in the *New York Times* in 2010. Back then, Robin Marantz Henig asked:

> Does that mean it's a good thing to let 20-somethings meander — or even to encourage them to meander — before they settle down? That's the question that plagues so many of their parents. It's easy to see the advantages to the delay ... But it's just as easy to see the drawbacks … And even if every 20-something were ready to skip the 'emerging' moratorium and act like a grown-up, there wouldn't necessarily be jobs for them all.[12]

Henig's feature article in the New York Times 'Sunday' magazine raised the prospect of a distinct stage in one's twenties called 'emerging adulthood' akin to the discovery of adolescence as a distinct stage of development. However, this concept raised quite a stir in the US media and even the ire of the blogosphere. In response to the title of Henig's article, 'What is it about 20-somethings?', Ilana Ross of 'postgradgrays.com' responded on a Huffington Post blog, 'I don't know, but please stop asking me'.[13] However, Slant Magazine turned around and wrote up an online symposium with a bunch of 20-somethings asking them what the hell was wrong with them.[14] They seemed more forthcoming than Ilana Ross.

Yet if the current rates of joblessness across the so-called advanced developed world are anything to go by, '20-somethings' aren't totally to blame for everything that's wrong with them. After all, Lena Dunham wrote the smash series 'Girls' in her parents' basement and reportedly still lived there as late as April 2012.[15] If she could make it using the privilege of her parents' basement, so should the rest of us. But so few jobs are available for what Henig describes as the '20-something[s] [who are] ready to skip the "emerging moratorium"' that the Portuguese are flocking to Angola and Mozambique for work, where the Chinese are investing heavily in mining and construction.[16] If the question remained unanswered in 2010 whether young people could spend their twenties 'meandering', Jenna Goudreau of *Forbes* magazine in 2012 has bluntly, but not unexpectedly, answered this in the negative. Perhaps alluding to Henig's article, Goudreau says:

> They are told to wait it out. They have the time. The 20s are for having fun anyway. Real life starts later.[17]

In light of yet another fresh round of reports of severe youth unemployment and underemployment in the US lower real wages compared to the 1970s, low levels of job satisfaction, and higher rates of depression and alcohol abuse for 'meandering' youth, vis-à-vis 'chained to the desk' types. Goudreau refutes altogether the calls for young people to 'meander'. She writes:

> But it doesn't [start later]. It starts now, and they are falling behind.[18]

After all:

> 'Two-thirds of lifetime wage growth happens in the first 10 years of a career. So those who wait until their 30s to get going in a 'real' job will never catch up.[19]

Elodie, Jane, Henrietta and co, and policy makers alike, might like to take note, as should you.

We say that slavery has vanished from European civilisation, but this is not true. Slavery still exists, but now it applies only to women and its name is prostitution

VICTOR HUGO

Complementary Protection

Bridging Gaps for Victims of Trafficking in Sexual Exploitation?

Ellen Joy
J.D. III

I. Introduction

Whilst it is certainly not a new phenomenon, human trafficking has been gaining recognition since 2001.[1] Due to its illicit nature, it is difficult to establish numbers of victims of trafficking, although the estimates range from 600 000 to 2.4 million people annually,[2] with sexual exploitation as the most common form. Despite recognition that human trafficking is a fundamental abuse of human rights, it has been difficult for victims of trafficking to establish permanent protection for themselves in Australia. Previously, victims may have only been able to access assistance in exchange for offering support with criminal investigations, or through obtaining refugee status. However, in March this year, a system of complementary protection was introduced in an effort to provide protection to individuals who may not fit the definition of a refugee and are likely to suffer harm if returned to their country of nationality. Despite the best efforts of the Australian government, it is questionable how much assistance complementary protection can really offer victims of trafficking. This article seeks to evaluate and compare the benefits of the process of attaining complementary protection against gaining refugee status.

Although Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children provides an extensive definition of trafficking, it is enough for the purposes of this article to assume that a person meets this definition. Further to this, this article focuses on women who have been trafficked for the purposes of sexual exploitation to Australia and have made themselves known to authorities. Women who find themselves in this situation may be fearful to return to their country of nationality for a multitude of reasons. They may be fearful of punishment by family or traffickers (particularly in relation to debt bondage), re-trafficking (which is likely to include rape, and physical and psychological abuse), or being ostracised from their community due to the stigma associated with prostitution.[3] It is therefore exceptionally important to provide victims of trafficking with adequate protection and support.

II. Criminal Justice Framework

A visa framework was introduced in 2004 for victims of trafficking willing and able to assist with criminal investigations and prosecutions. However, changes to the system in 2009 lead to the current three-stage visa process. Victims recognised by the Australian Federal Police may be granted 45 day Bridging F Visas that can be extended for up to 90 days.[4] Victims willing and able to assist police in investigation and prosecution of traffickers may be granted a temporary Criminal Justice Stay Visa.[5] Permanent protection may also be offered under a Witness Protection Visa where it is demonstrated that the victim made a contribution to a prosecution or investigation.[6]

Although this process does offer assistance to victims of trafficking in some instances, the focus on assistance with criminal prosecution is problematic. Whilst victims of trafficking often may be the only people capable of providing evidence, some individuals may be incapable or

unwilling to offer assistance; they may not have adequate information, may be too traumatised to assist, frightened of repercussions (either from traffickers or the stigma associated with going public), distrust authorities,[7] or may be related to their traffickers and unwilling to provide evidence against them. Seeking protection in this manner may not be feasible for some victims who fear being returned to their home country.

III. Attaining Protection Visas

Section 36 of the *Migration Act 1958* (Cth) provides that in order for a non-citizen to receive a protection visa in Australia, they must meet the definition of a refugee as provided by the Refugees Convention[8] as amended by the Refugees Protocol.[9] A victim of trafficking must therefore establish a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group (generally the most amenable ground for victims of trafficking), or political opinion.

In Australia, a 'well founded' fear has been understood as a fear induced by a 'real chance' of suffering harm if returned, on both a subjective and objective ground.[10] It is important to note that 'real' is not based on the balance of probabilities; claims could include harms of less than 50 per cent, so long as they are based in substance and are not far-fetched.[11] It may be difficult for a victim to establish fear of harm by traffickers if a syndicate or relationship with traffickers in the country of origin cannot be established.

A fear of persecution has many elements that are troubling for victims of trafficking to verify. They must establish 'serious harm',[12] systematic and discriminatory conduct,[13] a failure of state protection, and that their persecution is for reasons of one of the five Convention grounds (usually 'membership of a particular social group'). The Refugee Review Tribunal has accepted that trafficked women's fears (of re-trafficking etc) can amount to 'serious harm',[14] and following McHugh J's reasoning in *Ibrahim*,[15] conduct will be regarded as systematic and discriminatory where acts are 'non-random' or 'intended'. As victims are likely to fear repercussions from their original traffickers (and not the state), non-random or intended conduct is easier to establish. *Khawar's* case[16] established that domestic violence (a 'private' harm) might constitute persecution where the state's inaction and institutionalised acceptance of gender discrimination amounts to a failure to provide protection. It could be argued that harm to victims of trafficking by their traffickers fall under a similar category. However, many countries have criminal laws against trafficking and have signed the *United Nations Trafficking Protocol*, supplementing the *United Nations Convention against Transnational Organized Crime*.[17] This kind of information tends to be used by the Refugee Review Tribunal (RRT) as evidence that a nation is willing to offer protection to victims of trafficking and therefore cannot amount to persecution.[18]

Persecution for reasons of one of the Convention grounds - namely membership of a particular social group - can be extremely difficult to establish. Social groups must be identifiable by a common attribute or characteristic, which cannot be their shared fear of persecution, and the characteristic or attribute must distinguish them from society at large.[19] Although *Khawar's* case established that the courts might accept broad social groups such as 'women in Pakistan', the RRT has been unreliable in its acceptance of using such categories for trafficked women. However, even where victims are successful in establishing membership of a group such as 'trafficked women' (where their trafficked experience is used as a membership and not for the grounds of future persecution),[20] it is difficult to prove that the persecution is for the 'essential and significant reason'[21] of membership in that group. The RRT has tended to focus on trafficking as a criminal issue motivated by self-interest in financial gain, and views women as individual victims of crime, rather than as victims for Convention reasons.[22]

It can be seen that it can be excessively difficult for victims of trafficking to establish a fear of persecution in order to gain refugee status. Prior to the establishment of complementary protection, a victim falling outside of the Convention definition and not able to assist in criminal investigations would be reliant upon the Minister's non-compellable and non-reviewable discretion under s 417[23] to substitute a more favourable decision. However, the *Complementary Protection Act* may provide additional avenues for victims of trafficking.

IV. Complementary Protection

Introduced in March 2012,[24] the *Complementary Protection Act* amends the *Migration Act* and enables the Minister to delegate power to decide if individuals are deserving of complementary protection under an integrated scheme with refugee claims.[25]

The *Complementary Protection Act*[26] brings Australia closer to international law requirements not to *refoule* (return) individuals who may be persecuted or suffer significant harm if sent back to their home countries. Whilst the principle of non-refoulement underpins refugee law, it is also evident in the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and the *Convention on the Rights of the Child*.[27] As a result, some of the tests for determining harm in these conventions have been used in the amended s 36(2)(aa) of the *Migration Act* to establish when complementary protection may be granted. Whilst the notion of complementary protection may provide welcome relief for victims of trafficking, the test proposed may prove to be particularly onerous and inhibit women from claiming protection.

A. Section 36(2)(aa)

In order to be eligible for complementary protection, a victim of trafficking must be:

> (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph) (a) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

As the Act came into effect in March of this year, there is not yet any case law determining how s36(2)(aa) is interpreted. However, Professor Jane McAdam has written considerably[28] on the issue and advised parliament[29] prior to the enactment of the Act.[30] For this reason, much of the interpretation of this section will rely on her work. Whilst it can be observed that 'significant harm' creates the ground for complementary protection, it will also be necessary to establish the meaning of 'substantial grounds for believing', 'necessary and foreseeable' and 'real risk' to establish the threshold requirement for complementary protection and how this applies to victims of trafficking.

1. 'Significant harm'

The amended s 36(2A) provides:

> (2A) A non-citizen will suffer 'significant harm' if:
> (a) the non-citizen will be arbitrarily deprived of his or her life; or
> (b) the death penalty will be carried out on the non-citizen; or
> (c) the non-citizen will be subjected to torture; or
> (d) the non-citizen will be subjected to cruel or inhuman punishment
> (e) the non-citizen will be subjected to degrading treatment or punishment.

McAdams argues that the origins of the definitions (for example, 'death penalty' originating from art 6 of the Second Optional Protocol to the ICCPR and requiring

"reasonable anticipation" of the death penalty) will narrow the way in which s 36(2A) is interpreted.[31] However, whether the courts look to the origins of the terms in s 36(2A) or undergo a literal interpretation, the use of 'will be' in sections 36(2A) (b)-(e) creates a troublingly high requirement for proof of harm that is arguably a significantly higher standard than the 'serious harm' required for persecution under the refugee definition.[32] This standard may prove to be too high for some victims of trafficking, thereby preventing ascertainment of complementary protection and encouraging Australia to run afoul of its non-refoulement obligations. However, victims of trafficking may find it easier to prove 'significant harm' assessed based upon their individual experience, rather than attempting to prove membership of a particular social group required for refugee determination under s 36(2).

B. Threshold Requirements of s 36 (2) (aa): 'Substantial Grounds', 'Necessary and Foreseeable' and 'Real Risk'.

McAdams maintains that the three thresholds of 'substantial grounds', 'necessary and foreseeable' and 'real risk' are derived from various international instruments and are intended to complement and explain each other, rather than create a cumulative test.[33] She further elucidates that the common elements of each of these definitions should lead to an interpretation of s 36(2)(aa) as 'substantial grounds for believing' that 'there is a real risk that the non-citizen will suffer significant harm',[34] which should be practically applied in the same way as the 'well-founded fear' test required for refugee status applicants. This approach is logical, creates cohesion between thresholds for complementary protection and refugee protection (schemes intending to complement the refugee process should not have stricter grounds for protection), and prevents exposure to refoulement. However, it must be noted that this view was presented to and noted by the Senate Legal and Constitutional Affairs Legislation Committee,[35] and no relevant alterations were made to the final Act. This may suggest that Parliament intends the threshold for complementary protection to be significantly higher and a cumulative test. If this is the case, the usefulness of complementary protection is significantly reduced for individuals who fall outside of the Convention definition of a refugee. It also places Australia at a higher risk of *refoulement* of individuals who have legitimate fears of significant harm.

Each of the terms discussed above will be examined to establish the threshold for complementary protection, and whether it can be determined to be a cumulative process or whether the terms are intended to be explanatory.

1. 'Substantial Grounds for Believing'

'Substantial grounds for believing' appears in a number of instruments. The phrase appears in the *Extradition Act 1988* (Cth) s 19(2)(d), art 3 of the CAT, and in the *EU Qualification Directive*.[36] Both the CAT and the *EU Qualification Directive* have interpreted the phrase to mean 'foreseeable, real and personal risk' (although the *EU Qualification Directive* does elaborate that it must be a personal 'real risk'), which does not have to be highly probable.[37] Importantly, the UK has determined that this should be interpreted in the same way as a 'well-founded fear' in the Convention definition.[38] Similarly, in *Rahardja v Republic of Indonesia* the Federal court held that in interpreting 'substantial grounds for believing' in s 19(2)(d) of the *Extradition Act 1988* (Cth), it is sufficient if there is a 'real chance' of prejudice.[39] This interpretation is also in line with the High Court's finding in *Chan Yee Kin*.[40] For this reason, it would be wise to interpret 'substantial grounds for believing' as the same standard as the 'well-founded fear' test. This creates consistency and holds applicants for complementary protection to the same level as refugee applicants. A consistent standard also leaves less room for confusion and error on behalf of decision-makers.

2. 'Necessary and Foreseeable Consequence'

According to McAdams, 'necessary and foreseeable consequence' has never been used in international jurisprudence as a test for non-removal; moreover, its purpose has been to elucidate the meaning of a 'real risk'.[41] This would make the inclusion of 'necessary and foreseeable consequence' superfluous in the s 36(2)(aa) requirement due to the existence of the 'real risk of harm' provision.

Although it would be beneficial for the courts to interpret 'necessary and foreseeable consequence' in this manner in order to make s 36(2)(aa) less convoluted, it is more likely that the court will assume there was parliamentary purpose and intent for allowing the phrase to remain. This begs the question of whether 'necessary and foreseeable' may be interpreted more literally, meaning 'required' or 'essential' and 'predictable'. If this were the case, the standard of proof would be significantly higher for applicants for complementary protection. Rather than proving a 'real chance' of harm if returned, they would need to demonstrate that significant harm was almost inevitable if returned. Even a lower interpretation on the balance of probabilities still places a significant and difficult burden upon applicants.

3. 'Real Risk'

'Real risk' in international human rights jurisprudence has been interpreted to mean a 'foreseeable' risk (which is analogous to explanations above of 'necessary and foreseeable').[42] A risk cannot be a mere possibility of harm, but is also not to be calculated on a balance of probabilities.[43] Given this information, it is difficult to discern the difference between a 'real risk' and a 'real chance'. However, it is assumed that parliament intends a different test to apply to each by the use of alternative language. Perhaps the use of 'risk' is to connote the idea that risk may be based upon the severity of harm to be suffered, rather than a probability. This would mean it is not the likelihood or 'chance' that the harm will be suffered, but whether that risk (seen as the severity of harm) is in fact real. If this were the case, then the more severe the significant harm, the greater the risk, and the lower the threshold would be for establishing a 'real risk'.

On the one hand, this could be highly beneficial for victims of trafficking. The cumulative harm of fear of rape, torture, being re-trafficked or ostracised by their community may provide for an understanding of severe harm, which would create a greater risk and lower the threshold. Conversely, the gendered nature of the harms suffered by victims of trafficking may lead decision-makers to underestimate the severity of harm faced by women.

It is difficult to ascertain the threshold requirements of s 36(2)(aa) prior to any case law on the matter. However, what is clear from analysis is that it is convoluted and difficult to understand. This is likely to lead to variance across decision-makers and potentially prevent many legitimate victims from gaining protection in Australia.

V. Conclusion

There is no doubt that victims of trafficking suffer gross violations of their human rights and it is unsurprising that many victims fear returning to their country of nationality. Unfortunately, Australia's protection system does not reflect this understanding. The *Complementary Protection Act*[44] aimed to enable individuals who did not meet the definition of a refugee (but faced refoulement due to fear of significant harm), complementary protection in Australia.

The new scheme has strong advantages in regard to acknowledging significant harm in relation to trafficked women's experience and does not attempt to locate that harm in reasons of race, religion, nationality, membership of a particular social group, or political opinion.

However, it is troubling as to whether women must prove that they 'will be' subjected to harm (under s 36(2A)) as opposed to establishing a 'real chance'.

Furthermore, the threshold requirement of s 36(2)(aa) is excessively convoluted and unclear. It is unknown at this stage whether the courts will rightfully interpret the provision to have a threshold that matches that of s 36(2)(a), or whether the terms of the section will be assumed to be a cumulative process. If this view prevails, applicants for complementary protection will be severely disadvantaged by the higher threshold and Australia will risk violation of its non-refoulement obligations.

Whilst the complementary protection scheme does offer a new means of protection for victims of trafficking, it is by no means an easy standard to establish. Those who hoped that the *Migration Amendment (Complementary Protection) Act 2011* would bridge all the gaps created by the previous visa and protection system for victims of trafficking will be left wanting.

OUT OF SIGHT, OUT OF MIND? - MELISSA CHEN

1. The NSW Government Mental Health Review Tribunal, 'What is the Mental Health Review Tribunal?' (2007) The NSW Government Mental Health Review Tribunal <http://www.mhrt.nsw.gov.au/>.
2. Ronald Manderscheid, Center for Mental Health Services, US Department of Health and Human Services, 'The Australian Mental Health Strategy: Past Successes and Future Challenges' (Research Component No 1, Evaluation of the National Mental Health Strategy, Commonwealth Department of Health and Family Services, 1997) 3.
3. Anthony O'Brien 'Closing Asylums for the Mentally Ill: Social Consequences' (2005) 14 (3) *The International Journal of Health Sociology: Policy, Promotion, Equity & Practice* 313.
4. NSW Health 'Mental Health Act 2007 – Information Sheet for Consumers and Carers', *NSW Government Mental Health Policy Manual*, (2009) <http://www.health.nsw.gov.au/resources/mhdao/MentalHealthAct2007consumercarerinformationsheet_pdf.asp>.
5. Name changed for privacy/anonymity.
6. Catherine Jones, 'Life in a Public Mental Ward Enough to Drive You Insane', *The Sydney Morning Herald* (online), 15 March 2012 <http://www.smh.com.au/opinion/politics/life-in-a-public-mental-ward--enough-to-drive-you-insane-20120314-1v3ng.html>.
7. Ibid.
8. Mental Health Coordinating Council, 'Part 3 Section C: Rights in Public Hospitals,' *NSW Mental Health Rights Manual 3rd Edition* (2011) <http://mhrm.mhcc.org.au/chapter-3/3c.aspx>.
9. Terry Carney and David Tait, 'Mental Health Tribunals – Rights, Protection or Treatment? Lessons from the ARC Linkage Grant Study?' (2011) 18(1) *Psychiatry, Psychology and Law* 137.
10. Terry Carney, David Tait and Fleur Beupert 'Pushing the Boundaries: Realising Rights through Mental Health Tribunal Processes' (2008) 30(2) *Sydney Law Review* 329.
11. Andrew Caple, 'An Analysis of Open Justice and Privacy in Queensland's Mental Health Review Tribunal' (2009) *Queensland Criminal Justice Centre* <http://www.qcjc.com.au/research/author/2/andrew-caple>.
12. Carney and Tait, above n 10.
13. Ibid.
14. Mental Health Coordinating Council, above n 9.
15. Carney and Tait, above n 10.
16. Ibid.
17. Ibid.
18. *Mental Health Act 2007* (NSW) s 55.
19. Carney, Tait and Beaupert, above n 11.
20. O'Brien, above n 3.
21. NSW Health 'Landmark Mental Health Reform Legislation passes Parliament' (Media Release, 23 March 2012) <http://www.health.nsw.gov.au/news/2012/20120323_02.html>.
22. Suzanne Smith 'Mentally Impaired Being Held in NT Prisons without Conviction,' *ABC News* (online), 26 June 2012 <http://www.abc.net.au/news/2012-06-25/mentally-impaired-being-held-in-nt-prisons-without-conviction/4091940>.

THERE'S GOLD IN THEM THERE HILLS - ZOE DONLON

1. Instituto Brasileiro de Geografia e Estatística, *2010 Population Census* (6 June 2012) <http://www.ibge.gov.br/english/>.
2. *City Statute 2001.*
3. *Constitution of the Federative Republic of Brazil 1988.*
4. Enrique Desmond Arias and Corinne Davis Rodrigues, 'The Myth of Personal Security: Criminal Gangs, Dispute Resolution, and Identity in Rio de Janeiro's Favelas' (2006) 48:4 Latin American Politics and Society 53, 55; Joao Costa Vargas, 'When a Favela Dares to Become a Gated Condominium: The Politics of Race and Urban Space in Rio de Janeiro' (2006) 33:4 *Latin American Perspectives* 49, 59.
5. Elizabeth Leeds, 'Cocaine and Parallel Politics' (1996) 31 *Latin American Research* 47, 55 cited in Ben Penglase, 'States of Insecurity: Everyday Emergencies, Public Secrets, and Drug Trafficker Power in a Brazilian Favela' (2009) 32:1 *Political and Legal Anthropology Review* 47, 48.
6. Vargas, above n 4, 61; Janice Perlman, 'Metamorphosis of Marginality: Four Generations in the Favelas of Rio de Janeiro' (2006) 606 *Annals of the American Academy of Political and Social Sciences* 154, 155.
7. Arias and Rodrigues, above n 4, 48; Vargas, above n 4, 56; James Cavallaro, 'Public Enemy Number Two?: Rising Crime and Human Rights Advocacy in Transitional Societies' (2005) 18 *Harvard Human Rights Journal* 139, 146.
8. Victoria Baena, 'Favelas in the Spotlight' (2011) 33:1 *Harvard International Review*, 36.
9. Carmen Gonzalez, 'Squatters, Pirates, and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis?' (2009) 40:2 *University of Miami Inter-American Law Review* 239, 239.
10. Adam Smith, *The Wealth of Nations* (Digireads.com Publishing, 2009) 419.
11. Elizabeth Hart Dahill, 'Hosting the Games for All and by All: The Right to Adequate Housing in Olympic Host Cities' (2011) 36:3 *Brooklyn*

Journal of International Law 111, 116; Sarah Hager, 'Zimbabwe: Why the United Nations, State, and Non-State Actors Failed to Effectively Regulate Mugabe's Policy of Internal Displacement' (2007) 37:2 *California Western International Journal* 221, 231.
12. Claire Mahon, Fair Play for Housing Rights: Mega-Events, Olympic Games, and Housing Rights (Research Report, Centre on Housing Rights and Evictions supported by The Geneva International Academic Network, 2007) <http://www.ruig-gian.org/ressources/Report%20Fair%20Play%20FINAL%20FINAL%20070531.pdf>.
13. Office of the United Nations High Commissioner for Human Rights, *Comment on Economic, Social and Cultural Rights, General Comment 7: The Right to Adequate Housing: Forced Evictions*, UN Doc E/1998/22 (1998), 3.
14. Paul Ocheje, 'In the Public Interest: Forced Evictions, Land rights and Human development in Africa' (2007) 51:2 *Journal of African Law* 173, 176.
15. Solomon Greene, 'Staged Cities: Mega-events, Slum Clearance, and Global Capital' (2003) 6 *Yale Human Rights and Development Law Journal* 161, 162; Hager, above n 11, 231; Helen Yu, 'Just Compensation: Ideal or Compromise? A Comparison of the Implementation of the Just Compensation Clause and Forced Urban Evictions in China and South Korea' (2006) 16:1 *Transnational Law and Contemporary Problems* 189, 198.
16. Jeffrey Levine, 'A Golden Opportunity for Global Acceptance? How Hosting the Olympic Games Impacts a Nation's Economy and Intellectual Property Rights with a Focus on the Right of Publicity' (2008) 15 *Sports Lawyers Journal* 245, 246.
17. Paul Mastrocola, 'The Lords of the Rings: The Role of Olympic Site Selection as a Weapon against Human Rights Abuses: China's Bid for the 2000 Olympics' (1995) 15 *Boston College Third World Law Journal* 141, 147; International Olympic Committee, *Olympic Charter* (2011) 1.2.
18. Fédération Internationale de Football Association, *FIFA Statutes, Regulations Governing the Application of the Statutes, Standing Orders of the Congress* (2008) 5.
19. Greene, above n 15, 163.
20. Ibid 10.
21. Levine, above n 16, 249.
22. Ibid 248; Yu, above n 15, 198.
23. Andres Villareal and Braulio Silva, 'Social Cohesion, Criminal Victimisation and Perceived Risk of Crime in Brazilian Neighbourhoods' (2006) 84:3 *Social Forces* 1725, 1730; Perlman, above n 6; Gonzalez, above n 9, 243.
24. Claire Williams, 'Ghettourism and Voyeurism, or Challening Stereotypes and Raising Consciousness? Literary and Non-literary Forays into the Favelas of Rio de Janeiro' (2008) 27:4 *Bulletin of Latin American Research* 483, 493.
25. Ocheje, above n 14, 183-184.
26. John Jeter, 'South Africa Flattens Squatters Homes' *Washington Post* (Washington), July 13 2001, 1, cited in Greene, above n 15, 174.
27. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
28. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS, 171 (entered into force 23 March 1976).
29. *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).
30. UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*, 22 July 1998, UN Doc E/CN.4/1998/53/Add.2.
31. John Payne, 'Reconstructing the Constitutional Theory of Mount Laurel II' (2000) 3 *Washington University Journal of Law and Policy* 555, cited in Ngai Pindell, 'Finding a Right to the City: Exploring Property and Community in Brazil and in the United States (2006) 39:2 *Vanderbilt Journal of Transnational Law* 435, 446.
32. ICCPR art 2(1); *Constitution of the Federative Republic of Brazil 1988*, art 153(22) (Amendment 1).
33. Yu, above n 15, 200.
34. Pindell, above n 31, 444.
35. Arias and Rodrigues, above n 4, 77; Colin Crawford, 'The Social Function of Property and the Human Capacity to Flourish' (2011) 80:3 *Fordham Law Review* 1089, 1113; Jean-Louis Van Gelder, 'Tales of Deviance and Control: On Space, Rules, and Law in Squatter Settlements' (2010) 44:2 *Law and Society Review* 239, 250.
36. Baena, above n 8, 37.
37. Luiz de Andrade Filho, 'The Dynamics of Drug Related Organised Crime and Corruption in Brazil from a Development Perspective' (2008) 15:1 *Journal of Financial Crime* 49, 58.
38. Ibid.
39. Raquel Rolnik, *Special Rapporteur on Adequate Housing, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*, UN Doc A/HRC/13/20 (2009) cited in Dahill, above n 11, 112.
40. International Olympic Committee, above n 17; Fédération Internationale de Football Association, above n 18.
42. Mastrocola, above n 17, 165.
43. Ibid 2.
44. Fédération Internationale de Football Association, above n 18, art 2.
45. 483 US 522 (1987), 550.
46. International Olympic Committee, above n 17, art 2.5; Fédération Internationale de Football Association, above n 18.
47. Greene, above n 15, 174 -175.
48. Dahill, above n 11, 119.
49. Ibid, 113.
50. Greene, above n 15, 174 - 175.

CONTRACTING CUSTODY - HANNAH RYAN

1. Commonwealth Parliament, *Joint Select Committee on Australia's Immigration Detention Network: Final Report* (Canberra: March 2012) 25.
2. Ibid.
3. Ibid 6.
4. This article focuses on the relationship between DIAC and Serco, but it is worth nothing that DIAC has also contracted out responsibility for health services in detention centres to International Health and Medical Services. The issues raised in this article would also be relevant in examining the DIAC/IHMS relationship.
5. Australian Government Department of Immigration and Citizenship and Serco, 'Detention Services Contract Immigration Detention Centres: Public Release Version'.
6. *Joint Select Committee on Australia's Immigration Detention Network*, above n 1, 72.
7. Allan Hawke and Helen Williams, 'Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre' (31 August 2011).
8. *Joint Select Committee on Australia's Immigration Detention Network*, above n 1, 76.
9. Ibid.
10. Ibid 56.
11. Ibid 46.
12. Hawke and Williams, above n 7, 5, 82.
13. Australian Government Department of Immigration and Citizenship, *Key Immigration Detention Values* <http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>.
14. *Joint Select Committee on Australia's Immigration Detention Network*, above n 1, 25.
15. Australian Human Rights Commission, '2011 Immigration Detention at Villawood' (2011) 16; Australian Human Rights Commission, '2008 Immigration Detention Report: Summary of Observations following Visits to Australia's Immigration Detention Facilities' (2008) 4.
16. See for instance Guy J. Coffey, Ida Kaplan, Roby C. Sampson, and Maria Montagna Tucci, 'The Meaning and Mental Health Consequences of Long-term Immigration Detention for People Seeking Asylum' (2010) 70(12) *Social Science & Medicine* 2070-2079; Pauline McLoughlin and Megan Warin, 'Corrosive Places, Inhuman Spaces: Mental Health in Australian Immigration Detention' (2008) 14(2) *Health & Place* 254-264.
17. NSW State Coroner, Magistrate Mary Jerram, 'Findings in the Inquest into the Deaths of: Josefa Rauluni, Ahmed Obeid Al-Akabi, and David Saunders at Villawood Detention Centre, New South Wales, in 2010' (December 2011) 10.
18. Ibid 12. The third suicide investigated, that of Mr Ahmed Al-Akabi, had occurred in the context of negligence by IHMS and DIAC.
19. Ibid 12.
20. Coalition Dissenting Report in *Joint Select Committee on Australia's Immigration Detention Network*, above n 1, 220.
21. *Joint Select Committee on Australia's Immigration Detention Network*, above n 1, 61.
22. Nick Ralston, 'Buildings Set Alight in Villawood Detention Centre Rooftop Protest', *Sydney Morning Herald* (Sydney), April 21 2011.
23. Ibid 78.
24. Ibid 77-78.
25. *Joint Select Committee on Australia's Immigration Detention Network*, above n 1, 69.
26. *Work Health and Safety Act 2011* (NSW) s 19(2); *Work Health and Safety Act 2011* (Cth) s 19(2).
27. *Work Health and Safety Act 2011* (NSW) s 28(b); *Work Health and Safety Act 2011* (Cth) s 28(b).
28. *Work Health and Safety Act 2011* (NSW) s 4; *Work Health and Safety Act 2011* (Cth) s 4.
29. *Work Health and Safety Act 2011* (NSW) s 18. See also *Work Health and Safety Act 2011* (Cth) s 18.
30. Scott Morrison MP, 'Transcript – Doorstop Interview' (30 March 2012), Scott Morrison MP <http://www.scottmorrison.com.au/info/speech.aspx?id=377&page=1>.

PROPRIETARY RIGHTS IN NON-REPRODUCTIVE HUMAN TISSUE - NEHA KASBEKAR

1. 'Possession' is legally defined as physical control of an object or access to an object coupled with the intention to exert control and exclude others, endowing the possessor with a stronger title to a thing than all parties barring the true owner, as stated in *Asher v Whitlock* (1865) 1 LRQB 1 and affirmed in *Parker v British Airways Board* [1982] 1 ER 834.
2. Anthony Maurice Honore, *Making Law Bind* (Oxford University Press, 1987), 165-176; Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1990), 205-226; *Yanner v Eaton* (1999) 201 CLR 351, 366-67 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

3. The legislation in relation to human tissue extracted from dead persons has separate provisions for organs and other kinds of human tissue, such as reproductive human tissue, reflected here by the referencing of two different sections within each Act.
4. *Human Tissue Act 1982* (Vic) ss 7-8, 21; *Human Tissue Act 1983* (NSW) ss 23-24
5. *Human Tissue Act 1982* (Vic) s 38; *Human Tissue Act 1983* (NSW) s 32.
6. *Haynes' Case* (1614) 77 ER 1389; *Williams v Williams* (1882) 20 ChD 659; *Doodeward v Spence* (1908) 6 CLR 406.
7. Australian Law Reform Commission, *Human Tissue Transplant*, Report No 7 (1977) 7.
8. Australian Law Reform Commission, Essentially Yours: The Protection of Human Genetic Information, Report No 96 (2003) 20.34.
9. (1990) 793 P 2d 479.
10. [1997] 1 WLR 596.
11. In Australia, the cases of *R v Rothery* [1976] Crim LR 691 and *R v Welsh* [1974] RTR 478 have held that urine and blood samples may be the subject of theft, necessarily implying that such forms of tissue are property even though the courts did not engage in explicit property analysis according to some commentators like Roger Magnusson [Roger Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Journal* 601, 617] and Gerald Dworkin and Ian Kennedy [Gerald Dworkin and Ian Kennedy, 'Human Tissue: Rights in the Body and its Parts' (1993) 1 *Medical Law Review* 291, 300]. In the UK, the English and Welsh Court of Appeal recently contemplated a potential revision of the common law position, stating in *Jonathan Yearworth & Ors v North Bristol NHS Trust* [2009] EWCA Civ 37 at 631 that "It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of s 4, even without the acquisition of different attributes, if they have a use or significance beyond their mere existence." In an American context, *Washington University v Catalona* (2006) 437 F Supp 2d 985, where a dispute arose between a university and a researcher over control of human tissue samples, both the trial and appellate courts relied upon property discourse by conceiving of the donated material as an inter vivos gift from the research subjects to the university, while in *Greenberg v Miami Children's Hospital* (2003) 264 F Supp 2d 1064, the Court held that once a voluntary gift of tissue is made to a third party, property rights no longer exist, impliedly contemplating that property rights inhere in the tissue prior to the gift being made.
12. *R v Sharpe* (1857) 169 ER 959; *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680, 685 (Young J).
13. *Doodeward v Spence* (1908) 6 CLR 406 (Griffiths CJ and Barton J); *Pecar v National Australia Trustees Ltd* (Unreported, Supreme Court of NSW, Bryson J, 27 November 1996); *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680, 690 (Young J); J*ones v Dodd and Anor* [1999] 73 SASR 328, 125; *Roche v Douglas as Administrator of the Estate of Rowan (deceased)* (Unreported, Supreme Court of WA, Sanderson M, 7 June 2000), 146; *Re the Estate of the Late Mark Edwards* [2011] NSWSC 478.
14. (1908) 6 CLR 406
15. ALRC, above n 8, 20.21; Stephen R Munzer, 'Human Dignity and Property Rights in Human Body Parts' in J W Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer, 1997) 25; Debra Mortimer, 'Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia' (1993) 19 *Monash University Law Review* 217, 254; E Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Georgetown University Press, 1996); Margaret Jane Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849, 1888-91.
16. *Chambers v Warkhouse* (1692) 83 ER 717, 718; *Gregson v Gilbert* (1783) 99 ER 629, where the throwing overboard of slaves in a boat running low on water was treated as a dealing with goods; J W Salmond, *Jurisprudence* (London, Stevens & Haynes, 1902) 334.
17. This was discussed in depth in *Hopkins v Blanco* 320 A 2d 139 (1974).
18. 51 Cal 3d 120, 148.
19. Lyria Bennett Moses, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 29 *Sydney Law Review* 639, 657.
20. Julia Mahoney and Pamela Clark, 'Property Rights in Human Tissue' in Donatella Porrini and Giovanni Battista Ramello (eds), *Property Rights Dynamics: a Law and Economics Perspective* (Routledge, 2007)146.
21. Loane Skene, 'Arguments against People Legally 'Owning' their Own Bodies, Body Parts and Tissue' (2002) 2 *Macquarie Law Journal* 165, 165-6.
22. Mahoney and Clark, above n 20, 140-1; Rina Hakimian and David Korn, 'Ownership and Use of Tissue Specimens for Research' (2004) 292 *Journal of the American Medical Association* 2500, 2500-2505; Nuffield Council on Bioethics, Human Tissue: Ethical and Legal Issues (Nuffield Council on Bioethics, London, 1995). Relevant case law includes *Moore v Regents of University of California* (1990) 793 P 2d 479 and *Greenberg v Miami Children's Hospital* (2003) 264 F Supp 2d 1064.
23. Mahoney and Clark, above n 20, 138.
24. ALRC, above 8, 20.20.
25. Debra Mortimer, 'Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia' (1993) 19 *Monash University Law Review* 217, 227; Celia Hammond, 'Property Rights in Human Corpses and Human Tissue: The Position in Western Australia' (2002) 4 *University of Notre Dame Law Review* 97, 102.
26. ALRC, above n 8, 20.28; Mahoney and Clark, above n 20, 150.
27. Skene, above n 21, 167.
28. Mortimer, above n 25, 231.
29. Skene, above n 21, 167-8.
30. Hammond, above n 25, 98, 112; Peter D Skegg, 'The No-Property Rule and Rights Relating to Dead Bodies' (1997) 5 *Tort Law Review* 222, 229.
31. [1996] 4 ER 474.
32. (Unreported, Supreme Court of NSW, Bryson J, 27 November 1996)
33. Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007), 155; Kenyon Mason and Graeme Laurie, 'Consent or Property? Dealing with the Body and Its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 *Modern Law Review* 710, 712; Magnusson, above n 11, 611; Moses, above n 19, 641; Skegg, above n 29, 222.
34. Hammond, above n 25, 113; Hardcastle, above n 33, 201; Magnusson, above n 11, 629; Mason and Laurie, above n 33, 710.
35. Samantha Hepburn, *Principles of Property Law* (Routledge, 2001) 40.
36. *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204.
37. Mortimer, above n 25, 232; Dianne Nicol, 'Property in Human Tissue and the Right of Commercialisation: The Interface between Tangible and Intellectual Property' (2004) 30 *Monash University Law Review* 139, 139-140.
38. Hardcastle, above n 33, 160-2.
39. Hammond, above n 25, 105; Hardcastle, above n 33, 46; Magnusson, above n 11, 606-7.
40. *Wik v State of Queensland* (1996) 187 CLR 1, 73-74.
41. Hammond, above n 25, 102.

CUSTODIAL SENTENCES FOR JUVENILE OFFENDERS IN NEW SOUTH WALES - REMONA ZHENG AND SHOSHANA ROBUCK

1. *Children (Criminal Proceedings) Act 1987* (NSW) s 28.
2. Juvenile Justice NSW, Department of Attorney General and Justice (NSW), *Annual Report 2010–2011* (2011) 138.
3. Ibid 139.
4. Devon Indig et al, '2009 NSW Young People in Custody Health Survey: Full Report' (Report, Juvenile Justice NSW, Department of Attorney General and Justice (NSW), March 2011).
5. Dianna T Kenny et al, 'NSW Young People on Community Orders Health Survey 2003–2006: Key Findings Report', (Report, University of Sydney, 2006).
6. Don Weatherburn et al, 'Screening Juvenile Offenders for Further Assessment and Intervention' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 109, NSW Bureau of Crime Statistics and Research, Attorney General's Department of NSW, August 2007).
7. Department of Premier and Cabinet (NSW), *NSW State Plan 2010: Investing in a Better Future* (2010) 68.
8. Joan McCord and Kevin P Conway, 'Co-Offending and Patterns of Juvenile Crime' (Research in Brief No 210360, National Institute of Justice, Office of Justice Programs, US Department of Justice, December 2005), cited in Sumitra Vignaendra et al, 'Reducing Juvenile Reoffending by Understanding Factors Contributing to Intention to Reoffend' (2011) 22(3) *Current Issues in Criminal Justice* 433, 434.
9. Chris Cunneen and R D White, *Juvenile Justice: An Australian Perspective* (Oxford University Press, 2002), cited in Vignaendra et al, above n 9.
10. Vignaendra et al, above n 9, 437.
11. Ibid 443.
12. Ibid 445.
13. Ibid 449.
14. Natasha Wallace and Geesche Jacobsen, 'Children Reoffend as System Goes Soft', *Sydney Morning Herald* (online), 28 April 2012 <http://www.smh.com.au/nsw/children-reoffend-as-system-goes-soft-20120427-1xqb0.html>.
15. Ibid.
16. Ibid.
17. Ibid 4.
18. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).
19. Keys Young, National Youth Affairs Research Scheme, *Juvenile Justice: Services and Transition Arrangements* (1997).
20. National Association for the Care and Resettlement of Offenders report, cited in Young, above n 21.
21. Juvenile Justice Advisory Council of NSW, 'Briefing Paper — Outings and Leave' (Briefing Paper, Juvenile Justice Advisory Council of NSW, 26 July 2005).

#DOIOWNTHAT: POSSESSION, INFORMATION AND SOCIAL MEDIA - JONATHAN HALL SPENCE

1. *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1982) 64 FLR 387, 404–5; *Smith Kline & French Laboratories (Australia) Ltd v Secretary,*

Department of Community Services and Health (1990) 22 FCR 73, 120–1; *Federal Commissioner of Taxation v United Aircraft Corp* (1944) 68 CLR 525, 534 where Latham CJ remarked that: 'Knowledge is valuable, but knowledge is neither real nor personal property. A man with a richly stored mind is not for that reason a man of property'.

2. This point was recently reiterated by the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 472 (French CJ, Crennan and Kiefel JJ) ('IceTV').
3. Works and other subject matter have slightly different rights attached — *Copyright Act* 1968 (Cth) ss 31 (works), 85–88 (other subject matter).
4. *Copyright Act 1968* (Cth) ss 36(1) (works), 101(1) (other subject matter).
5. *Copyright Act* 1968 (Cth) ss 115(1)–(2).
6. *Copyright Act 1968* (Cth) ss 32(1)–(2). There is no requirement of originality for the subsistence of copyright in other subject matter. As a result, uploaded music and videos are much more likely to attract copyright protection than other social media content.
7. *IceTV* (2009) 239 CLR 458. While *IceTV* concerned a consideration of originality for the purposes of infringement (the originality of a part taken being highly determinative of substantiality) the comments in the case were directly applied in the context of subsistence by the court in *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142.
8. *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491.
9. Ibid. Interestingly, the United States Supreme Court came to the opposite conclusion on virtually identical facts in *Feist Publications Inc v Rural Telephone Service Co Inc* (1991) 499 US 340, a decision that would be echoed by the Federal Court in *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 194 FCR 142.
10. *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.
11. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.
12. Material that cannot be fit into one of the categories of copyright work will struggle to find protection. See, eg, *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1.
13. *IceTV* (2009) 239 CLR 458.
14. *Nine Network Australia Pty Ltd v IceTV Pty Ltd* (2008) 168 FCR 14, 41.
15. *IceTV* (2009) 239 CLR 458, 474, 479.
16. For Gummow, Hayne and Hayden JJ, the error of the Full Federal Court was in not distinguishing between the skill and labour used in selecting and arranging programming and the 'extremely modest' skill in producing the 'final print-out': *IceTV* (2009) 239 CLR 458, 501-503.
17. Ibid 511–512.
18. Ibid 474.
19. *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 189 FCR 109.
20. Ibid 122.
21. Ibid.
22. It has consistently been denied that literary works require any literary quality or merit to be the subject of copyright — see, eg, U*niversity of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.
23. Twitter, *Twitter Terms of Service* (25 June 2012), [Section 5] <https://twitter.com/tos>.
24. Facebook, *Statement of Rights and Responsibilities* (8 June 2012), [Section 2.1] <http://www.facebook.com/legal/terms>; Tumblr, *Terms of Service* (22 March 2012), [Section 6] <http://www.tumblr.com/policy/en/terms_of_service>.
25. *Copyright Act 1968* (Cth) s 195AN(3).
26. Ibid pt IX div 2.
27. Ibid pt IX div 4.
28. *Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J).
29. R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 1113.
30. See, eg, S*mith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 121 (Gummow J).
31. Meagher, Heydon and Leeming, above n 30, 1131. Comments to similar effect appear in the obiter of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 225.
32. *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 265 ALR 281, 290. This recent statement of the law is endorsed by J D Heydon and M J Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) 544 as an orthodox statement reflecting the reasoning in prior authority. In doing so they note that the traditional '3 element' test espoused by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47–48 is deficient in two respects. It omits reference to the requirement of specificity, integral for the court to formulate appropriate relief (*O'Brien v Komesaroff* (1982) 41 ALR 255, 266), and does not stipulate that relief will be available for apprehended breaches of the duty, as well as those that have occurred (Heydon and Leeming at 544).
33. Provided the information in the message had the 'necessary quality of confidence'. Given that the equitable obligation arises out of the relationship rather than the information, this is generally a low threshold test and is said to apply so long as the information is not trivia or 'tittle tattle' — *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 48 (Megarry J); *Hitchcock v TCN Channel Nine Pty Ltd* (2000) Aust Torts Reports ¶81-550, 63 640 (Austin J).
34. *Douglas v Hello! Ltd (No 6)* [2006] QB 125.
35. Ibid 159.
36. A cautionary approach should be taken towards the Douglas decision. The action for breach of confidence in the UK has taken on a very different form to that in Australia with one judge going so far as to label it a tort of 'misuse of private information' (*Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457, 464–5 (Lord Nicholls of Birkenhead)). It has been made clear that the developments in the UK to the traditional action for breach of confidence are a consequence of the implementation of the *Human Rights Act 1998* (UK) (A v B Plc [2003] QB 195, 202 (Lord Woolf CJ)).
37. See the various judgments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. That decision has been interpreted very differently, from definitively providing for creation of a direct tort of privacy protection (*Grosse v Purvis* (2003) Aust Torts Reports ¶81-706) to failing to recognise anything of the sort (*Giller v Procopets* (2008) 24 VR 1).
38. *Privacy Act 1988* (Cth) s 6(1). The NPPs are set out in Schedule 3 to the Act.
39. Ibid sch 3 cl 1.
40. Ibid sch 3 cl 2.
41. Ibid sch 3 cl 4.
42. *Privacy Act 1988* (Cth) s 52(1B).
43. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice, Report No 108* (2008) vol 1, 117.
44. *Privacy Act 1988* (Cth) s 6 (definition of 'personal information').
45. The definition of which would include transmission over the internet — *Telecommunications (Interception and Access) Act 1979* (Cth) s 5(1) (definition of 'telecommunications system').
46. Ibid s 6(1).
47. Ibid pt 2-9.
48. Ibid pt 2-10.
49. Ibid s 107A(7).

POSSESSION THAT ONLY SCRATCHES THE SURFACE? - JESSICA HARWOOD

1. *Petroleum (Onshore) Act 1991* s 6.
2. *Gasland* (Directed by Josh Fox, HBO Documentary Films, 2010).
3. See, Australian Broadcasting Corporation, 'Coal Seam Gas by the Numbers' (2011) *Australian Broadcasting Corporation website* <http://www.abc.net.au/news/specials/coal-sea'm-gas-by-the-numbers/drilling/>.
4. Ibid.
5. National Toxins Network, 'Submission to the NSW Inquiry into Coal Seam Gas' (September 2011) *National Toxins Network website* <http://ntn.org.au/wp-content/uploads/2011/02/NTN-Fracking-Briefing-Paper-2011.pdf>.
6. Rebekah Kebede, 'Santos confirms three spills from former Eastern Star Gas operations' (10 February 2012) *Reuters Online* <http://www.reuters.com/article/2012/02/10/australia-csg-idUSL4E8DA30020120210>.
7. National Water Commission, Position Paper, *Coal Seam Gas and Water Challenge*, December 2010, p1.
8. CSIRO, 'Coal seam gas – produced water and site management (fact sheet)' , April 2012.
9. CSIRO, "Coal seam gas – produced water and site management" Nov 2011 (Queensland). See also Minister for Resources and Energy the Hon Chris Hartcher, 'NSW Government has listened and acted: tough new conditions for coal and coal seam gas,' (Media Release, 21 July 2011).
10. Chris Russel, Submission No 358 to NSW Government, Coal Seam Gas Inquiry, 13 September 2011 <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/d1390acc04f8539dca25790d00270520/$FILE/Submission%200358.pdf>.
11. Ben Cubby, 'Arsenic and lead found in contaminated water leak at coal seam gas drill site', *Sydney Morning Herald (online)* 10 February 2012 <http://www.smh.com.au/environment/water-issues/arsenic-and-lead-found-in-contaminated-water-leak-at-coal-seam-gas-drill-site-20120209-1rx7s.html>.
12. Queensland Government, 'Hydraulic fracturing (fraccing) in CSG wells' (March 2011) *Department of Environment and Resource Management website* <http://www.derm.qld.gov.au/factsheets/pdf/environment/en10.pdf>.
13. Dr Mal Helmuth, 'Scoping study: Groundwater impacts of Coal Seam Gas Development – Assessment and Monitoring', (2008), 48. <http://www.gabpg.org.au/wp-content/uploads/2011/08/Groundwater-Impacts-of-CSG-development.pdf>.
14. CSIRO, "What is Coal Seam Gas," Factsheet.
15. Australian Broadcasting Corporation, 'Queensland farmers furious at freeze on CSG exploration in towns' (16 August 2011) *ABC Rural* <http://www.abc.net.au/rural/news/content/201108/s3294726.htm>.
16. Scott Hickie, 'Diminishing the efficacy of disallowance motions: Quasi-legislation in State jurisdictions' (Paper presented at the Australasian Annual Conference of the Australasian Study of Parliament Group, Melbourne, Victoria, 6-8 October 2011) <http://www.aspg.org.au/

conferences/melbourne2011/Scott%20Hickie.pdf>.
17. *Petroleum (Onshore) Act 1991* (NSW), s 7.
18. *Mining Act 1992 (NSW)* s 1, sch 2.
19. Peter Briggs, Kristie Richards, William Oxby and John Taberner, 'Important New Land Use Policies for Exploration and Mining in NSW' (15 March 2012) *Freehills website* <http://www.freehills.com.au/7924.aspx>.
20. Environmental Defenders Office, Submission to the NSW Government, *Draft NSW Aquifer Interference Policy – Stage 1*, 3 May 2012 <http://www.edo.org.au/edonsw/site/pdf/subs/120503aquifer_interference.pdf>.
21. NSW Government, 'Draft Code of Practice for Coal Seam Gas Explorers' (2012) *NSW Division of Resources and Energy* <http://www.resources.nsw.gov.au/community-information/coal-seam-gas/code-of-practice-for-coal-seam-gas-explorers>.
22. Marylou Potts, Submission 672 to the NSW Government, *Inquiry into Coal Seam Gas*, 6 October 2011<http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/31c6bf534ba9e4c9ca25794a000c25b0/$FILE/Submission%200672.pdf>.
23. See especially *Petroleum (Onshore) Act* 1991 (NSW), s 69D.
24. *Petroleum (Onshore) Act 1991* (NSW) s 69F.

TO POSSESS IS TO CONTROL: FORCED LABOUR PRACTICES IN NEPAL - DEVIKA GUPTA

1. Amnesty International, 'False Promises — Exploitation and Forced Labour of Nepalese Migrant Workers' (ASA Report No 31/007/2011, Amnesty International, December 2011) 20.
2. *International Labour Convention (No 29) Concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932) art 2.1.
3. International Labour Organization, 'Nepal Ratifies ILO Forced Labour Convention' (Press Release, ROAP/07/35, 4 September 2007) <http://www.ilo.org/asia/info/public/pr/WCMS_BK_PR_213_EN/lang--en/index.htm>.
4. International Trade Union Confederation (ITUC), 'Internationally Recognised Core Labour Standards in Nepal: Report for the WTO General Council Review of the Trade Policies of Nepal' (Report, ITUC, 27 January 2012) 8.
5. *Human Rights Commission Act, 2053* (1997) (Nepal) s 9(2) [National Human Rights Commission of Nepal trans, *Human Rights Commission Act, 2053* (1997) (11 November 2011) <http://nhrcnepal.org/plan_detail.php?id=7>.
6. *Interim Constitution, 2063* (2007) (Nepal) art 132(2) [United Nations Development Programme (Nepal) trans, *The Interim Constitution of Nepal, 2063 (2007): As Amended by the First to Eighth Amendments* (UNDP, 2010) 206].
7. National Human Rights Commission (Nepal), 'A Study of the Domestication Status of International Covenant on Civil and Political Rights in Nepal' (Report No 32/82/2064, National Human Rights Commission, May 2007) iii.
8. International Labour Office (Geneva), International Labour Organization, *A Global Alliance against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 93rd sess, Report I(B), (2005) 9 (*'ILO ILC Report'*).
9. Ibid.
10. Birendra Giri, 'The Bonded Labour System in Nepal: Perspectives of *Haliya* and *Kamaiya* Child Workers' (2005) 44(6) *Journal of Asian and African Studies* 599, 606.
11. ILO ILC Report, 30.
12. International Labour Office (Nepal), International Labour Organization, *Dalits and Labour in Nepal: Discrimination and Forced Labour* (Format Printing Press for ILO, 2005) xiii (*'Dalits and Labour in Nepal'*).
13. Ibid.
14. Ibid xv.
15. Giri, above n 10, 599 (citations omitted).
16. Ibid.
17. Ibid 599–600.
18. Ibid 600.
19. Ibid.
20. Ibid.
21. Asian Legal Resource Centre, *Nepal: The Haliya Bonded Labour Slavery System Must Be Abolished without Further Delay*, HRC, 15th sess, Agenda Item 3, UN Doc A/HRC/15/NGO/18 (1 September 2010) 2.
22. Asian Legal Resource Centre, *Nepal: The Haliya Bonded Labour Slavery System Must Be Abolished without Further Delay*, HRC, 15th sess, Agenda Item 3, UN Doc A/HRC/15/NGO/18 (1 September 2010) 3.
23. National Human Rights Commission (Nepal), above n 7, 11.
24. Ibid 23.
25. Ibid.
26. Ibid 12.
27. *Interim Constitution (Nepal), 2063* (2007) art 13 [United Nations Development Programme (Nepal) trans, *The Interim Constitution of Nepal, 2063 (2007): As Amended by the First to Eighth Amendments* (UNDP, 2010) 206].
28. National Human Rights Commission (Nepal), above n 7, 23–24.
29. *Dalits and Labour in Nepal*, above n 15, xvii.
30. Ibid.
31. Giri, above n 10, 600.
32. Ibid (citations omitted).
33. Ibid 605.
34. Ibid (citations omitted).
35. ITUC, 'How to Combat Forced Labour and Trafficking: Best practices manual for trade unions', February 2009, <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_142664.pdf>, 30.
36. *ILO ILC Report*, 37.
37. Ibid 83.
38. Giri, above n 10, 614.
39. *Dalits and Labour in Nepal*, above n 15, xvii.
40. National Human Rights Commission (Nepal), above n 7, 49.
41. *ILO ILC Report*, 80.
42. Bal Kumar KC et al, 'Nepal — Trafficking in Girls with Special Reference to Prostitution: A Rapid Assessment' (Investigating the Worst Forms of Child Labour Report No 2, International Programme on the Elimination of Child Labour (IPEC), International Labour Organization, December 2001) 1 (*'Trafficking in Girls IPEC Report'*).
43. Bal Kumar KC et al, 'Child Labour in the Nepalese Carpet Sector: A Rapid Assessment' (Investigating the Worst Forms of Child Labour Report, International Programme on the Elimination of Child Labour (IPEC), International Labour Organization, 2002) ix (*'Child Labour in the Nepalese Carpet Sector IPEC Report'*).
44. *Trafficking in Girls IPEC Report*, above n 50, 25.
45. *Child Labour in the Nepalese Carpet Sector IPEC Report*, above n 51, ix.
46. International Labour Office, 'Child Labour and Responses: Overview Note — Nepal' (Overview Note, International Programme on the Elimination of Child Labour, International Labour Organization, November 2004) 3.
47. *ILO ILC Report*, 6.
48. ITUC, 'Internationally Recognised Core Labour Standards in Nepal', above n 4, 7.
49. Ibid.
50. International Labour Office, above n 54, 2.
51. Ibid.
52. Ibid 2.
53. Ibid.
54. Ibid.
55. *Labour Rules, 2050 (1993)* (Nepal).
56. *Labour Act, 2048 (1992)* (Nepal) s 16 [Nepal Law Commission trans, *Labour Act, 2048 (1992)* (1996) 10].
57. *Child Labour in the Nepalese Carpet Sector IPEC Report*, above n 51, x.
58. *ILO ILC Report*, 8.
59. Ibid.
60. *International Labour Convention (No 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000) art 2.
61. *Labour Act, 2048 (1992)* (Nepal) s 2(h) [Nepal Law Commission trans, *Labour Act, 2048 (1992)* (1996) 10].
62. Shiva Sharma, Bijendra Basnyat and Ganesh GC, 'Nepal — Bonded Labour among Child Workers of the *Kamaiya* System: A Rapid Assessment' (Investigating the Worst Forms of Child Labour Report No 5, International Programme on the Elimination of Child Labour (IPEC), International Labour Organization, November 2001) 12.
63. *Child Labour in the Nepalese Carpet Sector IPEC Report*, above n 51, xii.
64. ITUC, 'Internationally Recognised Core Labour Standards in Nepal', above n 4, 11.
65. ITUC, 'How to Combat Forced Labour and Trafficking', above n 39, 17.
66. June Kane, 'Combating Child Labour in Asia and the Pacific: Progress and Challenges' (Making Decent Work an Asian Goal Report, ILO, 2005) 48.

STARS, STRIPES AND SLAVERY - KAREN RAUCHLE

1. *United States Constitution* amend XIII.
2. Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (University of California Press, 2009) 8.
3. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003)(*'Palermo Protocol to Prevent Trafficking in Persons'*).
4. Kimberly L Thachuk, 'An Introduction to Transnational Threats' in Kimberley L Thachuk (ed) *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life* (Praeger Security International, 2007) 3, 13.
5. Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (University of California Press, 2009) 46.
6. Louise I Shelley, 'The Rise and Diversification of Human Smuggling and Trafficking into the United States' in Kimberley L Thachuk (ed) *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life* (Praeger Security International, 2007) 194, 196.
7. Ibid.
8. Francis T Miko, 'International Human Trafficking' in Kimberley L Thachuk (ed) *Transnational Threats:*

Smuggling and Trafficking in Arms, Drugs, and Human Life (Praeger Security International, 2007) 36, 42.
9. Shelley, above n 5, 204.
10. Miko, above n 7, 39–40.
11. Shelley, above n 5, 206–207.
12. Bales and Soodalter, above n 2, 3.
13. Ibid, 6.
14. U.S. Department of State, Trafficking in Persons Report (June 2004) 23, <www.state.gov/g/tip/rls/tiprpt/2004/> in Bales and Soodalter, 6.
15. Kimberly A McCabe, *The Trafficking of Persons: National and International Responses* (Peter Lang, 2008) 113.
16. Thachuk, above n 4, 4.
17. Ibid 4–5.
18. Miko, above n 7, 36.
19. United Nations International Drug Control Programme, *World Drug Report* (Oxford University Press, 1997) 124, cited in Shelley, above n 5, 197.
20. *TIP Report 2006*, above n 12, 13.
21. Miko, above n 7, 39.
22. Ibid 37.
23. Ibid 36–37.
24. McCabe, above n 15, 40.
25. Bales and Soodalter, above n 2, 33.
26. Ibid.
27. Ibid 39.
28. *Victims of Trafficking and Violence Protection Act*, 22 USC ch 48 (2000).
29. *Palermo Protocol to Prevent Trafficking in Persons*, signed 13 December 2000, and ratified 3 November 2005.
30. McCabe, above n 14, 111.
31. Miko, above n 8, 38–39.
32. *Victims of Trafficking and Violence Protection Act of 2002*, 22 USC § 103(8) (2000).
33. Ibid.
34. US Department of State, *International Information Programs: Washington File* (January 24, 2002) <http://usinfo.state.gov>, cited in Miko, above n 8, 44.

FRESHER FUTURES - ELLA ALEXANDER

1. This name alludes to the 'Stronger Futures' Bill that will implement the next stage of the Northern Territory Intervention (under consideration in the federal Parliament at the time of writing). The implication in using this title is that the issue of food security in remote Indigenous communities is of vital importance and one that has not sufficiently been addressed.
2. Food and Agriculture Organization of the United Nations (FAO), *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by the 127th Council, November 2004. ('FAO Voluntary Guidelines on the Right to Food').
3. Office of the High Commissioner for Human Rights, *Fact Sheet No 34*, The Right to Adequate Food', 2004, <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>. ('OHCHR Right to Adequate Food Fact Sheet').
4. Australian Bureau of Statistics, 'Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities in Australia,' 2006.
5. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Everybody's Business: Remote Aboriginal and Torres Strait Community Stores* (2010) 24 ('House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs').
6. J Burns and N Thomson, Review of nutrition and growth among Indigenous peoples (2008), Australian Indigenous Health Info Net <http://www.healthinfonet.ecu.edu.au/health-risks/nutrition/reviews/our-review>.
7. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 3, 23.
8. 'Teachers help remote locals to food supplies', *ABC News (online)*, 4 April 2012, <http://www.abc.net.au/news/2012-04-04/food-store-teachers-cars-apy-watarru/3931502/?site=indigenous&topic=latest>.
9. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 6, 84.
10. Above, n 8.
11. Parliament of Western Australia, Western Australia Environmental Health Needs Coordinating Committee *2004 Environmental Health Needs of Indigenous Communities in Western Australia* (2005).
12. Alex Harper, Opinion, 'There's a food crisis happening now but it's now in Africa', *Sydney Morning Herald*, 28 October 2011 <http://www.smh.com.au/opinion/politics/theres-a-food-crisis-happening-now-but-its-not-in-africa-20111028-1mnof.html#ixzz1omM6wqXL>.
13. Sarah Martin, 'Funding cuts risk APY food supplies', *The Adelaide Advertiser*, 28 March 2011.
14. Personal communication about the town of Wilcannia with Legal Aid Solicitor.
15. For a list of studies, see House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5.
16. S Hudson, the Centre for Independent Studies, 'Healthy Stores, Healthy Communities: The Impact of Outback Stores on Remote Indigenous Australians' (2010).
17. Harper, above n 12.
18. National Aboriginal and Torres Strait Islander Nutrition Strategy and Action Plan (NATSINSAP), Submission 59 to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, 7.
19. Lexi Metherell, 'Emergency Food sent to remote SA community', *ABC News* (online), 2 September 2011, <http://www.abc.net.au/worldtoday/content/2011/s3308241.htm>.
20. See, eg, Queensland Health, 'The 2006 Healthy Food Access Basket (HFAB) survey' (2007), <http://www.health.qld.gov.au/ph/documents/hpu/33125.pdf>.
21. Australian Bureau of Statistics, 'Australian Social Trends, 2008: Population Distribution'.
22. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, 24; Harper, above n 12.
23. Preventative Health Taskforce of the Australian Government, 'Technical Paper 1: Obesity in Australia- a need for urgent action' (2008) <http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/tech-obesity-toc~tech-obesity-4~tech-obesity-4.3>.
24. Michael Coggan, 'Red Cross wants war on malnutrition', ABC Radio, The World Today', 21 October 2010, <http://www.abc.net.au/worldtoday/content/2010/s3044445.htm>
25. JR Condon, G Warman and L Arnold, *The Health and Welfare of Territorians* (Epidemiology Branch Territory Health Services, 2001) 121.
26. Personal communication with council staff at Nganmarriyanga community, July 2011.
27. Ishkandar Razak, 'Remote communities call for healthy food subsidy', *ABC Radio: The World Today*, 25 August 2006 <http://www.abc.net.au/worldtoday/content/2006/s1724538.htm>.
28. Richard Trudgen, *Why Warriors Lie Down and Die: towards an understanding of why the Aboriginal people of Arnhem Land face the greatest crisis in health and education since European contact* (Aboriginal Resource & Development Services Inc, 2000), 133-5; Andrew Stojanovski, *Dog Ear Café* (Hybrid Publishers, 2010).
29. Paul Torzillo et al, 'The state of health hardware in Aboriginal communities in rural and remote Australia.' (2008) 32 *Australian and New Zealand Journal of Public Health 1.*
30. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, 80-81.
31. Hudson, above n 16.
32. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, 24.
33. Preventative Health Taskforce of the Australian Government, above n 22; Hudson, above n 16.
34. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, 79.
35. Natalie Whiting, 'Wilcannia businesses to be inspected', *ABC News* (online), 1 May 2012 <http://www.abc.net.au/news/2012-05-01/wilcannia-businesses-to-be-inspected/3982920>.
36. Department of Families, Housing, Community Services and Indigenous Affairs, 'Evaluation of the Community Stores Licensing Program, Final Report, May 2011', 36.
37. Ibid.
38. Dan Harrison, 'Aboriginal education gets $580 m boost in NT, *Sydney Morning Herald*, 29 March 2012 <http://www.smh.com.au/national/education/aboriginal-education-gets-580m-boost-in-nt-20120401-1w6l9.html>; Dan Harrison, '$825m to fund indigenous protection program in NT', *Sydney Morning Herald* , 29 March 2012 <http://www.smh.com.au/opinion/political-news/825m-to-fund-indigenous-protection-program-in-nt-20120328-1vyrm.html>.
39. Michael Owen, 'Subsidy of $300, 000 could ease APY hunger', *The Australian* (online), 17 September, 2011, <http://www.theaustralian.com.au/national-affairs/indigenous/subsidy-of-300000-could-ease-apy-hunger/story-fn9hm1pm-1226139329231>.
40. Ibid.
41. Hudson, above n 16.
42. 'Report highlights food supply worries', *ABC News* (online), 12 April 2012. <http://www.abc.net.au/news/2012-04-12/food-security-report-apy-lands/3945158>
43. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 6, 24.
44. 'Indigenous communities starved of fresh food, Government told', *ABC News* (online), 17 November 2009 <http://www.abc.net.au/news/stories/2009/11/17/2745338.htm?site=news>.
45. Council of Australian Governments (COAG), 'National Strategy for Food Security in Remote Indigenous Communities, (2009) <www.coag.gov.au/coag_meeting...12.../nat_strat_food_security.pdf.>; National Public Health Partnership, Strategic Inter-Governmental Nutrition Alliance (SIGNAL), 'National Aboriginal and Torres Strait Islander Nutrition Strategy and Action Plan, 2000-2010 (2001); See Recommendation 23 regarding a freight subsidy for the Torres Strait, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 6, 24; Preventative Health Taskforce of the Australian Government, Technical Paper 1: Obesity in Australia- a need for urgent action' <http://www.health.gov.au/internet/

preventativehealth/publishing.nsf/Content/tech-obesity-toc~tech-obesity-4~tech-obesity-4.3>.

46. See, eg, Bob Debus, as quoted above, n 44 and South Australian Greens MP Tammy Franks, as quoted in 'Greens renew push for APY food subsidy', *ABC News* (online), 29 August 2011 <http://www.abc.net.au/news/2011-08-29/greens-renew-push-for-apy-food-subsidy/2860462>.
47. Australians for Native Title and Reconciliation ('ANTaR'), Submission to Treasurer's Department, Pre-Budget 2011-2012, (2012); Strategic Inter-Governmental Nutrition Alliance, *Eat Well Australia: an agenda for action for public health nutrition*, (2000) <www.nphp.gov.au/publications/signal/eatwell1.pdf>; Fred Hollows Foundation, Submission to National Food Plan Unit of the Commonwealth Department of Agriculture, Fisheries and Forestry, September 2011, 2; National Rural Health Alliance Inc, *Position Paper: Providing fresh food in remote Indigenous communities*, March 2006, <http://nrha.ruralhealth.org.au/cms/uploads/projects/providing%20fresh%20food%20%2830aug06%29.pdf>; Aboriginal Medical Services Alliance of the Northern Territory, *Fresh Food Summit: Interim Report*, May 2010 <http://www.remoteindigenousgardens.net/wp-content/uploads/AMSANT-FFS-Interim-report-1.pdf>; Dieticians Association of Australia and Public Health Association of Australia, *Food Security for Aboriginal and Torres Strait Islander Peoples Policy*, 2011, <http://daa.asn.au/wp-content/uploads/2011/03/Food-Security-for-Aboriginal-and-Torres-Strait-Islander-Peoples-Policy.pdf>; as discussed by research fellow Alex Harper of the Cape York Institute for Policy and Leadership: Alex Harper, above n 12, Central Land Council, Submission 57 to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5; Australian Red Cross, Submission 85 to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Everybody's Business: Remote Aboriginal and Torres Strait Community Stores* (2010).
48. Marcia Langton, 'Starved of their future at birth, *The Australian*, 22 August 2011 <http://www.theaustralian.com.au/national-affairs/indigenous/starved-of-their-future-at-birth/story-fn9hm1pm-1226119205446>.
49. Owen, above n 40.
50. Harper, above n 12.
51. Australian Government, Department of Infrastructure and Transport, *Background-Tasmanian Freight Equalisation Scheme*, <http://www.infrastructure.gov.au/transport/programs/maritime/tasmanian/scheme.aspx>.
52. Harper, above n 12.
53. Ibid.
54. Parliamentary Information and Research Service, Library of Parliament, Canada, 'The impact of economic instruments that promote healthy eating, encourage physical activity and combat obesity: literature review'. 2007 <www.parl.gc.ca/information/library/PRBpubs/prb0634-e.htm>.
55. 'Greens renew push for APY food subsidy', *ABC News* (online), 29 August 2011 <http://www.abc.net.au/news/2011-08-29/greens-renew-push-for-apy-food-subsidy/2860462>
56. For example, South Australian Aboriginal Affairs Minister Grace Portolesi notes that 'a long-term approach to food security is needed and a subsidy is not the way to go'. Federal Minister for Indigenous Affairs, Jenny Macklin, also rejects the idea in favour of income management to ensure a certain amount of weekly income is spent on food: Owen, above n 40.
57. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, 85.
58. See Recommendations 8 and 9 in House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 5, xvi.
59. Arnhem Land Progressive Aboriginal Corporation, 'ALPA FOODcard' <http://www.alpa.asn.au/pages/ALPA-FOODcard.html>.
60. See, eg, *Universal Declaration of Human Rights*, UN GA Resolution 217A (III), UN GAOR, 3rd Sess. 183rd plen mtg, UN Doc A/RES/217A (1948), art 25 (1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), art 6 (1); *The International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESR), Article 11 (1)-(2); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990), art 24 (1), (2)(c) and 27 (3) and the *Convention on the Elimination of all forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981, Article 12 (2).
61. United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No 34, The Right to Adequate Food*, 2004, 5.
62. ICESR, art 2 (1).
63. Ibid.
64. United Nations Office of the High Commissioner for Human Rights, above n 3, 20.
65. Ibid.
66. FAO, above n3, Guideline 8b, as quoted in FAO, *The Right to Food Guidelines and Indigenous Peoples: An Operational Guide*, 2009, 14.
67. United Nations Office of the High Commissioner for Human Rights, above n 3, 3.
68. Ibid.
69. *Australian Human Rights Commission Act 1986* (Cth) s 11 (1) (f), s 20 (1) (b).
70. Human Rights and Equal Opportunities Commission, 'Water: A Report on the provision of water and sanitation in remote Aboriginal and Torres Strait Islander communities (Toomelah Report) (1994).
71. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Submitting information to the Special Rapporteur, <http://www2.ohchr.org/english/issues/indigenous/rapporteur/submit.htm>.
72. United Nations Office of the High Commissioner for Human Rights, *Submission of information and individual complaints*, <http://www.ohchr.org/EN/Issues/Food/Pages/Complaints.aspx>.
73. Australian Human Rights Information Centre, *Communicating with the Human Rights Committee: A Guide to the Optional Protocol to the International Covenant on Civil and Political Rights*, s 3.4 <http://www.austlii.edu.au/au/other/ahric/booklet/index.html>.
74. Human Rights and Equal Opportunity Commission, Submission to the Coroner's Court of the Northern Territory, Inquest in to the Deaths of Kumanjay Presley, Kumnanara Coulthard and Kunmanara Brumby, 17 August 2006 <http://www.hreoc.gov.au/legal/submissions_court/intervention/presley_etal.html>.
75. Human Rights Committee General Comment No 6 regarding art 6 of the ICCPR Compilation of General Comments, UN Doc. HRI/GEN/I/Rev 1 at 6 (1994), (1994) 1-2 IHRR 4, Para 5; Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2011), 958.

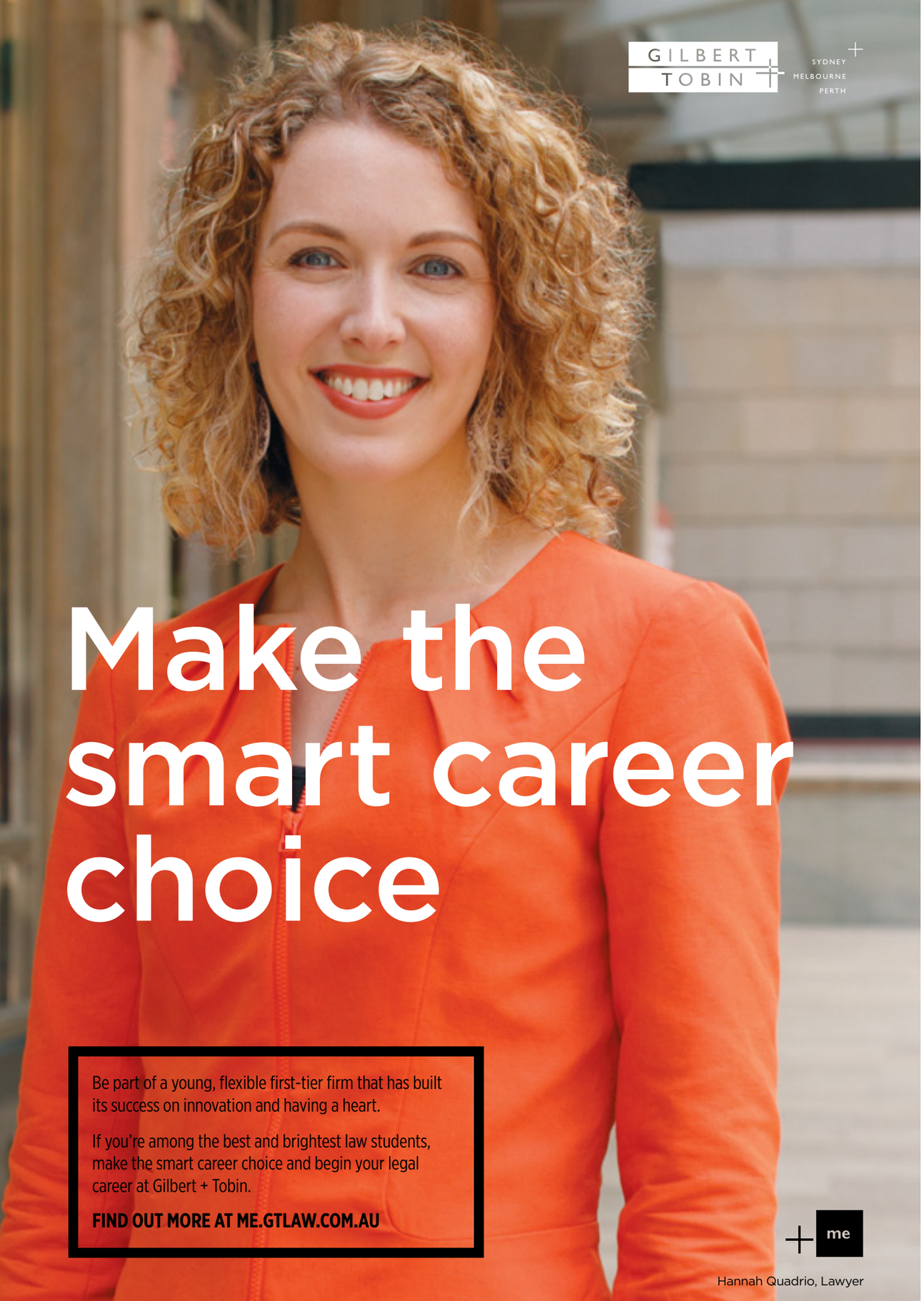
THE YOUNG AND THE RESTLESS - YOUTH MIGRATION IN THE FACE OF JOBLESSNESS AND SOCIAL IMMOBILITY - JUSTIN PENAFIEL

1. Chris Zappone, 'Tough times of young job seekers', *Sydney Morning Herald* (online), 2 March 2012 <http://www.smh.com.au/business/tough-times-for-young-job-seekers-20120302-1u721.html>.
2. Chris Zappone, 'Housing stress hits young people hard', *Sydney Morning Herald* (online), 18 April 2012 <http://www.smh.com.au/business/housing-stress-hits-young-people-hard-20120418-1x6ii.html>.
3. Australian Broadcasting Corporation, *Federal Budget targets Central Coast Youth Unemployment*, *ABC News Online* (11 May 2011) <http://www.abc.net.au/news/2011-05-11/federal-budget-targets-central-coast-youth/2713466>.
4. Zappone, above n 1.
5. Heath Gilmore, 'Quotas planned for uni students', *Sydney Morning Herald* (online) 19 March 2010 <http://www.smh.com.au/national/education/quotas-planned-for-uni-students-20100318-qiff.html>.
6. Obviously not her real name, and nor is anyone else's in this article.
7. Zappone, above n 2.
8. Brigid Delaney, 'Economic refugees flee Sydney for NYC', *Sydney Morning Herald* (online) 26 June 2012 <http://www.smh.com.au/opinion/society-and-culture/economic-refugees-flee-sydney-for-nyc-20120625-20yh2.html>.
9. Angelique Chrisafis, 'François Hollande wins French presidential election', *The Guardian* (online), 6 May 2012 <http://www.guardian.co.uk/world/2012/may/06/francois-hollande-wins-french-election>.
10. Australia-australia.com, 'Forum' (2012) *Australia-australie.com* <http://www.australia-australie.com/forum/>.
11. Al Jazeera, 'Unemployment soars in Paris banlieues', *Al Jazeera Europe* (18 April 2012) <http://www.aljazeera.com/video/europe/2012/04/201241810178247406.html>.
12. Robin Marantz Henig, 'What Is It About 20-Somethings?', *The New York Times* (New York), 18 August 2010, MM 28 <http://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?_r=1&hp=&pagewanted=all>.
13. Ilana Ross, 'What Is It About 20-somethings? I Don't Know, But Please Stop Asking me' (23 February 2012) *Huff Post College – The Blog* <http://www.huffingtonpost.com/ilana-ross/twenty-somethings_b_1248909.html>.
14. Slate Magazine, 'What's the Matter with Twentysomething Kids Today? (20 August 2010) *Slate Conversations In Real Time* <http://www.slate.com/articles/news_and_politics/im/2010/08/whats_the_matter_with_twentysomething_kids_today.3.html>.
15. Joy Press, 'Lena Dunham speaks uncomfortable truths about 'Girls', *Los Angeles Times* (online), 8 April 2012 <http://articles.latimes.com/2012/apr/08/entertainment/la-ca-lena-dunham-20120408>.
16. Lucy Ash, 'Portugal's jobless graduates flee to Africa and Brazil' (1 September 2011) *BBC News World* <http://www.bbc.co.uk/news/world-14716410>.
17. Jenna Goudreau, 'Why We Need To Take 20-Somethings Seriously', *Forbes Magazine* (online), 24 April 2012 <http://www.forbes.com/sites/jennagoudreau/2012/04/24/why-we-need-to-take-20-somethings-seriously/>.

18. Ibid.
19. Ibid.

COMPLEMENTARY PROTECTION: BRIDGING GAPS FOR VICTIMS OF TRAFFICKING FOR SEXUAL EXPLOITATION - ELLEN JOY

1. Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 1st ed, 2011) 431.
2. Udara Jayasinghe and Sasha Baglay 'Protecting Victims of Human Trafficking within a 'Non-refoulement' Framework: is Complementary Protection an Effective Alternative in Canada and Australia?' (2011) 23 *International Journal of Refugee Law* 489-520.
3. Kaori Saito, 'International Protection for Trafficked Persons and Those Who Fear Being Trafficked' (Research Paper No 149,UNHCR, 2007).
4. Anti-Slavery Australia, 'Fact Sheet 6: What are the Visa Options for Trafficked People' (2011) *Anti-Slavery Australia* <http://www.antislavery.org.au/resources/fact-sheets/98-fact-sheet-6-what-are-the-visa-options-for-trafficked-people.html>.
5. Ibid 3.
6. Ibid.
7. Fiona David, 'Prosecuting Trafficking in Persons: Known Issues, Emerging Responses', *Australian Institute of Criminology* (June 2008) <http://www.aic.gov.au/documents/1/5/6/{156229FC-EDC0-4F42-B1C5-7F46900E0090}tandi358.pdf>.
8. *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
9. *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).
10. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.
11. *MIEA v Guo* (1997) 191 CLR 559.
12. *Migration Act 1958* (Cth) s 91R(1)(b).
13. *Migration Act 1958* (Cth) s 91R(1)(c).
14. See *Case No V0618399* [2006] RRTA 95 (22 June 2006); *Case No N98/24000* [2000] RRTA 33 (13 January 2000).
15. *MIMA v Ibrahim* (2000) 204 CLR 1.
16. *MIMA v Khawar* (2002) 210 CLR 1 ('Khawar').
17. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, available at: <http://www.unhcr.org/refworld/docid/4720706c0.html [accessed 26 July 2012]>.
18. Anna Dorevitch and Michelle Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims Under Australia's Migration Law' (2008) 9 *Melbourne Journal of International Law* 1.
19. *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 ('Applicant S') [36].
20. UN High Commissioner for Refugees, 'Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked' (Guidelines HCR/GIP/06/07, UNHCR, 7 April 2006) [36] <http://www.unhcr.org/refworld/docid/443679fa4.html>.
21. *Migration Act 1958* (Cth), s 91 R(1)(a).
22. *Case No N98/24000* [2000] RRTA 33 (13 January 2000); *Case No V03/16442* [2004] RRTA 474 (25 June 2004); *Case No N02/43293* [2002] RRTA 944 (24 October 2002); *Case No V00/11003* [2000] RRTA 929 (29 September 2000).
23. *Migration Act 1958* (Cth).
24. *Migration Amendment (Complementary Protection) Act 2011* (Cth) (*'Complementary Protection Act', 'The Act'*).
25. DIAC, 'Fact Sheet 61a- Complementary Protection' (April 2012) Department of Immigration and Citizenship <www.immi.gov.au/media/fact-sheets/61a-complementary.htm>.
26. *Migration Amendment (Complementary Protection) Act 2011* (Cth).
27. *International Covenant on Civil and Political Rights, opened for signature 16 December 1966*, 999 UNTS 171 (entered into force 23 March 1976) <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) <http://www.unhcr.org/refworld/docid/3ae6b3a94.html>; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.
28. Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33 *Sydney Law Review* 687-734.
29. The Senate Legal and Constitutional Affairs Legislation Committee, *Parliament of Australia, 'Migration Amendment (Complementary Protection) Bill 2009'* (2009) at 15. Some of the recommendations from this report appeared in the *Migration Amendment (Complementary Protection) Bill* 2011 (which subsequently became the Act).
30. Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Complementary Protection) Bill 2009 (2009)* 15. Some of the recommendations from this report appeared in the *Migration Amendment (Complementary Protection) Bill 2011* (which subsequently became the Act); Jane McAdam, 'Australian Complementary Protection: A Step-by-Step Approach' (2011) 33 *Sydney Law Review* 687-734.
31. Above n 24, 696.
32. *Migration Act 1958* (Cth), s 91R(1)(b). This section requires 'instances' of harms similar to those listed in s 36(2A), although it must be noted that 'serious harm' is subject to later tests under the refugee definition that can be difficult to establish.
33. Ibid 26 , 715.
34. Ibid 26, 726.
35. Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Complementary Protection) Bill 2009* (2009) 14.
36. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989)* 169 CLR 379.
37. Ibid, 718.
38. Ibid, 26.
39. *Rahardja v Republic of Indonesia [2000]* FCA 1297, [37].
40. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.
41. Ibid, 722.
42. Ibid 26, 723.
43. Ibid 10.
44. *Migration Amendment (Complementary Protection) Act 2011* (Cth).


GILBERT
TOBIN
SYDNEY
MELBOURNE
PERTH
Make the smart career choice
Be part of a young, flexible first-tier firm that has built its success on innovation and having a heart.
If you're among the best and brightest law students, make the smart career choice and begin your legal career at Gilbert + Tobin.
FIND OUT MORE AT ME.GTLAW.COM.AU
me
Hannah Quadrio, Lawyer