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UNIVERSITY OF WESTERN SYDNEY  
**LAW REVIEW**

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Volume 17

2013

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## Editorial Advisory Board

In 2012 the *University of Western Sydney Law Review* (UWSLR) editorial committee decided to establish an Editorial Advisory Board for the UWSLR. The aims of the Advisory Board are to establish links with leading legal academics from other universities in Australia and the world, broaden the reach of the UWSLR to those other institutions in order to encourage submissions from academics at those and other institutions, and broaden the expertise of the UWSLR editorial committee when seeking external referees and advice on particular submissions.

The UWSLR sought members from diverse institutions in Australia and abroad with diverse areas of specialisation. We were fortunate to attract academics who are leaders in their areas of expertise and who are also generous with their knowledge. The UWSLR thanks the members of the Editorial Advisory Board and looks forward to a continuing productive relationship. The members of the Editorial Advisory Board are:

**Professor Michael Adams:** Dean, Law School, University of Western Sydney, Australia. Professor Michael Adams is an internationally recognised specialist in corporate law, governance, securities markets regulation, and legal education.

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## EDITOR'S NOTE

I am pleased to present Volume 17 of the *University of Western Sydney Law Review*.

This edition presents some wide ranging legal concerns and demonstrates the breadth of contemporary legal debate. I am pleased that the *University of Western Sydney Law Review* includes pieces by serving Judges as well as legal academics and legal practitioners, representing the concerns and interests of the legal community. This edition includes an occasional address by the Hon Justice T.F. Bathurst on how the practice of law has changed over the last forty years. We are also fortunate to be able to publish the 2013 Whitlam Institute and University of Western Sydney Law Address given by Professor George Williams, presenting the case for Aboriginal Peoples to be recognised in the Australian Constitution. The scholarly articles address: how the newly enacted *Evidence Amendment (Evidence of Silence) Act 2013 (NSW)* impact on the right to silence; the challenges to human rights and privacy posed by the increasing use of DNA databases; and how the law of war can incorporate the activities of transnational organized crime. As well, the Law Review contains case notes on two recently decided cases.

This edition was made possible through the hard work, co-operation and collegial spirit of the editorial committee and the student editors. The editorial committee and student editors embraced the task with enthusiasm and determination to produce what we believe to be a quality publication. Such standards could only be achieved through the dedication of all those involved in the editorial process.

In 2013 the *University of Western Sydney Law Review* was fortunate to be able to attract high quality submissions from academics covering a diverse range of topics. We wish to thank the academics from around Australia and abroad who generously gave of their time to double blind peer review the articles contained herein.

I also wish to thank the contributors for their articles, case notes and commentaries, and for helping to make this edition of the *University of Western Sydney Law Review* a publication that continues to contribute to vibrant legal discussion.

Dr Elfriede Sangkuhl

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## Occasional Address

### **UNIVERSITY OF WESTERN SYDNEY LAW ALUMNI OCCASIONAL ADDRESS 8 NOVEMBER 2013, DOLTONE HOUSE SYDNEY**

THE HONOURABLE JUSTICE TF BATHURST\*

#### I INTRODUCTION

A few months ago, when I received a letter from the Dean of Law and the President of the Alumni Association inviting me to speak at this dinner, I accepted with delight. I then put the letter onto one of the piles of papers on my desk, where it vanished for some time. When I finally found it again recently, two things I read caused me to come to a sobering realisation.

The first was reading that the University of Western Sydney has been providing high quality legal education for almost 20 years. I, on the other hand, have been attempting to provide moderate quality legal advice for some 40 years.

The second was learning that 3,000 students have graduated from UWS' LLB Program in those 20 years. That, I realised, is more than three times the number of barristers who were practising when I first came to the bar.

The conclusion I was forced to draw from these matters is that I really am quite old. That is probably not a huge revelation to anyone here tonight, but it came as quite a shock to me. Previous comparisons with the rest of my judicial colleagues had led me to believe I was early middle aged.

Having got over that shock, I thought I might take advantage of the situation, and reflect tonight on what has changed over the years since I began practicing. What value, you may ask, could this have, except for allowing me to indulge in reflections of the past that are probably best kept to myself?

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\* Chief Justice of New South Wales. I express my thanks to my Research Director, Ms Sienna Merope, for her assistance in the preparation of this address.

I don't know if you will find this a convincing answer, but to my mind considering what has changed over the last 40 years is relevant because it enables us, as a profession, to reflect, first, on how far we have come – both in providing legal services to the public, and in making legal practice more stimulating and interesting. Second, it allows us to identify changes to the legal landscape that have thrown up new challenges, and placed certain elements of professional life and dispute resolution under pressure – and perhaps even to suggest ways to meet those challenges.

Now rest assured, I'm not going to bore you by telling you how lucky you are to have graduated in the last twenty years on the one hand, or by talking endlessly about how good the good old days were on the other. Almost all members of the senior judiciary have had a go at the first type of speech, and no one would believe me if I began eulogising the past, least of all myself. Rather, I will try to simply reflect on some of the major changes of the last 40 years, and say a few words about the implications of some of those changes.

## II SUBSTANTIVE LEGAL CHANGE

Can I start at the mundane level? When I first started practising law as an articled clerk, although it had been 67 years since Federation and 26 years since the *Statute of Westminster Adoption Act 1942* (Cth), Australian courts were yet to declare their independence from the Privy Council and House of Lords. English law remained a towering influence on the development of Australian law. In fact, until the *Australia Acts 1986* (Cth) were passed in 1986, litigants continued to take appeals to the Privy Council, including directly from State Supreme Courts. In that way parties by-passed the High Court when it seemed advantageous to do so, for example because an existing decision seemed to be against them. In fact, the 'increased availability of air travel meant that the Privy Council was probably hearing more Australian appeals in the 1970's than in the 1930's'.<sup>1</sup> Cynics often suggested, of course, that the reason for the continuing popularity of the Privy Council, particularly in the months between May and October, had something to do with barristers' holiday plans. Nothing could be further from the truth.

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<sup>1</sup> The Hon Murray Gleeson, 'The Privy Council – An Australian Perspective' (Speech delivered at the Anglo-Australian Lawyers Society, Commercial Bar Association and Chancery Bar Association, London, 18 June 2008) 2.



At the time I entered the legal profession, there was minimal statutory intervention in the common law, with the possible exception of the Criminal Law. There was for example, no such thing as the *Trade Practice Act 1974* (Cth). The *Corporations Act 2001* (Cth), then known as the *Companies Act*, contained some 60 sections, mainly dealing with issues of ultra vires, reductions in capital and the relationship between the company and its shareholders. There was no *Evidence Act*. In fact I vividly remember when the *Evidence Act 1995* (NSW) came into force. I was appearing in Melbourne around the time, and in the course of argument I remarked to the judge 'now of course your Honour hasn't had the misfortune of dealing with the Evidence Act', to which his Honour replied, 'I was on the Commission that recommended that Act, Mr Bathurst'.

There was no *Supreme Court Act 1970* (NSW), certainly no Uniform Rules of Civil Procedure. There was however a *Common Law Procedure Act 1899* (NSW), carefully designed to trick people into commencing proceedings in the Equity as opposed to the Common Law division, at which point they were deemed non-suited and had to start again.

Rules of Pleading were fine in the extreme. At some point during my University career, I remember trying to memorise the 1845 edition of *Bullen and Leake on Pleadings*, to pass our pleadings exam. Yes, we had those. The exam was set by an extremely senior barrister who later went onto become a judge of the Supreme Court. He would generally start his lectures by waving a copy of *Bullen and Leake* around while proclaiming it 'the finest work of English literature known to history, save for King Lear and the King James Bible'. Each to their own I guess.

Much has changed since then. When I was preparing this speech I mentioned *Bullen and Leake* to my researcher, and she responded with the kind of dazed and confused stare more usually seen in clients emerging from a meeting with their tax accountant.

There have been other changes. Comprehensive tort reform in the early 2000s greatly decreased personal injury litigation resulting from motor accidents and work-related accidents - areas which had previously been a mainstay of the common law system. Commercial law is infinitely more complex today than even 20 years ago. Equitable principles have also increasingly expanded into the commercial sphere. The recognition of remedies for unconscionable conduct and misleading and deceptive conduct, and the expansion of fiduciary duties into commercial relationships, provide two of numerous examples.

Australian law has adopted an increasingly international outlook. No longer do we look only to the United Kingdom to assist with precedent. In fact as the influence of European Union law is increasingly felt there, it may be that judicial decisions from that jurisdiction will be increasingly less applicable to the Australian context. Rather, we now also seek guidance from other common law jurisdictions in our region, including New Zealand, Hong Kong and Singapore, as well as looking to United States authority.

A particularly notable development has been the increasing relevance of statute. As I mentioned, when I began practicing the common law operated relatively free of legislative intervention. That is no longer the case, to put it mildly. From the ever-expanding *Income Tax Assessment Act 1997* (Cth), to the introduction of the *Australian Consumer Law*, to continual amendments to Criminal legislation, statute is an overwhelming presence in the legal landscape.

There are many possible reasons for the greatly increased scope of legislative activity. It may be, as former Chief Justice Gleeson has put it, that citizens now look to legislators to intervene in many areas that were once the province of judges and lawyers 'partly as a consequence of the work of law reform agencies, partly as a consequence of expanding public and political interest in legal rights and obligations ... and partly as a consequence of an increased disposition to question and challenge all forms of authority'.<sup>2</sup> To that I would add a perception by governments that legislation will make the law simpler, and perhaps a view that change in the law is itself a sign of progress or improvement.

I would not want it to be thought that I am 'anti statute'. Legislation is certainly desirable in some areas and legislative intervention has achieved reforms that no doubt would have taken much longer, and may yet not have been completed, if left to the courts. However, I do have doubts about whether legislation simplifies the law. There seems at present to be a trend towards ever more specific and complex statutes, that aim to define and address every problem that may arise in a given legal area, rather than establish broad principles to guide judges. This creates difficulties, when inevitably, an unforeseen situation arises, and can impede the principled development of the law.

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<sup>2</sup> The Hon Murray Gleeson, 'Some Legal Scenery' (Speech delivered at the Judicial Conference of Australia, Sydney, 5 October 2007) 14.

Further, when common law principles are not only subsumed into but altered by statute, the result can be confusion rather than clarity, as courts lose the benefit of decades or centuries of accumulated common law guidance. It should be remembered that statutes must be interpreted by courts, and that not every issue will necessarily be improved by the sometimes unwieldy products of legislative drafting.

As a side note, there have been two rather quirky developments in the drafting of legislation over the last 40 years. The first is the new enthusiasm for giving statutes what I might describe as a 'happy title', designed to make the unsuspecting public think that what is in the legislation is a wonderful thing for them. So for example, instead of calling the legislation implementing the GST 'An act to levy a tax on goods and services' we had 'the New GST Act'. I guess calling it the 'New and Improved GST Act' was a bridge too far, but the implication is there. Similarly in industrial relations, friendly titles like WorkChoices and the Fairwork Act disguise the reality that the statute is an attempt to balance the rights of the employee and of the employer, the likely consequence being that everyone will think the legislation unfair to some degree.

The other development is the use of what legislative drafters describe with self-satisfaction as 'plain English'. I started speaking English when I was around two years old, which really was a long time ago. When I read some of these statutes however, I think that if this is plain English, I must have missed something important in primary school.

Legislation has certainly become more complex. Nevertheless, it is undeniable that it has and will continue to play an important role in the development of the law. In that context, it is imperative that law students and practitioners have expertise in statutory interpretation. Currently, I believe the subject is still treated as something of a side note in legal education. It will be interesting to see how that changes in coming years.

Another area of change, over the last 20 years in particular, has been the expanding importance and scope of administrative law. Arguably this is in part due to a growth in government decision-making that directly affects individuals, coupled with the introduction of legislation regulating the review of government decisions. It is also due to the increasing use of tribunals – a trend which can be seen most recently in the decision to establish the NSW Civil and Administrative Tribunal (NCAT). Tribunals have brought many benefits in terms of more accessible justice and innovations in judicial process. They have also

made review of administrative decisions one of the fastest growing areas of litigation, particularly since the High Court's decision in *Kirk*.<sup>3</sup>

### III DISPUTE RESOLUTION PROCESSES

These changes relate to what can be described loosely as substantive law. There have been equally significant if not greater changes in the process of dispute resolution, and not only in the sense that *Bullen and Leake* has fallen out of favour in legal education.

When I started practice, a long trial was one that went for two days. Cases were found by consulting books. LexisNexis had yet to be established. Briefs were shorter. Party autonomy was sacrosanct. The courts had almost total monopoly over dispute resolution.

Those days are hard to imagine now. The change was brought home to me when I assumed my present role. I had to clear out my old Chambers. In the dustiest corner, there were some old briefs, tied in frayed pink ribbon, which I could only hope I had in fact attended to. They reminded me fondly of the days when delivery of a brief was done by a solicitor's clerk, rather than by a professional removalist company.

Changes in technology, in commerce and in the complexity of the law have greatly altered the nature of litigation. The obvious example is discovery. In 2010, 1.9 billion email users sent 107 trillion emails. To be fair, a decent proportion of those were probably cat videos. Nonetheless, the amount of information generated and stored that is potentially relevant to a legal dispute has increased exponentially since I started practice. This has had serious implications for the cost of litigation - discovery in particular - and in turn for the accessibility of justice.

The legal system has responded to these challenges in a number of ways. For courts, the move towards judicial case management has been particularly significant. This change has been described by Justice Sackville as 'a transformation of the judicial role from the traditional model of passive decision-maker, little concerned with public perceptions of the judicial system, to one in which courts actively revise procedures and administrative processes in order to achieve defined objectives'.<sup>4</sup> Case management has allowed judges to supervise

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<sup>3</sup> *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

<sup>4</sup> The Hon Ronald Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (2002) 12 *Journal of Judicial Administration* 5, 19.

and manage pre-trial procedures and to ensure that trials are conducted efficiently with a focus on the real issues in dispute between the parties. This has had undeniable benefits in terms of reducing delay and improving efficiency, lessening not only the cost on litigants and pressure on judges, but the overall cost of justice on the community.

I should add however that case management it is not an end in itself. Cooperation between courts and the profession in determining what issues need to be addressed at case management hearings, and compliance with courts' directions, are needed to ensure that extensive case management does not end up *adding* costs to litigation.

Another fundamental development has been the growth of alternative dispute resolution (ADR). ADR emerged as a result of the recognition that both the financial and emotional costs of litigation were high, and that litigation did not always meet the needs of clients. Today ADR processes are utilised in all types of legal disputes. Arbitration for instance plays a particularly central role in commercial dispute resolution, due to the advantages of party control, efficiency, confidentiality, flexibility, industry expertise and, often, lower cost. Mediation has brought huge benefits in family law. Measures such as court-annexed mediation have also contributed significantly to the achievement of just, quick and cheap outcomes for litigants, courts and the community more generally.

Changes of this magnitude have of course brought their own challenges. For instance, there are concerns in some quarters that if private dispute resolution continues to expand, the transparency, procedural fairness and jurisprudential development that only courts can guarantee will be sidelined. There is no doubt that courts face challenges in determining how best to supervise ADR, so as to ensure that the fundamental tenets of the administration of justice are not compromised. For my own part however I think that while ADR will continue to complement traditional courts structures, it will not replace them. The importance of a transparent system of public justice will endure.

#### IV THE LEGAL PROFESSION

I have said something about the changes both in the substance and processes of the law. In the time I have remaining I would like to consider the legal profession – how it was when I started, and how it has evolved in the last 40 years. It is of course very dangerous to make

comparisons between then and now, precisely because things were so different.

Certainly professional conduct was different in some respects. When I began practicing, there was one very successful common law silk who was known to ask female plaintiffs for whom he was acting if they had a baby. If they replied no, he would advise them to borrow one from a neighbour or friend (babies could usually be found) and bring it to court. When the plaintiff was called to give evidence, the instructing solicitor – or more likely the solicitor’s unfortunate clerk – was made to hold the baby and to poke it discreetly at opportune moments so that it would cry. The barrister would then stop his examination, look at the woman with a mournful gaze and then, you guessed it, look at the jury. He apparently only did this on one or two occasions, but legend has it, he more than doubled the expected verdict in those cases.

There were of course other great jury advocates who never went to such extreme lengths. One of those was Chester Porter, who I understand spoke to you in 2008. He could convince a jury of just about anything. Those of you who heard him speak can probably understand why.

These days it is different and has to be. Litigation involves greater documentary material and is surrounded by complex legislative restraints. The case involving the woman and her stand-in baby would now be heard by a judge, and irrespective of how clever the attempts to manipulate were, she would be unlikely to overcome the statutory benchmark to receive any compensation.

The judiciary has also changed. I think as far as that is concerned, you people have the better end of the stick than graduates of my time. I don’t mean because you have me as Chief Justice. I was actually going to list that as one of the advantages, but my researchers told me not to delude myself.

There is, for one thing, a much greater degree of courtesy between counsel and the Bench than existed at that time. When I hear people, including distinguished jurists of a certain age talk about judicial bullying today, I smile to myself and wonder if they had an extraordinarily sheltered existence in their early career. It is probably more likely that they have managed to achieve amnesia in relation to the traumas of their youth.

In the 1970s and very early 1980s, the NSW Court of Appeal, whilst it lacked for nothing in intellectual ability and integrity, thought the idea of engaging with counsel meant engaging in cross-examination. At its most charitable, that cross-examination could be described as blunt. Even experienced silks got nervous going there. More than one barrister was reduced to tears. That has changed. I would not be bold enough to claim that judicial bullying never occurs, but it is universally recognised as unacceptable behaviour, as well it should be.

There have been other significant improvements. The increasing diversity in gender, professional and social background amongst the judiciary and the profession has greatly benefited the administration of justice. I hope and believe it will be followed in due course by greater ethnic diversity. The increasing tendency by judges to talk publicly about the role of the courts and the work of the judiciary is also to be welcomed. Judges should continue to speak primarily through their judgments, but public engagement also plays an important role in improving community understanding and with it confidence in the administration of justice.

While on the theme of courtesy though, one thing I have noticed in recent years is the increasing ferocity with which lawyers exchange correspondence. Forty years ago there were far fewer lawyers, and you often knew the person you were communicating with quite well. In those circumstances standards of courtesy applied as a general rule. Increasing pressures being put on the profession seems to be leading to a decline in that standard.

It is important we strive to retain professional courtesy. Whenever putting something in writing I think it is apt to remember what Justice Gummow once said to a particularly ferocious counsel who will remain nameless – ‘more light, less heat Mr X’. The other thing to keep in mind is that discovery being what it is, the letter or, more often, email, you write in the heat of the moment is likely to end up before the Bench one day.

I do have great sympathy for the pressures, many of them due to commercialism and technology, that are placed on legal professionals today however.

That is not to say that it was a walk in the park in my day. Under the older articles of clerkship system that operated when I first started legal practice, the employment of a young solicitor was a genteel form of slavery. Well, sometimes it was genteel. Graduating students would

sign a roll promising they would serve their *master* – I emphasise that term – solicitor faithfully for a period of up to five years. They were then worked to the bone and were expected to be seen but not heard. For the privilege they were paid something in the order of five dollars a week, or whatever lesser amount would enable them to catch public transport to and from their home to their master's place of employment.

Today, the role of young lawyers is, I think, generally more interesting. Graduate program training and the commitment by firms to supporting young lawyers to engage in pro bono work have played an important role in this respect.

There are however, undoubtedly new challenges for legal practitioners today. Technology, while it has had many benefits for legal practice - including making information vastly more accessible - has also heightened the pressure on lawyers. In the old days, you would write a letter to the other side, wait a day or two for the mail to reach them, and a day or two for them to reply. Today, instant communication means that lawyers are expected to be glued to their Blackberries at all times of the day and night.

The increasing commercialisation of legal practice has also raised new issues, both in relation to practitioners' wellbeing and to the maintenance of professional ethics. The structure and operation of 'mega firms', the use of international outsourcing, the incorporation of law firms, and the growing use of in-house counsel are all factors of relevance. I have spoken previously on this topic and won't bore you by repeating my comments tonight but I would just like to emphasise two points. First, ensuring that our enduring professional ethics are maintained in the face of increasing commercial pressure requires that law firms develop an ethical *legal* culture, and not simply *corporate* culture. That in turn requires an open discussion about how professional ethics are to be upheld and applied in ever-changing modern contexts.

Second, the legal profession must take its responsibility to educate and nurture young lawyers seriously, including in relation to personal wellbeing and professional ethics. A profession where young lawyers have little contact with clients and feel that their primary responsibility is to exceed their 'billables target' has a worrying future. Likewise when recent graduates feel that they cannot object to any of the work demanded of them because there is a 'long queue in the street willing



to take their place'. No amount of mental health seminars will replace the pressing need to address these issues.

There is no doubt that this is a difficult time to be a young lawyer, not only for those experiencing the pressures of legal practice, but for all the well qualified legal graduates who are struggling to find work in this incredibly competitive legal market. I dread to think what my own career prospects would have been if things had been as tough when I graduated as they are now.

It is important to remember however, that this is not the first time that alarming articles about a 'crisis in legal employment' have been written. The past is instructive in that respect. Every time there has been an economic downturn in the last 40 years, someone has said that there are simply too many lawyers. Eventually the market picks up and with it the demand for the skills of legal graduates. This downturn has lasted longer and been worse than most, but I have no doubt the same principle applies.

That said, it is important that thought be given to encouraging graduates to pursue a wide field of employment opportunities, rather than holding up employment in a large commercial law firm on the one hand, or a community legal centre on the other, as the ultimate goals of a law degree. This and other measures will be needed to respond to the changes to the legal profession that the next forty years will no doubt bring.

## V CONCLUSION

I have spoken about change. One thing that stands out however, when I consider the developments of the last 40 years, is that while lawyers and judges have changed the way we do things, we have not fundamentally changed the things we do. New challenges have emerged and new strategies have been adopted to respond to those challenges. However the fundamental goals of the justice system, namely impartiality, due process, accessible justice, equality before the law and the just and efficient resolution of disputes, remain largely unchanged. The essential obligations of legal practitioners, including duties of fidelity, candour, good faith and due care, a paramount obligation to the court and a duty to continue learning, remain universally accepted. The importance of an independent judiciary and of public confidence in the administration of justice continue to be widely recognised.

The manner in which legal practice changed in the past 40 years was, I think far more substantial and drastic than what had occurred between Federation and the late 1960s. I have occasionally tried to predict the future. Having no psychic ability, I have always been wrong, so I won't try again tonight. However, while we may not know what changes will occur in the next 40 years, what we can be sure of is that they will be significant and numerous. Lawyers such as yourselves will have a vital role to play in ensuring that such changes are accommodated in a way that maintains the fundamental principles which underpin the rule of law and the essential obligations of legal practitioners, to which I have just referred. For my own part, I have sufficient faith in the judiciary and legal profession to confidently predict that such accommodation will be achieved.

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## Occasional Address

# SHOULD ABORIGINAL PEOPLES BE RECOGNISED IN THE AUSTRALIAN CONSTITUTION?

WHITLAM INSTITUTE AND UNIVERSITY OF  
WESTERN SYDNEY LAW ADDRESS  
20 AUGUST 2013, UNIVERSITY OF WESTERN SYDNEY

PROFESSOR GEORGE WILLIAMS\*

### I INTRODUCTION

The idea of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution has been championed by both sides of politics for more than a decade. Prime Minister John Howard sought, unsuccessfully, to have the Australian people support a new preamble to the *Constitution of the Commonwealth of Australia* (the Constitution). This was a question on the ballot paper for the 1999 republic referendum. The new preamble would have stated:

We the Australian people commit ourselves to this Constitution ... honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.<sup>1</sup>

Even though this attempt failed, it spurred like change at the State level. Victoria was the first to move, adding the following text in 2004 to its *Constitution Act 1975* (Vic):

#### **1A Recognition of Aboriginal people**

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –

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\* Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar.

<sup>1</sup> Constitution Alteration (Preamble) 1999 (Cth).

- (a) have a unique status as the descendants of Australia's first people; and
  - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
  - (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.
- (3) The Parliament does not intend by this section –
- (a) to create in any person any legal right or give rise to any civil cause of action; or
  - (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

Similar statements of recognition have since been added to the constitutions of Queensland,<sup>2</sup> New South Wales<sup>3</sup> and South Australia.<sup>4</sup>

Howard's advocacy for change did not end with the 1999 referendum. In the lead up to the 2007 election, he stated: 'I announce that, if re-elected, I will put to the Australian people within eighteen months a referendum to formally recognise Indigenous Australians in our Constitution – their history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation'.<sup>5</sup> He declared that his 'goal is to see a new Statement of Reconciliation incorporated into the Preamble of the Australian Constitution'.<sup>6</sup>

Howard lost the 2007 election, but his successor, Kevin Rudd, continued to argue for change. One of his first acts as Prime Minister was an Apology to the Stolen Generations. In that speech, he sought bipartisan support for the 'constitutional recognition of the first Australians'.<sup>7</sup>

Rudd did not progress the issue further, leaving matters to his successor as Prime Minister, Julia Gillard. The hung Parliament produced by the 2010 election led her to make a commitment to hold a referendum on recognising Aboriginal peoples in the Constitution in that term of government. She made this to Independent and Greens MPs in return for their support for her government. The promise was,

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<sup>2</sup> *Constitution of Queensland 2001* (Qld) preamble, s 3A.

<sup>3</sup> *Constitution Act 1902* (NSW) s 2.

<sup>4</sup> *Constitution Act 1934* (SA) s 2.

<sup>5</sup> Prime Minister John Howard as quoted by Michael Brissenden in ABC TV, 'Michael Brissenden on the PM's Indigenous referendum plan', *The 7.30 Report*, 11 October 2007 (Michael Brissenden) <[www.abc.net.au/7.30/content/2007/s2057247.htm](http://www.abc.net.au/7.30/content/2007/s2057247.htm)>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd).

however, dropped in 2012 when it became clear that not enough work had been done to give the referendum a reasonable chance of success.

While the Gillard government did not hold a referendum, it did establish an Expert Panel to examine the issue. Chaired by Professor Patrick Dodson, former Chairman of the Council for Aboriginal Reconciliation, and former Reconciliation Australia co-chair Mark Leibler, the Panel travelled the length and breadth of Australia to talk to people about whether the Constitution should be changed, and, if so how. Its report,<sup>8</sup> released in early 2012, found strong support for the change, and proposed proposals for altering the text of the Constitution.

The Gillard government did not officially respond to the Panel's report. Instead, it funded Reconciliation Australia to raise community awareness of the issue. That has led to the creation of Recognise, a body that is actively involved at the grassroots level in explaining to Australians what this issue is about, and why they should support reform. Recognise is currently working with members of the community and both sides of politics to prepare the way for a referendum on the subject, perhaps in early to mid-2015.

## II WHY THE EFFORT?

The idea of recognising Aboriginal and Torres Strait Islander peoples in the Constitution has certainly attracted considerable activity and attention over the course of more than a decade. What then is all the fuss about? Why have so many people championed the idea? There are many things that need to be done in the area of Aboriginal policy and disadvantage, so why focus on this?

One of the most important reasons is that Aboriginal people themselves have identified the need for reform. They have long sought change to Australia's national and State Constitutions. Their advocacy culminated in a successful referendum in 1967 that deleted negative references to them from the Constitution. Since then, many have agitated for further change.

They have done so because they have recognised that Australia's legal structures, and ultimately the Constitution, have had a profound effect upon their lives. In the case of the Australian Constitution, it:

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<sup>8</sup> *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report of the Expert Panel, January 2012).

- establishes lines of power in our society (such as who can do what to whom);
- establishes relationships and legitimacy of people and organisations; and
- provides recognition and a set of national aspirations.

When it comes to Aboriginal peoples, the Constitution has failed them on all of these counts. It has permitted discrimination against them and has made no mention of them or their history. They rightly argue that the story of our nation is incomplete without the histories of the peoples who inhabited this continent before white settlement.

It is been recognised that this failure of recognition contributes to a broader range of problems. Research on the social determinants of health shows how discrimination, disadvantage and exclusion can have a major, negative impact on mental and physical health. It is hard to underestimate the emotional and other costs of being cast as an outsider in your own land. Experts have recognised this. For example, the Royal Australian and New Zealand College of Psychiatrists has said:

The lack of acknowledgement of a people's existence in a country's constitution has a major impact on their sense of identity and value within the community, and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people. There is an association with socioeconomic disadvantage and subsequent higher rates of mental illness, physical illness and incarceration.

Recognition in the Constitution would have a positive effect on the self esteem of Indigenous Australians and reinforce their pride in their culture and history. It would make a real difference to the lives of Indigenous Australians, and is an important step to support and improve the lives and mental health of Indigenous Australians.<sup>9</sup>

What then needs to be done to achieve constitutional recognition? To understand this, we need to look to the drafting and text of the Constitution itself.

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<sup>9</sup> Royal Australian and New Zealand College of Psychiatrists, 'Mental Health Benefits in Constitutional Recognition of Indigenous Australians' (Media Release, 25 May 2011). See also Royal Australian and New Zealand College of Psychiatrists, *Recognition of Indigenous people in the Australian Constitution* (Position Statement 68, September 2011).

### III THE AUSTRALIAN CONSTITUTION

The Australian Constitution was written in the 1890s against a backdrop of racism that led to the White Australia policy and a range of other discriminatory laws and practices. Many of these laws and practices were not directed at Aboriginal people, but Chinese and other non-white immigrants to Australia. Nonetheless, they demonstrate how Australia's legal system was created with an embedded capacity for racial discrimination. Separating people according to their race was based upon a discredited 19th-century scientific theory in which a person's race can determine everything from their intelligence to their suitability for certain roles.

Australia's 1901 Constitution referred to Aboriginal peoples only in negative terms. Section 127 even made it unlawful to include 'aboriginal natives' when counting the number of 'people' of the Commonwealth. Section 127 was removed by the 1967 referendum, but other problems were left untouched. Australia today has a Constitution that in its text and operation still runs counter to the idea that Aboriginal Australians are equal members of the community.

The first problem is section 25. Headed 'Provision as to races disqualified from voting', the section provides that if a State disqualifies the people of a race from voting in its elections, the people of that race are not to be counted as part of the state's population in determining its level of representation in the federal parliament. This section was proposed in the 1890s constitutional conventions by Tasmanian Attorney-General Andrew Inglis Clark, who adapted the wording from the 14th Amendment to the United States Constitution. The section has the apparently benign purpose of ensuring that states suffer a loss to the level of their federal representation when they disqualify people from voting because of their race.

Although section 25 acts as a penalty, it does so by acknowledging that the States may disqualify people from voting due to their race. This reflects the fact that at Federation in 1901, and for decades afterwards, Aboriginal people were denied the vote in federal, Queensland and Western Australian elections. Unfortunately, the Constitution still recognises this as being a legal possibility for State elections.

The second problem is the races power in section 51(xxvi). As drafted in 1901, the section stated:

51. Legislative powers of the Parliament The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -  
(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

This power was intended to allow the Commonwealth to restrict the liberty and rights of some sections of the community on account of their race, though not Aboriginal peoples because it was thought that such laws for them should be passed by the States. By today's standards, the reasoning behind the provision was clearly racist. Sir Edmund Barton, later Australia's first prime minister and one of the first members of the High Court, made the position clear when he told the 1897-98 Constitutional Convention that the races power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.<sup>10</sup> By this, he was indicating that the federal parliament needed a power to pass negative laws in areas like employment for the Chinese and other non-white people who had entered Australia. In this, the framers were driven by a desire to maintain race-based distinctions when it came to 'Chinamen, Japanese, Hindoos, and other barbarians'.<sup>11</sup>

Inglis Clark supported a counter provision taken from the US Constitution requiring the 'equal protection of the laws'. However, the framers were concerned that Inglis Clark's clause would override laws such as those in Western Australia under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'.<sup>12</sup> Sir John Forrest, the premier of Western Australia, summed up the mood of the convention when he stated:

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.<sup>13</sup>

Inglis Clark's provision was rejected, and section 117, which merely prevents discrimination on the basis of state residence, was instead

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<sup>10</sup> *Official Record of the Debates of the Australasian Federal Convention: 1891-1898*, Melbourne, 27 January 1898, 228-229 (Edmund Barton).

<sup>11</sup> *Official Record of the Debates of the Australasian Federal Convention: 1891-1898*, Melbourne, 3 March 1898, 1784 (Dr Quick).

<sup>12</sup> *Official Record of the Debates of the Australasian Federal Convention: 1891-1898*, Melbourne, 8 February 1898, 665 (Sir John Forrest).

<sup>13</sup> *Ibid* 666.



inserted. In formulating the words of section 117, Henry Bournes Higgins, one of the early members of the High Court, said that it:

would allow Sir John Forrest ... to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based on colour and race'.<sup>14</sup>

In the 1967 referendum, Australians chose to strike out the words 'other than the aboriginal race in any State' in section 51(xxvi). While the referendum thus meant that Aboriginal peoples could be subject to laws made under the power, nothing was put in the Constitution to say that these laws had to be positive. In effect, the racially discriminatory underpinnings of the races power were extended to Aboriginal people without any indication that the power should only be used for their benefit.

#### IV THE *HINDMARSH ISLAND BRIDGE CASE*

Nearly a century after the *Constitution* came into force, the federal parliament used the races power to pass the *Hindmarsh Island Bridge Act 1997* (Cth). A group of Aboriginal women belonging to the Ngarrindjeri people had sought to protect an area near Hindmarsh Island in South Australia from development by using the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). They argued that they were the custodians of secret 'women's business' for which the area had traditionally been used.

The *Hindmarsh Island Bridge Act* presumptively overrode their claim without allowing it to be tested. The Ngarrindjeri women brought a case against the Commonwealth in the High Court,<sup>15</sup> arguing that the *Hindmarsh Island Bridge Act* was invalid. They said that the races power should be interpreted by the High Court so as to only allow Parliament to pass laws for the benefit of a particular race. Hence, the parliament could pass legislation directed at providing health care for the specific needs of a racial group. On the other hand, the power could not support laws banning people of a race from working in certain professions or from attending particular schools.

In response, the Commonwealth asserted that there are no limits to the power so long as the law affixes a consequence based on race. In other

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<sup>14</sup> *Official Record of the Debates of the Australasian Federal Convention: 1891-1898*, Melbourne, 3 March 1898, 1801 (Henry Bournes Higgins).

<sup>15</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*'). The author appeared as counsel for the plaintiffs in this case.

words, it was not for the High Court to examine the positive or negative impact of the law. The federal Solicitor-General, Gavan Griffith QC argued that the races power 'is infected, the power is infused with a power of adverse operation'.<sup>16</sup> He also acknowledged 'the direct racist content of this provision using "racist" in the expression of carrying with it a capacity for adverse operation'.<sup>17</sup> The following exchange then occurred:

Justice Michael Kirby: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.

Mr Gavan Griffith QC: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.<sup>18</sup>

The federal government thus argued that the Commonwealth could apply the races power to pass laws that discriminate against people on the basis of their race. This possibility is obviously abhorrent to most Australians, and is also inconsistent with accepted community values such as equality under the law. But this is exactly what the framers of the Constitution intended in drafting the power.

A divided High Court handed down its decision in the *Hindmarsh Island Bridge Case* in 1998. The result was clear in upholding the capacity of the *Hindmarsh Island Bridge Act* to amend the *Aboriginal and Torres Strait Islander Heritage Protection Act* so as to deny the Ngarrindjeri women their claim. In reaching this conclusion, the High Court split on whether the races power can still be used to discriminate against Indigenous and other peoples. The overall effect of the judgments was inconclusive. The Court divided 2:2 on this aspect of the races power, with a further two judges not deciding. It thus left open the possibility that Commonwealth still possesses the power to enact racially discriminatory laws.

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<sup>16</sup> *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (Transcript of Argument, High Court of Australia, 5 February 1998).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

The ambiguous result in the Hindmarsh Island Bridge case highlights the tenuous position of Aboriginal peoples and Torres Strait Islanders under the Constitution. As a result of the 1967 referendum, laws can be made by the federal parliament with respect to them. However, there is nothing in the Constitution to indicate that such laws should be for their benefit, or that such laws should not discriminate against them on the basis of their race.

## V WHAT CHANGE IS NEEDED?

When the history and current text of the Constitution are taken into account, Aboriginal and Torres Strait Islander peoples should be recognised in the Australian Constitution by way of:

1. Positive recognition of Indigenous peoples and their culture;
2. The deletion of:
  - (i) section 25; and
  - (ii) section 51(xxvi);
3. The insertion of new sections that:
  - (i) grant the Commonwealth Parliament the power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples';
  - (ii) prohibit the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws and powers which redress disadvantage or recognise and preserve the culture, identity and language of any group).

These changes were all accepted by the Gillard government's Expert Panel. In addition, the Panel recommended that the Constitution also contain a new clause providing recognition for Aboriginal languages. The question now is whether Australia's political leaders are prepared to support, and to bring about, these changes via the process set down in the Constitution.

## VI CHANGING THE CONSTITUTION

There is a major hurdle standing in the way of the attempt to change the Australian Constitution to recognise Aboriginal peoples. It can only occur by way of s 128 of the Constitution, which requires that the change be:

1. passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and
2. at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

Since 1901, 44 referendum proposals have been put to the Australian people with only 8 of those succeeding. Significantly, no referendum has been passed by the people since 1977 when Australia voted, among other things, to set a retirement age of 70 years for High Court judges. As at 2013, 36 years have passed since Australia changed its Constitution. At around one-third of the life of the nation, this is by far the longest period that Australia has gone without amending its Constitution.

In *People Power: The History and Future of the Referendum in Australia*,<sup>19</sup> David Hume and I examined Australia's record of referendums, and how this experience might be applied to hold referendums with greater prospects of success. We conclude that Australia must avoid repeating, yet again, the same past mistakes, and that there are realistic prospects that the Australian people will vote Yes if a referendum is approached in the right way. To win the coming referendum on Aboriginal recognition, the process should be based upon the following principles:

#### *A Bipartisanship*

Bipartisan support has proven to be essential to referendum success. Referendums need support from the major parties at the Commonwealth level. They also need broad support from the major parties at the State level. The history of referendums in Australia provides many examples of proposals defeated by committed opposition from a major party at either level. This has been a particular feature of failed referendums put by the Australian Labor Party. Its proposals have tended to be opposed by either or often both of the Opposition and the States.

When it comes to Indigenous recognition, the need for bipartisanship is no less apparent. It is highly unlikely that any referendum on the topic could succeed without the support of each of the major parties. An advantage in this respect is that the reform, at least in general terms, has for some time had the support of both sides of politics.

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<sup>19</sup> (University of New South Wales Press, 2010).

### *B Popular Ownership*

Just as deadly as partisan opposition is to constitutional reform is the perception that a reform idea is a 'politicians' proposal'. From the 1967 nexus proposal, which was felled by the cry of 'no more politicians', to the republic referendum, which was killed off by the claim that it was the 'politicians' republic', Australians have consistently voted No when they believe a proposal is motivated by politicians' self-interest. The constitutional design of Australia's reform process exacerbates this problem. Politicians, and only politicians, can initiate constitutional reform through the federal Parliament. This renders every referendum proposal at risk of being perceived as self-serving, especially of those interests aligned with the Commonwealth.

For this referendum to succeed, it must be backed by a genuine people's movement. This makes the work of Recognise all the more important, as well as the need for people who support this change to get involved in their work and that of other community bodies such as AnTAR. By polling day, the referendum proposal needs to have a strong connection to both the Aboriginal and broader Australian community.

### *C Popular Education*

Surveys of the Australian public show a disturbing lack of knowledge about the Constitution and Australian government. Rather than being engaged and active citizens, many Australians know little of even the most basic aspects of government. The problem has been demonstrated over many years. For example a 1987 survey for the Constitutional Commission found that almost half the population did not realise Australia had a written Constitution, with the figure being nearly 70 per cent of Australians aged between 18 and 24.

These problems can be telling during a referendum campaign. A lack of knowledge, or false knowledge, on the part of the voter, can translate into a misunderstanding of a proposal, a potential to be manipulated by the Yes or No cases and even an unwillingness to consider change on the basis that 'don't know, vote No' is the best policy. Overall, the record shows that when voters do not understand or have no opinion on a proposal, they tend to vote No. The community needs sufficient information about Indigenous recognition so that scare campaigns can be headed off, and so that voters can feel confident in embracing the change.

*D A Sound and Sensible Proposal*

As important as it is to get the process of generating proposals right, it is equally important to get the proposals themselves right. Australians need to vote on a proposal that they can see has been well thought out. It needs to be safe and sensible. The recommendations of the Expert Panel are a good start in this regard.

VII CONCLUSION

Australia ought to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. It does not speak well of our nation that after more than a century we have yet to achieve this, and have not removed the last elements of racial discrimination from the document. It is past time that Australia had a Constitution founded upon equality that recognises Indigenous history and culture with pride.

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# TINKERING WITH THE RIGHT TO SILENCE: THE *EVIDENCE AMENDMENT (EVIDENCE OF SILENCE) ACT 2013 (NSW)*

VICTOR CHU\*

## ABSTRACT

In March 2013, the New South Wales ('NSW') Parliament passed the *Evidence Amendment (Evidence of Silence) Act 2013 (NSW)* ('*Evidence Amendment Act*'), qualifying the long-standing absolute right to silence. This paper seeks to analyse this recent law reform and argues that it is highly problematic and unnecessary for three reasons. First, the reform is a response to perceived problems in the criminal justice system that are arguably illusory. Even if the problems are manifest, it is unclear whether the reform would be effective in resolving them. Second, the qualification of the right to silence is beset with philosophical difficulties associated with the inappropriate undermining of fundamental legal principles including the presumption of innocence. Third, the reform is complicated to apply and introduces into NSW significant practical difficulties that are observable in the other (few) jurisdictions which have similarly restrained the right to silence, in particular England and Wales. This paper concludes that in light of such glaring difficulties and problems, which were made clear to the government by virtually every major criminal law stakeholder in the form of submissions strongly opposing the reform, the *Evidence Amendment Act* cannot be considered a genuine attempt at law reform in the sense of making changes to improve the law. Rather, it is arguable that the reform is an example of ill-conceived and populist legislation by a NSW government attempting to appear 'tough' on crime in response to recent media coverage of the activities of organised crime gangs operating in Sydney.

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## I INTRODUCTION

The right to silence is generally considered a fundamental legal right, protected in virtually every major common law jurisdiction. The right ensures that suspects being questioned by police and defendants in a criminal trial can remain silent without any detrimental legal consequence. It exists as a protection of individual liberty, preventing the State from compelling a person to provide information or confessing to an offence, as occurred in more ancient times, often in response to torture. In this way, the right to silence also serves to strengthen other fundamental legal rights in most common law jurisdictions, including the presumption of innocence and the privilege against self-incrimination. No suspect or defendant may be compelled to speak in his or her own defence since it is the State that must prove guilt. However, despite its fundamental importance, in March 2013, the NSW Parliament passed the *Evidence Amendment Act*, significantly affecting the right. Under the new legislation, the right to silence is no longer absolute in NSW. Rather, in some circumstances, an adverse inference may be drawn by the court against defendants who elect to remain silent during police questioning and who fail or refuse to mention a fact that they ought reasonably have mentioned and which is later relied on in their defence.

The reform has generated significant controversy. This is understandable given that its effect is to intrude upon a long-held and fundamental legal right. However, arguably more importantly and no doubt because of this, the reform is highly controversial since its enactment occurred despite strong opposition from numerous experts and virtually every major stakeholder in the criminal justice system. The reform was also enacted despite contrary recommendations from the NSW Law Reform Commission ('NSWLRC') and even a recent Scottish report that advised against similar legislative change in that jurisdiction. Given this particular context, this paper seeks to examine the restrictions placed on the right to silence in NSW. After summarising the main elements of the reform and outlining the government's rationale behind them, this paper will argue that the reform does not achieve any of the government's stated rationales, thus rendering it unnecessary. Moreover, the reform introduces into NSW a range of philosophical and practical difficulties. For example, it arguably complicates criminal proceedings, extending their duration and public expense. To support this argument, the effect of similar reforms in England and Wales in 1994, will be analysed. These reforms have been generally regarded as problematic, if not disastrous. Considering the government's persistence in supporting and



implementing the *Evidence Amendment Act*, given the overwhelming opposition amongst all major stakeholders, and with knowledge of the detrimental impact similar reforms have had in England and Wales, this paper concludes by suggesting that the passing of the Act reflects *political* motives rather than any genuine endeavour by the government to reform the right to silence. The Act is arguably the product of a government attempting to appear tough on crime in response to negative publicity about organised crime gangs operating in Sydney.

## II EVIDENCE AMENDMENT (*EVIDENCE OF SILENCE*) ACT 2013 (NSW)

### A *An Overview of the Reform*

The *Evidence Amendment Act* amends the *Evidence Act 1995* (NSW) (*'Evidence Act'*), significantly changing the law regarding the right to silence. Prior to the reform, s 89 of the *Evidence Act* provided a general prohibition on using the silence of an accused as evidence in criminal proceedings. In particular, the making of an adverse inference in relation to a defendant who remained silent during a police interview was precluded. Passed in March 2013, the *Evidence Amendment Act* qualifies the general prohibition in s 89, making it subject to a newly inserted s 89A. Under this new section, the general right to remain silent in the pre-trial stage of criminal proceedings without legal consequences is limited, such that:

unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and that is relied on in his or her defence in that proceeding.<sup>1</sup>

From the section's wording, it is clear that the legislature intended to confer a discretion to draw an adverse inference from silence during a police interview. Indeed, the section refers simply to a defendant's failure or refusal 'to mention a fact' during a police interview, thereby *not* requiring 'the failure or refusal to be in relation to a specific question or representation' from the interviewer.<sup>2</sup> This gives the section a wide ambit and places a strong (and new) onus 'on the defendant to mention all relevant facts' *per se* when being interviewed.<sup>3</sup>

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<sup>1</sup> *Evidence Act* s 89A(1).

<sup>2</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 86 (Greg Smith).

<sup>3</sup> *Ibid.*

Despite this wide ambit, the operation of s 89A is dependent upon the fulfilment of two threshold criteria. First, the section does not apply automatically to all suspects being interviewed at a police station, but only those whom the police *reasonably* suspect have committed a serious indictable offence.<sup>4</sup> Second, the ability to draw an adverse inference is dependent upon the interviewer *first* administering a special caution,<sup>5</sup> which has the effect of conveying to the defendant the fact that they need not say or do anything, but that it may harm their defence should they fail or refuse to mention something later relied on in court.<sup>6</sup>

Finally, the application of s 89A is limited by certain safeguards designed to protect the accused from being subject to the formation of an inappropriate unfavourable inference by the court. For example, the section only applies to facts 'that the defendant could *reasonably* have been expected to mention in the circumstances existing at the time'.<sup>7</sup> Also, in order to protect vulnerable defendants, s 89A does not apply to juvenile defendants or anyone 'incapable of understanding the general nature and effect'<sup>8</sup> of the special caution. It is also a requirement that the special caution be given 'in the presence of an Australian legal practitioner...acting for the defendant'<sup>9</sup> at the time. Importantly, the defendant is also to be allowed, in private, 'a reasonable opportunity to consult with that...legal practitioner...about the general nature and effect'<sup>10</sup> of the special caution. While the legislation does not define presence, in his second reading speech, the Attorney-General noted that this required actual *physical* presence, with 'contact by telephone or some other electronic means'<sup>11</sup> being insufficient. Finally, the section does *not* apply 'if evidence of the failure or refusal to mention the fact is the *only* evidence that the defendant is guilty'.<sup>12</sup> In this way, a safeguard is introduced to ensure that individuals would not be convicted solely upon the prosecution's reliance on the adverse inference drawn from the accused's silence.

In short, the *Evidence Amendment Act* significantly reforms the law regarding the right to silence in NSW, rendering that right no longer

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<sup>4</sup> *Evidence Act* s 89A(2)(a).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* s 89A(9).

<sup>7</sup> *Ibid* s 89A(1)(a) (emphasis added).

<sup>8</sup> *Ibid* s 89A(5)(a).

<sup>9</sup> *Ibid* s 89A(2)(c).

<sup>10</sup> *Ibid* s 89A(2)(d).

<sup>11</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 86 (Greg Smith).

<sup>12</sup> *Evidence Act* s 89A(5)(b) (emphasis added).

absolute, at least in the context of a police investigation. Now, in appropriate circumstances, an unfavourable inference may be drawn against a defendant who fails to mention a fact during a police interview that they ought reasonably to have disclosed, if that fact is later relied on in court. In passing the Act, NSW became the first Australian jurisdiction to restrict the right to silence. NSW now joins England, Wales and Singapore as the only other major common law jurisdictions to have similarly modified the right to silence.<sup>13</sup>

### B *Government Rationale*

The NSW government justified the reform to the right to silence as being a beneficial amendment necessary to 'crackdown' on crime.<sup>14</sup> In particular, the government portrayed the reform as an important measure aimed at 'closing a legal loophole to stop criminals exploiting the system to avoid prosecution'.<sup>15</sup> It was argued that 'higher end' criminals, such as members of organised crime gangs, were exploiting their former absolute right to silence by refusing to cooperate with police and by refusing to disclose any information, thereby frustrating the investigative process.<sup>16</sup> By hiding 'behind a wall of silence', these criminals were able to, at times, escape prosecution.<sup>17</sup> Therefore, a key rationale for the reform was to encourage suspects to disclose relevant information during the investigative process.

Moreover, it was suggested that the right to silence was being abused by defendants as a strategic mechanism to keep undisclosed for as long as possible, relevant information that their defence would subsequently rely upon in court. The objective of this strategy was to effectively ambush the prosecution by producing undisclosed evidence in court, thereby disadvantaging prosecutors at trial.<sup>18</sup> There was also a suggestion that it was common for defendants to rely upon the right to silence and then present 'evidence which suddenly appears at a trial...designed to get the accused off'.<sup>19</sup> The government argued that this tactic not only affected the prosecution, but also delayed the course

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<sup>13</sup> New South Wales Bar Association, Submission to Criminal Law Review Division Department of Attorney General and Justice, 28 September 2012, 6.

<sup>14</sup> Premier of New South Wales, 'Crime Crackdown: "Right to Silence" Law Toughened' (Media Release, 14 August 2012) 1.

<sup>15</sup> Attorney-General of New South Wales, 'Call to Support Changes to Right to Silence' (Media Release, 12 September 2012) 1.

<sup>16</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 86 (Greg Smith).

<sup>17</sup> Attorney-General of New South Wales, above n 15, 2.

<sup>18</sup> David Shoebridge MLC, The Greens, Submission to Criminal Law Review Division Department of Attorney General and Justice, 28 September 2012, 6.

<sup>19</sup> Premier of New South Wales, above n 14, 1.

of criminal proceedings. The reform, which would prevent this strategy, was therefore supported by the government as a piece of legislation that would 'help to reduce delays in the criminal justice process and...promote fairness to...[the] prosecution'.<sup>20</sup>

Therefore, the reform was justified by the government as addressing the problems caused by sophisticated criminals who were using the right to silence to impede upon both police investigations and the work of the prosecution. The reform created what was considered a new police power. Indeed, the *Evidence Amendment Act* does not compel the application of s 89A in all circumstances when its threshold criteria and safeguards are satisfied. Rather, the police may use their discretion in applying s 89A when they believe it necessary to break down a specific 'wall of silence', as opposed to the blanket application 'in all cases in which a serious indictable offence is being investigated'.<sup>21</sup> In other words, although the ultimate effect of the section is to change the evidentiary impact of silence at trial, should the prosecution decide to make the required submissions with respect to silence, it is the actions of the police which are scrutinised in order to attract s 89A. The police must decide whether the circumstances exist for them to administer the special caution, being one of s 89A's threshold requirements. The government considered the reform to be 'common sense'<sup>22</sup> and noted explicitly that it was being modelled on similar reforms made in England and Wales in 1994.

### III A CLOSER LOOK AT THE EVIDENCE AMENDMENT ACT

Having outlined the main features of the *Evidence Amendment Act* and the government's rationale behind its implementation above, this paper now turns to a closer examination of the reform in order to discuss its limitations and difficulties. The purpose of this is to demonstrate that the reform to the right to silence in NSW does not achieve any of its stated objectives and is so problematic that the *Evidence Amendment Act* could *not* have been supported by a government attempting to *genuinely* improve the law in any meaningful way. This section of the paper will first examine how the reform does not achieve any of its stated objectives, before turning to consider the philosophical and practical difficulties that the reform has unnecessarily introduced into NSW.

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<sup>20</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 92 (Greg Smith).

<sup>21</sup> *Ibid* 87.

<sup>22</sup> Premier of New South Wales, above n 14, 1-2.

### A Rationale Meets Practice

As summarised above, in supporting the new s 89A, the government argued that the section was necessary to deal with the problem of sophisticated criminals exploiting their right to silence by creating a wall of silence, frustrating the progress of police investigations. Then, at trial, these defendants would mount an ambush defence, suddenly breaking their silence and disclosing information designed to prove their innocence.<sup>23</sup> Ultimately, so the argument went, criminals escaped justice due to their exploitation of the right to silence. Therefore, the ability to draw adverse inferences from silence during police questioning would encourage more suspects to speak to the police and confess to the crimes they commit, or at least provide valuable information. Upon closer examination however, the validity of the government's arguments are highly questionable.

While the government's main justification for the reform was that the right to silence had become a 'loophole' that was being exploited, this claim was never substantiated. In fact, on the contrary, the NSWLRC noted in 2000 that:

[a]n examination of the empirical data...does not support the argument that the right to silence is widely exploited by guilty suspects, as distinct from innocent ones, or the argument that it impedes the prosecution or conviction of offenders.<sup>24</sup>

Twelve years later, Hamer et al reiterated this finding, noting that 'there is no evidence that the current safeguards for defendants are "exploited"...nor that...a "code of silence" commonly operates'.<sup>25</sup> Therefore, at the outset, significant issues existed regarding the efficacy of the government's reform in dealing with an arguably non-existent problem. Moreover, even if it were *assumed* that such a problem existed, it is highly questionable as to the positive impact the new s 89A would actually have. Indeed, a 2000 study by the United Kingdom Home Office ('UKHO'), assessing the impact of a similar section introduced in England and Wales in 1994, suggests that its impact was negligible in those jurisdictions. The study concluded that in comparing the periods before and after 1994:

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<sup>23</sup> The Greens, above n 18, 6.

<sup>24</sup> New South Wales Law Reform Commission, *The Right to Silence*, Report No 95 (2000) [2.138].

<sup>25</sup> David Hamer et al, Submission to Criminal Law Review Division Department of Attorney General and Justice, September 2012, 2.

...there have not been changes in the proportions of suspects charged, the level of guilty pleas or the proportion of defendants who are convicted, which can be related to the introduction of the provisions. The rate at which suspects provide admissions during police interviews also appears to have remained static.<sup>26</sup>

These conclusions cast doubt on the effectiveness of introducing the ability to draw adverse inferences from silence during the pre-trial stage. Interestingly, the UKHO study also noted that the police were sceptical as to whether the 1994 reform actually had any impact on 'professional' criminals, in terms of encouraging their cooperation and responsiveness with police during questioning.<sup>27</sup> It was also noted that those who had chosen to remain silent *continued* to do so, irrespective of the threat of an adverse inference.<sup>28</sup> This is important given that the NSW government claimed to be targeting this very group of 'higher end' recalcitrant criminals.

Similarly, it is questionable as to what impact the *Evidence Amendment Act* would have in dealing with the problem of defendants mounting 'ambush defences', an issue the NSWLRC noted *rarely* occurred in the first place.<sup>29</sup> This is because in NSW significant mechanisms already exist to promote pre-trial disclosure, reducing the potential for the defence to strategically surprise the prosecution at trial. The *Criminal Procedure Act 1986* (NSW), for example, requires the defence to provide the prosecution with notice of its 'intention to adduce evidence of substantial mental impairment' in a murder trial.<sup>30</sup> The same Act also requires the defence to give written notice of an intention to provide evidence of an alibi at least '42 days before the trial is listed for hearing'.<sup>31</sup> Moreover, the Act empowers the court with the discretion to order additional pre-trial disclosures should it 'be in the interests of the administration of justice to do so'.<sup>32</sup> Given the availability of existing mechanisms ensuring that the possibility of an ambush defence is minimised, it is difficult to see what additional impact the new s 89A would have on what is a very minor and *infrequent* problem.

In light of this analysis, it appears that the *Evidence Amendment Act* is unnecessary in NSW. First, the problems that the legislation was introduced to alleviate arguably do not exist. Second, even if those

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<sup>26</sup> Tom Bucke, Robert Street and David Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994*, Home Office Research Study 199 (2000) 71.

<sup>27</sup> *Ibid* 72.

<sup>28</sup> *Ibid*.

<sup>29</sup> New South Wales Law Reform Commission, above n 24, [3.102].

<sup>30</sup> *Criminal Procedure Act 1986* (NSW) s 151.

<sup>31</sup> *Ibid* s 150.

<sup>32</sup> *Ibid* s 141.

problems *do* exist, it is questionable whether the legislation will solve them. This disjunction between the legislation's stated rationale and actual practical impact casts doubt over whether the government genuinely intended to improve the law regarding the right to silence in NSW.

### B *Philosophical Difficulties: Undermining Fundamental Principles*

Furthermore, the *Evidence Amendment Act* significantly undermines longstanding, fundamental criminal law principles. The right to silence, which first existed at common law, has traditionally been viewed as vital protection for a defendant, safeguarding their liberty and ensuring that the State is not able to compel an accused person to provide information.<sup>33</sup> In this way, the protection addresses the significant power imbalance between the defendant and the State while also ensuring that an accused does not have to face the injustice of being forced to incriminate themselves.<sup>34</sup> Moreover, the right to silence is a principle that coexists and supports other fundamental rights at criminal law. In particular, the presumption of innocence, which is the 'golden thread' that runs through the criminal law.<sup>35</sup> A defendant is entitled to remain silent because there is no requirement that they prove their own innocence. Rather, the onus is on the State to prove guilt beyond reasonable doubt.<sup>36</sup> As Hamer et al noted, the right to silence:

...reinforces the presumption of innocence. It preserves a privilege against self-incrimination. It mitigates the power imbalance that often exists between police and suspect. ... It respects the privacy and integrity of the suspect. It avoids presenting the guilty suspect with a cruel trilemma of options: (1) accuse yourself of a crime; (2) mislead police, committing a further offence; or (3) remain silent and face compulsion.<sup>37</sup>

Therefore, the right to silence is an essential criminal law principle, both in its own right as a protection for the accused vis-à-vis the State, and also as a principle that supports other significant rights. It is this significance which is attached to the right that leads one to question whether the government genuinely intended to reform the law, in the sense of attempting to change the law for the better. By qualifying the right to silence, the *Evidence Amendment Act* erodes the fundamental

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<sup>33</sup> *RPS v The Queen* (2000) 199 CLR 620, 643; *Rees v Kratzmann* (1965) 114 CLR 63, 80.

<sup>34</sup> *Petty and Maiden v The Queen* (1991) 173 CLR 95, 128-9.

<sup>35</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

<sup>36</sup> *Petty and Maiden v The Queen* (1991) 173 CLR 95, 128-9.

<sup>37</sup> David Hamer et al, above n 25, 3.

principles and protections that the right embodies. Indeed, the majority of the High Court, in *Petty and Maiden v The Queen* went so far as to state that the ability to draw an adverse inference from silence would 'erode the right of silence or...render it valueless'.<sup>38</sup>

In enacting s 89A, the NSW government supported an amendment that undermines fundamental principles of criminal law. In fact it is arguable that the reforms have re-introduced problems that the right to silence sought to mitigate. For example, the power imbalance between an accused and the State is wider than ever. This is because, while the legislation acts to encourage defendants to reveal information and cooperate with the police during an investigation, there exists no corresponding requirement for the police to disclose any information to the defendant. This discrepancy in the duty to disclose exacerbates the general power imbalance between the accused, the police and the State. Therefore, it appears that the NSW government, in enacting the *Evidence Amendment Act*, has introduced reforms that significantly undermine important legal principles, based upon a questionable rationale as discussed above.

### C Practical Difficulties

Having considered the theoretical difficulties raised by the reforms, in terms of unnecessarily undermining important criminal law principles, this paper will now examine the new s 89A's practical difficulties. It will suggest that the section is arguably overly complex and raises significant issues in terms of confusion, uncertainty, delay in and cost of criminal proceedings. This section will begin first by examining practical difficulties, before focussing on two specific issues: implications of s 89A for lawyers and vulnerable defendants. Finally, the experience of England and Wales post-1994 will be briefly considered to illustrate these issues in practice.

#### 1 General Issues

In recommending to the Scottish government that it retain the absolute right to silence in its criminal law, Lord Carloway's recent 2011 report suggested that modifying the right to draw adverse inferences would unnecessarily burden Scottish law with practical difficulties, including 'unduly complex rules' with 'little practical benefit'.<sup>39</sup> This finding is applicable in NSW. The *Evidence Amendment Act* arguably complicates

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<sup>38</sup> (1991) 173 CLR 95, 99.

<sup>39</sup> Lord Carloway, *Reforming Scots Criminal Law and Practice: The Carloway Report*, Scottish Government Consultation Paper (2011) [10.10].



the law in two ways. First, with its numerous and complex threshold requirements, the actual drawing of an adverse inference is unnecessarily difficult. Second, this difficulty translates to more complicated criminal proceedings, the burdening of juries and the lengthening of trials.

As described above, despite s 89A's wide ambit, its operation is dependant on the satisfaction of two threshold criteria and limited by certain safeguards. It is unquestionable that these criteria are crucial in ensuring that s 89A is only applied in appropriate cases. For example, when the defendant is an adult who understands the meaning and effect of the special caution.<sup>40</sup> However, this does not detract from the fact that these criteria and safeguards, albeit necessary, are complex in application. For instance, one safeguard provides that an adverse inference may only be drawn if a defendant relies on facts at trial that they *reasonably* could have mentioned during the police interview but did not.<sup>41</sup> Significant difficulty exists in establishing what constitutes 'reasonable'. Is it reasonable to expect a defendant to disclose information that may embarrass him or her, implicate or incriminate others in another offence? Some defendants may be particularly shy and reserved in character, or hold a distrustful attitude towards police.<sup>42</sup> These variables, which require individual consideration, unnecessarily complicate the application of s 89A. Moreover, proceedings themselves could arguably become complicated and extended if the defence were to challenge the application of s 89A threshold criteria or by arguing that the safeguards in the section were not met. It has been argued that such considerations burden juries with complex issues and takes the focus 'away from the alleged offence and the immediate proceedings...to the [police] interview and its surrounding circumstances'.<sup>43</sup> As Hamer et al note, this 'time-consuming complexity'<sup>44</sup> attributable to s 89A is not worth the already questionable benefit the amendment brings.

## 2 Lawyers

A further practical difficulty associated with s 89A relates to the safeguard that the defendant be allowed a reasonable opportunity to consult their lawyer about the meaning and effect of the special

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<sup>40</sup> *Evidence Act* s 89A(5)(a).

<sup>41</sup> *Ibid* s 89A(1)(a).

<sup>42</sup> New South Wales Law Reform Commission, above n 24, 55–61.

<sup>43</sup> Roger Leng, 'Silence Pre-trial, Reasonable Expectations and the Normative Distortion of Fact Finding' (2001) 5(4) *International Journal of Evidence and Proof* 240, 253.

<sup>44</sup> David Hamer et al, above n 25, 10.

caution.<sup>45</sup> Clearly, a lawyer in these circumstances would only be 'in a position to give proper advice when...fully apprised of the case against their client' and after 'having had the opportunity in a considered way to speak to their client and take instructions'.<sup>46</sup> It is difficult to see how this would be possible, particularly in the circumstances of a police interview, when a defendant might have only recently engaged the lawyer and the police case against the suspect is still developing. A lawyer in this position would arguably be *unable* to provide fully considered advice. Even if this were possible, significant difficulties exist if the advice provided is that the defendant remain silent. As noted above, s 89A only applies in circumstances where the defendant relies on information in court that was not disclosed during the interview but *reasonably* should have been.<sup>47</sup> Serious issues now arise as to whether it may be considered reasonable in the circumstances for a defendant to follow legal advice to remain silent. While this may seem intuitively reasonable, it raises a practical difficulty when lawyers merely advise clients to remain silent, thereby making 'a mockery of the legislation' and rendering it inapplicable.<sup>48</sup> The alternative is that the reasonableness of the reliance on legal advice be tested. This raises even greater problems. As Hamer et al note, '[t]he suggestion that the defendant may not be justified in relying on legal advice could undermine the lawyer's position and consequently damage the lawyer-client relationship'.<sup>49</sup> In order to test 'reasonableness', juries may have to consider the advice given and its surrounding circumstances, intruding upon lawyer-client privilege.<sup>50</sup> Further, the lawyers themselves may be required to provide evidence in open court as to the reasons for advising their client to exercise the right to silence.<sup>51</sup> In this way, s 89A presents significant difficulties for a defendant's lawyer. Should the reasonableness of legal advice be challenged, the section inappropriately undermines the role of lawyers while introducing added complexity to proceedings.

### 3 *Vulnerable Defendants*

A second practical difficulty relates to the safeguard that s 89A does not apply 'to a defendant who, at the time of the official

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<sup>45</sup> *Evidence Act* s 89A(2)(d).

<sup>46</sup> Law Society of New South Wales, Submission to Criminal Law Review Division Department of Attorney General and Justice, 27 September 2012, 2.

<sup>47</sup> *Evidence Act* s 89A(1)(a).

<sup>48</sup> Simon Cooper, 'Legal Advice and Pre-trial Silence: Unreasonable Developments' (2006) 10 *International Journal of Evidence and Proof* 60, 67.

<sup>49</sup> Hamer et al, above n 25, 8.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

questioning...is incapable of understanding the general nature and effect of a special caution'.<sup>52</sup> This is undoubtedly an important provision, ensuring that no adverse inferences are drawn against vulnerable suspects unable to understand the legal implications of remaining silent. This safeguard is an improvement of the earlier draft, pursuant to which s 89A would only have been inapplicable to defendants suffering a 'cognitive impairment'.<sup>53</sup> Excluding defendants who are unable to understand the implications of silence from the application of s 89A appears wider than the need to identify a particular type of cognitive impairment. However, it is arguable that the safeguard is extremely difficult to apply. While there may be clear cases of defendants who are incapable of understanding the effect of a special caution, such as, highly intoxicated suspects, in many circumstances, the application of the safeguard is unclear or at least subject to time-consuming complicated analysis and argument in court. Young adult suspects, for example, may appear to have understood the special caution, but may actually be overwhelmed by stress and confusion, especially if it is the first time they have been interrogated by police.<sup>54</sup> Further, studies indicate that given their unique cultural background, Aboriginal suspects tend to 'give the answer they think the police will want to hear',<sup>55</sup> which may include a statement that they understand the implications of silence, when in reality they are confused and do not. Given that young adults and Aboriginal people constitute a disproportionately large number of defendants within the criminal justice system, it may be seen how in many circumstances, the issue of whether s 89A is applicable may be unclear.<sup>56</sup> As a result, significant trial-time may need to be devoted to assessing whether s 89A should be operative. It is arguable that, given this inherent complexity in determining whether s89A is even applicable to a particular case, the section is overly difficult to apply, especially when considering its questionable rationale and impact.

#### 4 *The UK Experience*

An examination of the experience in England and Wales following the 1994 introduction of s 34 of the *Criminal Justice and Public Order Act 1994* (UK), a provision materially similar to s 89A, reinforces the practical difficulties noted above. Almost all studies conducted as to

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<sup>52</sup> *Evidence Act* s 89A(5)(a).

<sup>53</sup> Evidence Amendment (Evidence of Silence) Bill 2012 (NSW) (Exposure Draft) sch 1 item 2.

<sup>54</sup> Michelle Lam, 'Remaining Silent: A Fundamental Right' (2012) *Law Society Journal* 17, 18.

<sup>55</sup> *Ibid.* See also, New South Wales Law Reform Commission, above n 24, [2.118].

<sup>56</sup> Hamer et al, above n 25, 6.

the effect of s 34 highlight the limited value that qualifying the right to silence has had in England and Wales in terms of fighting crime and securing convictions, contrasted with 'the significant expense and complexities introduced'<sup>57</sup> into the criminal justice system as a result. For example, a 1999 cost-benefit analysis of s 34 noted, in no uncertain terms, that:

...it is surely beyond argument that the demands on judge and jury of the complex edifice of statutory mechanisms [introduced by s34] are enormous in proportion to the evidential gains they permit.<sup>58</sup>

The analysis concluded by urging policymakers to adopt the advantages of 'giving up the ghost and reverting to the common law rule' of an absolute right to silence.<sup>59</sup> Similarly, a 2001 study concluded that 'far from facilitating the exercise of common sense, the effect of s 34 has been to introduce unnecessary complexity'.<sup>60</sup> This complexity included the practical difficulties highlighted above. Trials were now being sidetracked by peripheral evidentiary considerations brought on by s34, with lawyers, juries and judges increasingly spending time on issues relating to the provision's application rather than 'the real issues in the case'.<sup>61</sup> Ultimately, the increased practical difficulties associated with s 34 have lengthened cases by opening up more avenues for appeals, for example, over whether a threshold criterion or safeguard with respect to s 34 was properly applied.<sup>62</sup> Even the English courts have arguably recognised the practical difficulties embodied in s 34. In *R v B (Kenneth James)* (2003), the Court of Appeal referred to the section as 'a notorious minefield' of complexity.<sup>63</sup> Astonishingly, in *R v Brizzalari (Michael)*, in response to this complexity, the Court went so far as to discourage 'prosecutors from too readily seeking to activate the provisions of section 34'.<sup>64</sup> In the words of the Court:

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<sup>57</sup> New South Wales Law Reform Commission, above n 24, [2.114]. Example of studies conducted as to the effect of s 34 include, for example: Leng, above, n 43; Diane J Birch, 'Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the *Criminal Justice and Public Order Act*' (1999) *Criminal Law Review* 769; John D Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) 5(3) *International Journal of Evidence and Proof* 145.

<sup>58</sup> Birch, above n 57, 787.

<sup>59</sup> *Ibid* 788.

<sup>60</sup> Leng, above n 43, 241.

<sup>61</sup> *Ibid* 243.

<sup>62</sup> Hamer et al, above n 25, 9–10.

<sup>63</sup> [2003] EWCA Crim 3080 (23 October 2003) [20] (Dyson LJ).

<sup>64</sup> [2004] EWCA Crim 310 (19 February 2004) [57].

...we would counsel against the further complicating of trials and summing-up by invoking this statute unless the merits of the individual case require that that should be done.<sup>65</sup>

#### IV CONCLUSION: POLITICS AND POPULARITY?

Governments and legislatures commonly reform the law. Statutes are amended in the belief that changes will be beneficial to the overall aims and purposes of the legislation. However, in the case of the *Evidence Amendment Act*, it is unlikely that the NSW government supported the legislation due to the belief that it would benefit the State. In light of the numerous problems inherent in the *Evidence Amendment Act*, the conclusion must be reached that the government's modification of the right to silence cannot be considered a genuine attempt at legislative reform. No rational government would support an amendment in the face of such glaring problems. These problems are threefold. First, the government's very rationale for supporting the reform is questionable. Their claim that the right to silence was being exploited by criminals is doubtful. Even if the claim could be substantiated, it is uncertain whether introducing the ability to draw adverse inferences from silence would have any effect. Second, the amendment is beset with theoretical difficulties caused by its undermining of longstanding and fundamental criminal law principles such as the presumption of innocence. Finally, s 89A introduces into NSW a range of practical difficulties, unnecessarily complicating the law and its application in court. The NSW government was clearly aware of these problems, given that they were noted by almost every major criminal law stakeholder, from the NSWLRC to the Bar Association, in their strong opposition to the reform.<sup>66</sup>

Finally, the only explanation for the *Evidence Amendment Act* is that it reflects political motives by a government attempting to appear tough on crime. Indeed, the reform occurred in the context of significant media coverage of organised 'bikie' crime gangs operating in Sydney.<sup>67</sup> This conclusion is not unique. Others have noted examples of the NSW government implementing legislation as part of 'populist...policies...

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<sup>65</sup> Ibid.

<sup>66</sup> All major stakeholders within the NSW criminal justice system opposed the modification of the right to silence to include an adverse inference with respect to the silence. See, for example: New South Wales Law Reform Commission, above n 24; New South Wales Bar Association, above n 13; Law Society of New South Wales, above n 46. The only major stakeholder to support the reform was the New South Wales Police. See Premier of New South Wales, above n 14, 2.

<sup>67</sup> For a typical example of the media coverage, see Lisa Davies, 'Hundreds of Police Raid Sydney Bikies', *Sydney Morning Herald*, 12 March 2013. This news report, incidentally, was published during the month the *Evidence Amendment Act* was passed by Parliament.

facilitated by 'law and order' political rhetoric and widespread fear of crime'.<sup>68</sup> Garland, for example, has noted the tendency of governments to respond to the public's fear of crime and specific incidents with legislation 'more concerned to accord with political ideology and popular perception than with expert knowledge or the proven capacities of institutions'.<sup>69</sup> The *Evidence Amendment Act*, introduced despite its overwhelming problems, is arguably an example of such ill-conceived and politically motivated legislation.

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<sup>68</sup> Arlie Loughnan, 'The Legislation We Had to Have?: The *Crimes (Criminal Organisations Control) Act 2009* (NSW)' (2009) 20 *Current Issues in Criminal Justice* 457, 457.

<sup>69</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 112.

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# FORENSIC USE OF DNA INFORMATION v HUMAN RIGHTS AND PRIVACY CHALLENGES

KHALEDA PARVEN\*

## I INTRODUCTION

The use of scientific genetic-based evidence (DNA profiling)<sup>1</sup> in legal case investigation processes brings into collaboration the disciplines of science and law, which have their own institutional needs, standards and imperatives. The combination of these two disciplines is broadly geared toward ensuring justice for various cases, without completing retaining and relinquishing their autonomy.<sup>2</sup> Recent scientific advances through DNA technology play an important role in providing legal protections<sup>3</sup> and the preservation of law and order. The widespread use of DNA data to detect offenders and protect the rights of the innocent (that is, exonerating the wrongly-accused)<sup>4</sup> is one of the most notable examples of such advancements and revolutionary impact of DNA technology, which makes the justice delivery system more efficient and accurate.<sup>5</sup> However, the use of this new technology is not

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<sup>1</sup> It is also known as 'DNA Fingerprinting' or 'DNA Typing'.

<sup>2</sup> Sheila Jasanoff, 'Just Evidence: The Limits of Science in the Legal Process' (2006) 34 *Journal of Law, Medicine and Ethics* 328, 329.

<sup>3</sup> Leigh M Harlan, 'When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples' (2004-05) 54 *Duke Law Journal* 179, 179. The same article points out that '[y]et current law, which fails to mandate the destruction of voluntarily provided DNA samples, falls well short of providing genetic privacy to innocent individuals', see Harlan: at 180 (citation omitted).

<sup>4</sup> Helen Wallace, *Prejudice, Stigma and DNA Databases* (July 2008) Council for Responsible Genetics, <[http://www.councilforresponsiblegenetics.org/pageDocuments/PDA\\_FXSTDPX.pdf](http://www.councilforresponsiblegenetics.org/pageDocuments/PDA_FXSTDPX.pdf)>. For 'an extract' of this full paper see Helen Wallace, 'Prejudice, Stigma and DNA Databases' (2008) 21(3-4) *eMagazine: GeneWatch* <<http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=60&archive=yes>>. See also UK Home Office, 'Keeping the Right People on the DNA Database: Science and Public Protection' (2009) 60; Liz Campbell, 'A Rights-Based Analysis of DNA Retention: "Non-Conviction" Databases and the Liberal State' (2010) (12) *Criminal Law Review* 889, 889.

<sup>5</sup> Harlan, above n 3.

completely risk free. DNA profiling may reveal very sensitive information about an individual and their family which may affect them adversely if not properly guarded against potential misuse – accidental or deliberate. The most common form of such misuse resulting in serious violation of privacy and human rights could be unauthorised disclosure of sensitive information with regard to a person's predisposition to disease and their ancestry, for instance, which can be obtained from their DNA samples. Therefore, it is important to adopt a balanced approach in the use of DNA information, so the risk of the violation of privacy and human rights remain at an acceptable level.

The identification of offenders and the protection of innocent suspects are two of the main goals for ensuring justice.<sup>6</sup> DNA samples and profiles are very useful for identification purposes, for example, in identifying victims of disasters, as well as suspects (including rapists and murderers). It is also useful for conducting parentage testing and for resolving immigration cases, where a familial relationship (or identity) is in question.<sup>7</sup> In many instances, suspects who are actually innocent are relatively quickly acquitted or excluded from legal proceedings. This technology is, in effect, upholding the principles of 'presumption of innocence', which requires that 'guilt must be proved beyond reasonable doubt', upon which each and every criminal justice system is based. Therefore, every accused person irrespective of his or her status has a right to a fair trial. This legal right even applies to those who have been convicted of similar offences committed in the past.<sup>8</sup> The right of a 'fair trial' is derived from the principles of natural justice. This right has also become the norm of international and regional human rights law<sup>9</sup> and it is also adopted by many countries in

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<sup>6</sup> George Clarke and Janet Reno, *Justice and Science: Trials and Triumphs of DNA Evidence* (Rutgers University Press, 2007) Foreword by Janet Reno, ix.

<sup>7</sup> US Department of Energy Genome Programs, *Human Genome Project Information, DNA Forensics* (16 June 2009) Genomics.energy.gov <[http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/forensics.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml)>. For the Australian experience see, eg, Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) vol 2, 935–37[37.12], [37.17].

<sup>8</sup> Tania Simoncelli, 'Dangerous Excursions: The Case Against Expanding Forensic DNA Databases to Innocent Person' (2006) 34 *Journal of Law, Medicine and Ethics* 390, 390.

<sup>9</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GOAR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) ('UDHR'), art 10 provides that 'everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him'; art 14 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) ('ICCPR') reaffirmed the objects of UDHR and provides that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' See also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened



their procedural law, though the form and practice of the principles of natural justice may vary from system to system on the basis of prevailing conditions of the society concerned.<sup>10</sup> This is one of the fundamental canons of modern democracy and is reflected in legal jurisprudence throughout the world. With the support of DNA technology, the right for a fair trial has been enhanced and it has also contributed to the speedier administration of justice.<sup>11</sup>

During the mid-1980s, the potential application of DNA typing or profiling was initiated by laboratories in the United Kingdom (UK), the United States (US), and Canada.<sup>12</sup> The modern forensic DNA typing invented by Professor Alec Jeffrey was first used in the *Colin Pitchfork case* in 1985 in the UK.<sup>13</sup> This was the first criminal case in which DNA was used in the UK and the resolution of this case provided an effective demonstration of this method's potential. It also demonstrated for the first time how a small DNA sample could be used to identify a perpetrator from amongst a large population.<sup>14</sup> By the late 1980s the technology was being used in the US by commercial laboratories and the Federal Bureau of Investigation (FBI). The pioneering *Colin Pitchfork case* and the rapid development of DNA technology databases firmly pointed toward the future of DNA profiling as the most important forensic investigative tool to be developed in the 20<sup>th</sup> century.<sup>15</sup> Within relatively few decades, DNA technology became commonly used in the investigative processes of many countries (including both developed and developing nations). However, the forensic use of DNA data is always subject to particular scrutiny not only because of its potential benefits in a justice delivery system but also due to the risk of possible misuse.

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for signature 4 November 1950 213 UNTS 222 (entered into force 3 September 1953) ('ECHR'), art 6, which also has a provision about right to a fair trial.

<sup>10</sup> Neeraj Tiwari, 'Fair Trial vis-à-vis Criminal Justice Administration: A Critical Study of Indian Criminal Justice System' (April 2010) 2(4) *Journal of Law and Conflict Resolution* 66, 66.

<sup>11</sup> 'Genetic Analysis System Boosts Criminal Justice', above n 7.

<sup>12</sup> Committee on DNA Technology in Forensic Science et al, *DNA Technology in Forensic Science* (National Academy Press, 1992) 28.

<sup>13</sup> *R v Pitchfork*, Case No: 2008/04629/A1, EWCA Crim 963 (14 May 2009). See also, Jay D Aronson, 'DNA Fingerprinting on Trial: The Dramatic Early History of A New Forensic Technique' (2005) 29(3) *Endeavour* 126, 128; Alan Gunn, *Essential Forensic Biology* (John Wiley and Sons, 2<sup>nd</sup> ed, 2009) 86, 92.

<sup>14</sup> Peter Gill, 'DNA as Evidence — The Technology of Identification' (2005) 352(26) *The New England Journal of Medicine* 2669, 2669.

<sup>15</sup> Peter Gill and John Buckleton, 'Biological Basis for DNA Evidence' in John S Buckleton, Christopher M Triggs and Simon J Walsh (eds), *Forensic DNA Evidence Interpretation* (CRC Press, 2005) 1, 2.

The following sections will address and discuss the issues with regards to human rights and privacy challenges in the context of forensic use of DNA or genetic information. While using such information in criminal or civil case investigations is useful, the issues of human rights and privacy need to be balanced with public interest or state security measures.

## II USE OF DNA INFORMATION IN THE JUSTICE DELIVERY SYSTEM: HUMAN RIGHTS AND PRIVACY CHALLENGES

It is well recognised that genetic science is one of the most dependable sources of truth, particularly in disputes concerning human identity. Sheila Jasanoff has rightly pointed out that ‘Genetic science produces truthful facts about human identity, and that establishing the truth in matters of identity is equivalent to ensuring justice.’<sup>16</sup>

As a result, DNA profiling or ‘fingerprinting’ is increasingly used for human identification in the legal proceedings of many nations.<sup>17</sup> Forensic DNA technology is used to analyse DNA profiles which normally originate from human DNA samples. These samples could be collected either from the crime scenes or from the body of suspects or victims. Then DNA profiles (that is, the analysed results of the DNA samples collected) are compared with previously stored profiles in the DNA database to locate matches. The forensic use of DNA samples and profiles has, therefore, enhanced the success of civil as well as criminal investigations and the process has already proved to be a valuable tool for delivering a speedy trial and justice. Recognising the potential of DNA Technology, in the case of *People v Wesley*<sup>18</sup> it was observed that ‘DNA Typing is the single greatest advance in the “search for truth” ... since the advent of cross-examination’.<sup>19</sup>

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<sup>16</sup> Jasanoff, above n 2, 332.

<sup>17</sup> Richard Hindmarsh and Barbara Prainsack, ‘Introducing Genetic Suspects’ in Richard Hindmarsh and Barbara Prainsack (eds), *Genetic Suspects: Global Governance of Forensic DNA Profiling and Databasing* (Cambridge University Press, 2010) 1, 1-2; see also Lawrence F Kobilinsky, Thomas F Liotti and Jamel Oeser-Sweat, *DNA: Forensic and Legal Applications* (John Wiley and Sons, 2005) xiii; Ian Freckelton, ‘DNA Profiling: A Legal Perspective’ in J Robertson, AM Ross and 1990) LA Burgoyne (CRC Press (eds), *DNA in Forensic Science: Theory, Techniques and Applications* (CRC Press, 1990) 156-7.

<sup>18</sup> 198 3d 519 (Cal App, 1988).

<sup>19</sup> *People v Wesley* 198 3d 519 (Cal App, 1988) (Joseph Harris J), cited in C Thomas Blair, ‘Spencer v Commonwealth and Recent Developments in the Admissibility of DNA Fingerprint Evidence’ (1990) 76 *Virginia Law Journal* 853, 853; see also Stephen M Patton, ‘DNA Fingerprinting: The Castro Case’ (1990) 3 *Harvard Journal of Law and Technology* 223, 223.

Now countries are establishing and expanding human DNA databases<sup>20</sup> for their use in civil and criminal intelligence with such bases 'ranging in size from a few hundred to a few million samples'.<sup>21</sup> DNA databases are, therefore, an extraordinary resource for forensic evidence.<sup>22</sup> Use of DNA profiling by law enforcement agencies was initially justified for identifying rapists, murderers and other heinous offenders, but it has gradually been expanded to involve suspects of various other crimes. Since the events of 9/11 in the US, law enforcement agencies around the world have expanded their areas of investigation and the techniques used. The expansion and use of forensic DNA databases has also been justified on the basis of the threat of terrorism. However, there are several ethical objections to such uses. The implications to society have been raised because of extensive uses of human DNA data and DNA databases.

### *A Human Rights and Privacy Objections*

Several objections with regard to the forensic use of DNA databases have been raised, and most of these objections are connected with the collection, retention, access and use of DNA samples that are the basis of DNA profiles.<sup>23</sup> Many forensic DNA databases retain DNA samples from various persons, including people, who have been acquitted after the conclusion of judicial proceedings, or where the charges were dropped or not proceeded with, or even where the samples are from persons excluded from investigation by that very sample. When DNA samples are kept and retained in any databases, it is possible to gather the most personal information about any individual (including his or her family) with regard to certain characteristics, including predisposition to certain diseases.<sup>24</sup> This is because '[g]enes are considered to be good predictors of many facets of human identity'.<sup>25</sup> They can indicate human physical traits (for example, eye colour) and a predisposition to certain diseases (for example, heart disease, inherited

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<sup>20</sup> Currently '56 countries worldwide operate national DNA databases from Asia to Europe and the Americas': Andrew D Thibedeau, 'National Forensic DNA Databases' (Council for Responsible Genetics, 2011) 15.

<sup>21</sup> Tania Simoncelli and Helen Wallace, 'Expanding Databases, Declining Liberties' (2006) 19(1) *Genewatch: A Bulletin of the Committee for Responsible Genetics* <<http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=191&archive=yes>>.

<sup>22</sup> Simoncelli, 'Dangerous Excursions', above n 8, 393.

<sup>23</sup> Annemie Patyn and Kris Dierickx, 'Forensic DNA Databases: Genetic Testing As a Societal Choice' (2010) 36 *Journal of Medical Ethics* 319, 319.

<sup>24</sup> Robin Williams and Paul Johnson, 'Inclusiveness, Effectiveness and Intrusiveness: Issues in the Developing Uses of DNA Profiling in Support of Criminal Investigations' (2005) 33(3) *Journal of Law, Medicine and Ethics* 545, 551.

<sup>25</sup> Jasanoff, above n 2, 337.

breast cancer). An examination of DNA samples can also detect genetic conditions that affect intelligence (for example, phenylketonuria) but sometimes not the degree to which a genetic condition may manifest itself (for example, Down Syndrome). It can also indicate a predisposition to certain mental illnesses (such as schizophrenia). Some researchers believe that DNA contains information regarding 'a series of behavioural characteristics, ranging from thrill-seeking<sup>26</sup> to aggression'<sup>27</sup> and 'the propensity for aggressive, addictive, or criminal behaviors'.<sup>28</sup> A number of authors and researchers, however, dispute the claims made in regard to the usefulness of DNA samples as predictive of such behaviours (rather than associated in some instances with certain behaviours), and point to the complex interactions of genetics and environment.<sup>29</sup> In addition, it is also 'well recognised that DNA contains information regarding familial lineage'<sup>30</sup> or pedigree. Such sensitive data has raised concerns for individual and familial privacy. As Simoncelli has observed:

DNA data banks pose a number of significant individual privacy concerns ... Unlike fingerprints ... DNA samples can provide insights into personal family relationships, disease predisposition, physical attributes, and ancestry. Such information could be used in sinister ways and may include things the person herself does not wish to know. Repeated claims that human behaviors such as aggression, substance addiction, criminal tendency, and sexual orientation can be explained by genetics render law enforcement databases especially prone to abuse.<sup>31</sup>

Further the DNA identification of a suspect can potentially bring police officers to the doors of his or her relatives to ask questions about their genetic relationship to the offender (or arrestee) and their whereabouts

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<sup>26</sup> N Angier, 'Variant Gene Tied to a Love of New Thrills', *New York Times* 2 January 1996 A1, cited in Jasanoff, above n 2, 337.

<sup>27</sup> Virginia Morell, 'Evidence Found for a Possible 'Aggression Gene'' (1993) 260 *Science* 1722, 1722-3; see also R W Stevenson, 'Researchers see Gene Link to Violence but Are Wary', *New York Times* 9 February 1995, cited in Jasanoff, above n 2, 337.

<sup>28</sup> Fred W Drobner, 'DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing' (2000) 28 *Capital University Law Review* 479, 479-80, cited in Harlan, above n 3, 181.

<sup>29</sup> Avi G Haimowitz, *Heredity Versus Environment: Twin, Adoption, and Family Studies* (24 November 2011) Rochester Institute of Technology (RIT) <<http://www.personalityresearch.org/papers/haimowitz.html>>; see also Samantha P Lumbert, *Addictive Behaviors: Heredity or Environment?* (24 November 2011) Rochester Institute of Technology (RIT) <<http://www.personalityresearch.org/papers/haimowitz.html>>.

<sup>30</sup> Drobner, above n 28, cited in Harlan, above n 3, 181.

<sup>31</sup> Simoncelli, 'Dangerous Excursions', above n 8, 391-2.

at the time of the crime.<sup>32</sup> An even more striking intrusion of privacy is when law enforcement agencies directly interrogate a suspect's family members, very often to request their DNA.<sup>33</sup> This has some obvious societal as well as practical implications. For instance, it can potentially destroy a person's marital life, disrupt his or her career, or even ruin his or her whole life. In this regard Sonia M Suter has rightly pointed out:

All of these actions imply that the relative is a suspect or, at least, a person of interest, which itself can be threatening, intimidating, and intrusive. At best, such an investigation is a hassle or form of harassment. At worst, it violates the relative's privacy interests by subjecting them to a "lifetime [of] genetic surveillance".<sup>34</sup>

There are some important uses of DNA by the law enforcement and judicial proceedings, but it is also true that neither law enforcement nor the courts adequately consider the full extent of the privacy threats posed by DNA profiling.<sup>35</sup>

Further, the 'forced or non-consensual' collection of DNA samples from individuals constitutes a possible threat to bodily integrity.<sup>36</sup> The potential further use of DNA data stored in DNA databases constitutes a potential threat to bodily integrity and genetic privacy. Rules and policies concerning DNA sample collection, entry and removal criteria of DNA samples on a database generally, as well as the placement and retention of profiles on forensic DNA databases, specifically imply some more ethical challenges.<sup>37</sup> In general, ethical issues surrounding obtaining DNA data focuses on the concept of 'informed consent'.<sup>38</sup>

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<sup>32</sup> Sonia M Suter, 'All in the Family: Privacy and DNA Familial Searching' (Spring 2010) 23(2) *Harvard Journal of Law and Technology* 310, 349.

<sup>33</sup> Ibid 352. See also Daniel J Grimm, 'The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community' (2007) 107 *Columbia Law Review* 1164, 1164-6.

<sup>34</sup> Suter, above n 32, 350. See also Frederick R Bieber, Charles H Brenner and David Lazer, 'Finding Criminals Through DNA of Their Relatives' (2006) 312 *Science* 1315, 1316.

<sup>35</sup> Suter, above n 32, 312.

<sup>36</sup> Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness' above n 24, 546.

<sup>37</sup> Helena Machado and Susana Silva, 'Informed Consent in Forensic DNA Databases: Volunteering, Constructions of Risk and Identity Categorization' (2009) 4 *BioSocieties* 335, 336.

<sup>38</sup> In this regard, Amy Harmon points to a recent episode which she asserts demonstrates a clear violation of the informed consent issue. Harmon describes the case of the Havasupai tribe of Arizona stating: 'members of the tiny, isolated tribe had given their DNA samples to [Arizona State] University researchers starting in 1990, [for the express purpose of looking for] genetic clues to the tribe's devastating rate of diabetes. But they learned that their blood samples had been used to study many other things, including mental illness and theories of the tribe's geographical origins that contradict their traditional stories': Amy Harmon, 'Indian Tribe Wins Fight to Limit Research of Its DNA', *The New York Times* (online) 21 April 2010 <<http://www.nytimes.com/2010/04/>

Upon obtaining fully informed consent, taking and storing DNA data is no longer unethical. There are some instances where subsequent access by a third party has been permitted, where the question of ethics appears to have been ignored, such as where a DNA profile of a suspect is uploaded onto a national forensic DNA database, and access to this database (including that suspect's profile) is later given by police to another government agency for studying behavioural genetics. Such access and use, however, is justified only with 'free and informed consent' of the sample provider. Such use is also granted only for the purposes it was originally collected. In this regard, some could argue that convicted persons have fewer civil rights; however innocent donors or suspects, who are later acquitted, do not lose their right to informed consent, and they should have a legitimate claim before a court of law.<sup>39</sup> This is, of course, contingent upon whether the consent given is fully informed or not, as this is required to make the decision. Some additional ethical issues associated with informed consent include: what 'informed' truly indicates, and how to ensure that the consent provider is actually informed.<sup>40</sup> Further, it is very often argued that for the future collective well-being of society or public good, individuals' should provide their DNA samples. Rules and practices of informed consent, therefore, supply a framework for what has become a moral duty for citizens, that is, to comply with technical interventions for the sake of the administration of justice. However, little attention has been paid to the duties of the management or custodians of forensic DNA databases<sup>41</sup> with regards to the protection of sample providers' rights.

As well as for law enforcement purposes, DNA information is also being used for statistical, educational and medical research purposes.<sup>42</sup>

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22/us/22dna.html?ref=general&src=me&pagewanted=print>. In this case, researchers and institutions are required to obtain "informed consent" from sample providers, ensuring that they understand the risks and benefits before they participate. It is also interesting to note that in the case of *R v Dymnt* [1988] 2 SCR 417, [38], Justice La Forest (Dickson CJ concurring) of the Supreme Court of Canada maintained that the 'use of a person's body without his consent to obtain information about him invades an area of privacy essential to the maintenance of his human dignity': as cited in Bartha Maria Knoppers and Claude Laberge, 'DNA Sampling and Informed Consent' (1989) 140 *Canadian Medical Association Journal* 1023, 1023.

<sup>39</sup> Council for Responsible Genetics, *Forensic DNA Collection: A Citizen's Guide to Your Rights Scenarios and Responses* (18 June 2011)

<<http://www.councilforresponsiblegenetics.org/pageDocuments/I6W7Q3D7RM.pdf>>.

<sup>40</sup> Nicholas Dufour et al, *DNA Fingerprinting* (Degree of Bachelor of Science Thesis, Worcester Polytechnic Institute, 27 August 2008) 73-4.

<sup>41</sup> Garrath Williams and Doris Schroeder, 'Human Genetic Banking: Altruism, Benefit and Consent' (2004) 23 *New Genetics and Society* 89, 90, 100.

<sup>42</sup> Mark A Rothstein and K Talbott Meagher, 'The Expanding Use of DNA in Law Enforcement: What Role for Privacy?' (2006) 34(2) *Journal of Law, Medicine and Ethics* 153, 159.

Consequently, a group of individuals, corporations, and agencies are interested in such sensitive information about the human body.<sup>43</sup> Release of this sensitive genetic information could have some far-reaching familial and social implications. It could, for example, influence placement decisions by adoption agencies or allow prospective spouses to select their mates based on perceived genetic advantage and so on. It could also give rise to discrimination against and stigmatisation of an individual or groups. Moreover, such biological information could give rise to another class in society: a 'genetic minority' or an underclass of those perceived as genetically inferior. This could mean that solely on the basis of biological information, society could discriminate against individuals deemed 'substandard' subjecting such persons to custodial arrangements or to specific eugenic measures designed to eliminate those whose DNA manifested the undesirable trait.<sup>44</sup> Such measures could include compulsory sterilisation of those of reproductive age, and compulsory pre-conception or pre-implantation testing, or termination of foetuses conceived with the undesirable DNA trait. This could theoretically occur even though it is a mere prediction or a possibility, not a certainty, that some undesired trait or characteristics may be manifested in them.<sup>45</sup>

In some jurisdictions, human rights and privacy objections are sometimes overlooked by stressing that the collection and use of DNA data are very useful for maintaining law and order.<sup>46</sup> Many DNA databases around the world retain DNA samples, including those of innocent suspects, for a period of time even after finishing the

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<sup>43</sup> Harlan, above n 3, 181.

<sup>44</sup> '[B]y the late 1930s, Hitler's eugenic-based national program of "race hygiene" had escalated into a program of euthanasia targeting both children and adults with various mental and physical disorders. This policy eventually culminated in the deaths of millions of Jews during the Holocaust': Karen Norrgard, 'Human Testing, the Eugenics Movement, and IRBs' (2008) 1(1) *Nature Education* <<http://www.nature.com/scitable/topicpage/human-testing-the-eugenics-movement-and-irbs-724>>. Moreover, 'During World War II, a number of German physicians conducted painful and often deadly experiments on thousands of concentration camp prisoners without their consent': Holocaust Encyclopedia, *Nazi Medical Experiments* (6 January 2011) United States Holocaust Memorial Museum <<http://www.ushmm.org/wlc/en/article.php?ModuleId=10005168>>. See generally Laura Hix, *Modern Eugenics: Building a Better Person?* (22 July 2009) Science in Society <<http://scienceinsociety.northwestern.edu/content/articles/2009/research-digest/eugenics/modern-eugenics-building-a-better-person>>.

<sup>45</sup> Harlan, above n 3, 182.

<sup>46</sup> Nuffield Council on Bioethics noted that, '[d]eviation from [the ethical values] can be justified in various ways, most notably by invoking the public interest in general': Nuffield Council on Bioethics, 'The Forensic Use of Bioinformation: Ethical Issues' (Nuffield Council on Bioethics, 2007) 31.

investigation. The main justification for such retention is that persons who later commit more crimes can be identified and apprehended quickly.<sup>47</sup> Indefinite retention of DNA data collected from suspects and other individuals has given rise to questions about privacy rights. In the case of *S and Marper v the UK*,<sup>48</sup> S and Marper claimed that retention of their DNA samples and profiles interfered with their right to respect for private life because this sensitive information is linked to their personal identity. They argued that such types of information should be kept within their control. The Administrative Court rejected their application and an appeal to the UK House of Lords was also dismissed.<sup>49</sup> Lord Steyn concluded that the mere retention of fingerprints and DNA samples did not constitute any interference with private life and it was proportionate to what was necessary for detection investigation and prosecution of crime.<sup>50</sup> UK legislation does not require the destruction of DNA samples and they may be retained even after fulfilment of the purpose for which they have been collected.<sup>51</sup> Finally, however, on appeal to the European Court of Human Rights (ECtHR), the Court ruled that the 'blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences' violates the right to respect for private and family life.<sup>52</sup> The case pioneered developments in this field. The rules it recommended be adopted and the procedures it advised to be followed have been of considerable influence in other contexts around the world. Although the ECtHR provided its ruling protecting human rights and privacy in 2008, at this stage, it is essential to analyse how many national jurisdictions (including the UK) have taken appropriate measures in pursuit of the principle and rule set forth by this judgment.

DNA samples are a potential source of human genetic information and can reveal sensitive health information. It can, therefore, violate bodily integrity, privacy (information concerning health, familial relationships and so on) and facilitate discrimination against people and have other social consequences.<sup>53</sup> At the same time, while addressing human rights and privacy issues and also to ensure proper use of DNA data,

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<sup>47</sup> Gill, 'DNA as Evidence', above n 14.

<sup>48</sup> *S and Marper v United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 30562/04 and 30566/04, 4 December 2008).

<sup>49</sup> *Ibid* [12], [15].

<sup>50</sup> *Ibid* [19], [21].

<sup>51</sup> *Police and Criminal Evidence Act 1984* (UK) c 60, s 64(1A) ('PACE Act').

<sup>52</sup> *S* (Eur Court HR, Grand Chamber, Application Nos 30562/04 and 30566/04, 4 December 2008) [125]-[126].

<sup>53</sup> Patyn and Dierickx, above n 23.



some gaps (financial, technological, cultural and social) possibly exist between developed and developing countries that need also to be addressed. The following section will determine the extent to which human rights and genetic privacy are protected in existing justice delivery systems.

### *B How Far Are Our Human Rights and Privacy Protected?*

In relation to human identification issues, the freedom or liberty, secrecy, autonomy and privacy interest of individuals are highly connected. At present, addresses, telephone numbers, social security numbers, credit ratings, range of incomes, demographic categories, and information on hobbies of many individuals in a particular society are currently available from various computerised data sources.<sup>54</sup> Even such simple information about human identity requires confidentiality to avoid unwarranted intrusions into people's lives (for example, advertisers cross-matching income and purchase patterns to target prospects).

More detailed information related to identity would require additional security. As with fingerprint files and other personal identity related data, DNA samples and profiles could be used to search and correlate criminal and/ or medical record databases. However, such samples and profiles are far more revealing than are fingerprints. The collection and storage of materials and profiles in the latter database is also not usually associated with consent for such a purpose. Computer storage of DNA information therefore increases the possibilities for further misuse, in particular the violation of privacy.

DNA profiling, in principle, has the potential to provide personal information – such as medical characteristics, physical traits, and consanguinity – that carries with it risks of discrimination. For instance, the Committee on DNA Technology in Forensic Science mentioned that the forensic restriction fragment length polymorphism (RELP) typing markers<sup>55</sup> are not known to be associated with particular traits or medical conditions, but there is a possibility that they might be used in the future. The current Polymerase Chain

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<sup>54</sup> Committee on DNA Technology in Forensic Science, above n 12, 114–15.

<sup>55</sup> The Restriction Fragment Length Polymorphism (RFLP) is a technique that was used for the first time in the world in the 1980s by the British biologist, Professor Alec Jeffreys for DNA fingerprinting. The process of DNA fingerprinting involves extracting and cutting the DNA into small pieces of fragments of varying lengths. These are further analysed to reveal patterns in their occurrence (composition, location, length).

Reaction (PCR) typing<sup>56</sup> uses the human leucocyte antigen (HLA) DQ locus (area) in a gene that controls many important immunological functions and is associated with diseases.<sup>57</sup>

Consequently, DNA profiling has raised considerably greater issues of privacy than does ordinary fingerprinting.<sup>58</sup> In addition, potential privacy threats arise from the fact that the original DNA samples are generally retained as well as the DNA profiles held on the databases. Further information could be derived from those samples in future, or new technologies could lead to new information. One of the most important privacy concerns in the context of forensic use of DNA data is the collection and retention of powerful DNA information (that is, DNA sample and profiles) on a routine basis. In some cases, individuals are also coerced into providing DNA samples in 'dragnets' or a mass screening process.<sup>59</sup> Further, the relatives of some criminals or suspects are asked to provide their samples, but after the case is resolved, those original samples (from parties innocent in relation to the offence being investigated) are retained for an uncertain period of time for future use.<sup>60</sup> Privacy implications are also raised through the retention of DNA samples and profiles.

Once there is a crime committed, or there is a suspicion that one has been committed, law enforcement agencies require biological information from individuals for law enforcement purposes (such as in the identification of criminals, or missing persons, or in regard to an issue of parentage).<sup>61</sup> Very often they do so in connection with the investigation of a case.

Rothstein and Talbott Meagher, in their 2006 article, contrast the use of DNA testing and the simple drug testing of blood and saliva samples (the latter attracting less community anxiety than the former). In their example, police investigating a series of murder cases at pharmacies in a particular area found that all of the murders committed during a

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<sup>56</sup> PCR is a molecular biological technique through which a particular DNA sequence can be amplified or copied from a small amount of DNA. Newton and Graham has defined the term PCR as 'an *in vitro* technique which allows the amplification of a specific Deoxyribonucleic acid (DNA) region that lies between two regions of known DNA sequence', for further details see, CR Newton and A Graham, *PCR* (BIOS Scientific Publishers, 1994) 1.

<sup>57</sup> Committee on DNA Technology in Forensic Science, above n 12, 114-15.

<sup>58</sup> *Ibid* 113.

<sup>59</sup> This is the process through which police seek and collect DNA samples from the public to catch the guilty person.

<sup>60</sup> Rothstein and Meagher, above n 42, 160.

<sup>61</sup> See generally Michelle Hibbert, 'DNA Databanks: Law Enforcement's Greatest Surveillance Tool?' (1999) 34 *Wake Forest Law Review* 768, 787-9.

series of armed robberies had another feature in common, that is, that the thief was in the habit of stealing an expensive and relatively rare drug. From this information police speculated that the thief was dependent on a particular type of medicine. In fact, such information could also indicate that a near family member or other relative required this medication. As this was the only clue, in order to identify the actual offender, police could ask the people of that locality to undergo a blood or saliva test to detect the presence of that particular rare drug. Rothstein and Talbott Meagher argue that the drug test reveals more personal information (in regard to illness on the basis of the drug taken) than any current DNA test, but added that such drug testing lacks the specificity of a DNA test which would be able to identify the individual involved, if there was a sample left at the scene of the crime. Nevertheless the samples supplied in *any* mass screening (including blood or saliva for drug analysis) could be subsequently used for DNA analysis and divulge personal health and other information about all the individuals who have been tested. Even though they are innocent, their information as well as their personal details might be retained for an indefinite period on the forensic database. The test can reveal sensitive personal health information<sup>62</sup> which is vital for both the individual and his or her family. It is no wonder therefore, that some people object, usually without effect, to the submission of samples for DNA analysis.

An interesting example of how a DNA database may become a potential risk to human rights and privacy could be seen in the example of US *Social Security Act* passed in the early nineteen thirties. When the Act was passed in the US, the Congress stipulated that the social security number should not be used other than for the purpose envisioned in this Act. However, a considerable number of databases belonging to both public and private agencies, for example, drivers' licence issuing authorities and credit card companies, collected these numbers and used them for purposes other than what was originally indicated in the Act. Such use included providing the government with a permanent database about many of the activities of US citizens and covering every sphere of their life.<sup>63</sup> Later, this practice raised a number of significant privacy concerns. Similarly, many believe that easy access to DNA databases, which have even more sensitive data, may pose even more serious threat of privacy violation, and hence, it requires greater protection.

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<sup>62</sup> Rothstein and Meagher, above n 42, 160.

<sup>63</sup> E Donald Shapiro and Michelle L Weinberg, 'DNA Data Banking: The Dangerous Erosion of Privacy' (1990) 38 *Cleveland State Law Review* 455, 477.

The above discussion highlights a number of human rights and privacy violation issues in a number of contexts, which are ongoing in the existing DNA database practices and/or in the justice delivery systems. Some notable forms of privacy violations with regard to the forensic use of human DNA data, which are identified and considered significant by the author, are discussed below.

## 1 Retention of DNA Samples and Profiles

Cellular or DNA samples are retained for the purposes of possible later verification of a profile, or for correcting some error, for quality control purposes (as happens in the case of CODIS),<sup>64</sup> or for resolving subsequent disputes, and also for further research. The justification for this retention is also based on the necessity to facilitate any re-profiling that may become necessary 'if the current profiling methodologies change to include more loci or even shift more radically to new kinds of technological platforms' such as Single-Nucleotide Polymorphism (SNP)<sup>65</sup> (the process most likely to replace STR analysis used in the formation of DNA databases). However, retention of DNA samples and profiles for an unspecified period of time poses serious threats to individual or social privacy. Privacy violations can occur in two ways. The first is by interfering with a person's physical integrity (physical genetic privacy) to obtain a DNA sample. The second is by accessing those databases, which contain potentially much greater and more personal, sensitive and detailed information. For example, when DNA samples are kept and retained in any databases, it is possible to gather the most personal information about any individual (including his or her family) with regard to certain characteristics. This includes, the predisposition to certain diseases<sup>66</sup> and more information concerning individuals and their relatives than other forms of data such as fingerprints. The latter constitutes a breach of informational privacy.

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<sup>64</sup> R E Gaensslen, 'Should Biological Evidence or DNA be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively Stipulated Conditions' (2006) 34 *Journal of Law, Medicine & Ethics* 375, 377.

<sup>65</sup> P Gill and D J Werrett, 'An Assessment of Whether SNPs will Replace STRs in National DNA Databases' (2004) 44(1) *Science and Justice* 51 cited in Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness', above n 24. SNP is the simplest type of polymorphism and it is single base difference in the sequence of the DNA. SNPs normally have just two alleles – one allele with a guanine (G) and one with an adenine (A), and therefore are not highly polymorphism. However, SNPs are so abundant throughout the genome that it is theoretically possible to type hundreds of them, which can make the combined power of discrimination very high. For further details see William Goodwin, Adrian Linacre and Sibte Hadi, *An Introduction to Forensic Genetics* (John Wiley and Sons, 2007) 13–14. See also Wilson Wall, *Genetics and DNA Technology: Legal Aspects* (Cavendish Publishing, 2<sup>nd</sup> ed, 2004) 57.

<sup>66</sup> Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness', above n 24, 551.

The kind of knowledge in relation to someone's life, which is possible to gather from DNA samples, has no parallel in the history of science and technology, and it raises profound questions about the protection of human rights and privacy.<sup>67</sup> While evaluating the privacy implications, it is necessary to evaluate the challenges to the benefits of retention of DNA samples in databases.<sup>68</sup> Moreover, collection and storage of large quantities of biological samples by law enforcement agencies call for specific regulations controlling their fair use and terms of retention, which balance human rights and privacy protection.

## 2 *Unfettered Power Exercised by Police*

There is another ancillary or interconnected problem with regard to the retention of DNA samples and profiles. In relation to the use of these DNA databases, the UK police exercise some unfettered powers. Originally, under s 64 of the *Police and Criminal Evidence Act 1984* (UK) ('*PACE Act*') DNA samples had to be destroyed if a person was not charged or was acquitted. However, this section has been amended by s 57 of the *Criminal Justice and Public Order Act 1994* ('*CJPO Act*') and s 64(3A) of the *PACE Act*. For example, s 64(3A) of the *PACE Act* provides that samples need not be destroyed if samples 'were taken for the purposes of the investigation of an offence of which a person has been convicted'. As a result, the samples taken can be kept indefinitely. Further, s 82 (2) of the *Criminal Justice and Police Act* ('*CJP Act*') of 2001 amended s 57 of the *CJPO Act* and it allowed DNA samples to be retained and used for future investigations. That meant DNA samples could be retained even where charges were not proceeded with or were dropped.

Moreover, police access to human DNA data, which can identify individuals as well as contain personal information, has some obvious consequences in terms of a right to privacy.<sup>69</sup> For example, while 'many Australian jurisdictions expressly confine the police's use and disclosure of information obtained from forensic procedures to investigative purposes',<sup>70</sup> such police use and or disclosure of information has nevertheless been seen as 'encompass[ing] potentially broad intrusions into privacy'.<sup>71</sup>

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<sup>67</sup> *Ibid.*

<sup>68</sup> Yale H Yee, 'Criminal DNA Data Banks: Revolution For Law Enforcement or Threat to Individual Privacy?' (1995) 22 *American Journal of Criminal Law* 461, 480.

<sup>69</sup> Jeremy Gans, 'DNA Identification, Privacy and the Irrelevance of Australian Law' (2007) 3(9) *Privacy Law Bulletin* 110, 110.

<sup>70</sup> *Ibid* 111.

<sup>71</sup> *Ibid.*

Australian police can lawfully obtain a person's DNA profile without either a court order or consent. They can do so by collecting that person's body sample from an item the person has touched.<sup>72</sup> In addition, the collected DNA information — from suspects, criminals or other innocent persons by the police — could be later used to identify them in regard to subsequent activities where a sample is taken and found to match the original.<sup>73</sup>

Again, as Gans observes, if the police have obtained a known person's DNA profile and it is compared with all other profiles derived from crime scene samples,

then the police can potentially learn of any of the person's behaviour, criminal or innocent, or associated, accurately or not, with any crime, actual or apparent, at any time, past or future.<sup>74</sup>

This practice has the effect, in Australia, of all offenders and suspects whose DNA profile was obtained by the police, consensually or otherwise, facing loss of their privacy.<sup>75</sup> In the case of offenders, this is consistent with the rationale for DNA sampling because of the risk of recidivism. Moreover, since they are offenders, they should have reduced rights to privacy. On the other hand, in the case of suspects, privacy intrusion greatly exceeds the original purpose of the DNA sample. That means the DNA samples might be used for purposes other than in the investigation of the offence for which they were suspected of committing.

Furthermore, in Australia, DNA profiles from volunteers and even victims can also be used to identify suspects or offenders. Gans points out that while Australian statutes appear to provide for the use of samples volunteered only 'for the "purpose" for which the profile was volunteered'<sup>76</sup> nevertheless the people giving the sample may be asked not to so limit the use of the sample. Gans also notes an instance where

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid 112.

<sup>74</sup> Ibid 111. Such behaviour may include staying in a hotel, driving a car while drunken, using a syringe, handling a weapon or having sex.

<sup>75</sup> Ibid.

<sup>76</sup> For example, see *Crimes Act 1914* (Cth) s23YDAF; *Crimes (Forensic Procedures) Act 2000* (ACT) s 97; *Crimes (Forensic Procedures) Act 2000* (NSW) s 83A, s 93; *Police Administration Act* (NT) s 147B(2) (matches to profiles relating to offences carrying a maximum penalty of less than fourteen years of imprisonment only); *Police Powers and Responsibilities Act 2000* (Qld) s 494(1)(a) & *Police Powers and Responsibilities Regulations 2000* (Qld) reg 8; *Criminal Law (Forensic Procedures) Act 2007* (SA) s 45(3)(a); *Forensic Procedures Act 2000* (Tas) s 54; *Crimes Act 1958* (Vic) s 464ZGI; *Criminal Investigation (Identifying People) Act 2002* (WA) pt 10.

victim DNA profile was used to assist identification of a relative for an unrelated offence.<sup>77</sup>

It is also important to recognise that the police in England and Wales are given extensive powers under section 64(1A) of the *PACE Act*<sup>78</sup> to retain DNA samples and data derived from suspects indefinitely. The implication of this is that the police are never required to destroy samples that they have legitimately collected.

In addition, DNA databanking could lead to an unprecedented and extremely powerful means of governmental intrusion into a citizen's most private sanctuary.<sup>79</sup> The power given to the law enforcement agencies could be misused either for political or other reasons. For instance, when DNA samples and/or information are in the custody of police, there is a possibility that such information could be used by the government other than for its original purposes.<sup>80</sup> The problem can be more acute for developing countries, where the judicial systems are not very well developed. There is also a high chance that corrupt practices might begin in the use of DNA database in those countries, such as manipulating innocent people, harassing the leaders of the opposition parties, and also making transactions with some interested third parties with regard to this highly sensitive information.

### *3 Issues with Regards to Informed Consent*

Another interconnected issue with regards to the power of the police is – the informed consent issue of sample providers (be they innocent volunteers, suspects or accused). In the investigative process, the collection and use of DNA samples without consent and/or forcibly collected from suspects also raises a question about the protection of the privacy of that person's interests. In this regard, it can be cited that there are two rules that exist in Australian jurisdictions. On the one hand, in some jurisdictions police have no power to compel someone to provide their DNA sample. In such circumstances, police have to rely purely on that person's consent to obtain their DNA.<sup>81</sup> On the other hand, in many Australian states police rely on consent even though they have the power to compel someone to cooperate in obtaining a sample of their DNA. However, as police have power to compel, 'many suspects or offenders explicitly told that a refusal to

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<sup>77</sup> Gans, above n 69.

<sup>78</sup> *PACE Act*; see also *CJP Act* s 82.

<sup>79</sup> Shapiro and Weinberg, above n 63, 479.

<sup>80</sup> Rothstein and Meagher, above n 42, 161.

<sup>81</sup> Gans, above n 69, 111.

consent may result in the use of force to carry out a subsequent DNA sampling order', inevitably comply with this request.<sup>82</sup> In this situation, a suspect's consent is not voluntary and free from undue pressure. Similarly, under the UK domestic legislation, if an individual is arrested in connection with a 'recordable' offence, the police can take fingerprints and biological samples at their discretion without the consent of the individual.<sup>83</sup> In such circumstances, it is also debatable as to whether informed consent from people can truly be taken freely in the police custody during an investigation, because refusal to give a sample immediately places a person under suspicion.<sup>84</sup>

#### 4 Controversy Regarding Familial Searching

Collection of DNA samples from close relatives, including children, as a means of locating a suspect creates another human rights and privacy issue. For the purpose of solving a case, 'familial searching'<sup>85</sup> is often conducted by the law enforcement agencies. The investigative benefits of this familial searching are apparent, but some obvious concerns are that a perhaps unexpected genetic link could be revealed from that searching. For example, the evidence from the 'familial search' might reveal that several people on the database are related to each other and also to the unknown suspect for the crime. In one notable US case, a familial search identified a perpetrator as the brother of a victim, who had submitted a sample in an unrelated case.<sup>86</sup> The genome speaks for itself. It tells the police that a particular person is the biological father or son or mother or sister of an offender or share in some degree of consanguinity, though they may have never met.<sup>87</sup> In other instances, testing reveals that a relationship (for example, father-son) as putative rather than actual, with serious personal ramifications for those involved.

In addition, there also exists a greater societal interest in maintaining and promoting intact, healthy family units. Family integrity and

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<sup>82</sup> Ibid.

<sup>83</sup> CJA s 10(2).

<sup>84</sup> Helena Kennedy, 'We Should Be Outraged by these DNA Databases: A Labour Peer Condemns a New Government Assault on Civil Liberties', *The Guardian* (online) 14 May 2001 <<http://www.guardian.co.uk/education/2001/may/14/highereducation.uk>>.

<sup>85</sup> Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness', above n 24, 553. Williams and Johnson defined the term "familial searching" as a reference 'to a form of database searching based on knowledge about the probability of matches between the STR markers of two members of the same family as opposed to the probability of matches between these markers when the individuals compared are unrelated'.

<sup>86</sup> *United States v Davis*, 657 F Supp 2d 630 (MD Ct, 2009).

<sup>87</sup> Erin Murphy, 'Relative Doubt: Familial Searches of DNA Databases' (2010) 109 *Michigan Law Review* 291, 318.



privacy is a cornerstone of human rights values. Thus, implicating family members in an investigation, where a relative (genetic or social) might be involved, is likely to have profound social, cultural and physical impacts on that family.<sup>88</sup> The investigation alone has the 'capacity to deepen painful rifts within strained familial bonds'.<sup>89</sup> Family members may have already suffered greatly as a result of the actions of a related convicted offender, such as, incurring financial losses as a result of legal costs or thefts, or emotional losses from incarceration, abandonment, or betrayal. Criminality can tear families apart, and when the state conducts investigations based primarily on familial links, it does so with the strong likelihood of inflicting further damage.<sup>90</sup> Even in families in which the offender's position is reconciled, familial searching effectively turns convicted offenders into involuntary 'genetic informants'.<sup>91</sup> It burdens the relationship between innocent relatives and the convicted offender as relatives to find themselves suspected of a crime they did not commit by virtue of nothing other than the biological connection.<sup>92</sup>

Information derived from DNA is much greater than that flowing from any other forensic tests, such as a fingerprint, and it presents a direct challenge to a basic right to privacy.<sup>93</sup> Though the prevention of crime is one of the fundamental duties of a state, it is also necessary to protect and respect some basic ethical values of its citizens, for example, privacy. Sometimes a suspect (though their crime is subsequently not proved beyond reasonable doubt) is forced to provide a DNA sample. In the national interest, sometimes it is essential to do so. At the same time, it is also important to obtain consent from the suspect before doing the DNA test and to destroy the DNA sample after using it. Even if, in exceptional circumstances, its retention is required, there should be some time limit on such retention and proper security measures need to be maintained in relation to the sample and the profile derived from it, because everyone has a right to privacy and a right to make an independent decision about their life.

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<sup>88</sup> Erica Haimes, 'Social and Ethical Issues in the Use of Familial Searching in Forensic Investigations: Insights from Family and Kinship Studies' (2006) 34 *Journal of Law, Medicine and Ethics* 263, 269; See also Murphy, above n 87, 319.

<sup>89</sup> Murphy, above n 87, 319.

<sup>90</sup> Ibid 320; See also Suter, above n 32, 364.

<sup>91</sup> Haimes, above n 88, cited in Murphy, above n 87, 320.

<sup>92</sup> Murphy, above n 87, 319, 320.

<sup>93</sup> E Donald Shapiro, 'Dangers of DNA: It Ain't Just Fingerprints' (1990) 203 (15) *New York Law Journal* at 1, col 2. The Power of Forensic DNA Technology Makes Abuse a Serious Concern, NY Forensic DNA Panel Report, cited in Shapiro and Weinberg, above n 63, 469.

The power of DNA and its related technology as well as their future potentialities are significant, but they raise profound questions that cannot be ignored. It is necessary to consider the serious moral dilemmas surrounding the use of DNA profiling. The societal answers require economic and legal reassessments (cost-benefit analysis) in regard to those fundamental rights of the individual versus those of society.<sup>94</sup> Almost all governments are required to be aware that it is simply not a matter of what the current state of DNA profiling techniques can reveal, but what might be able to be read from this technology in the near future. However, while state security measures cannot cease, due to the need to protect the people generally, a balanced approach is needed. Emphasising the need to balance human rights and the technological development in the criminal justice system, Kristina Rooker highlights that:

Not everyone who is in prison is guilty and even if they are guilty they do not leave their constitutional rights and protections at the prison door. Although it is important that law enforcement officials have DNA profiles in order to solve crimes and convict criminals, it is also important that the civil liberties and privacy of inmates be protected. There needs to be a balance.<sup>95</sup>

### III THE FUTURE OF FORENSIC USE OF DNA INFORMATION

#### *A Balancing State Security Measures, and Human Rights and Privacy*

It is essential to protect the two mutually dependent interests of society that is, forensic use of DNA for the enforcement of justice and the protection of human rights and privacy. In the field of forensics, '[t]he collection, storage and use of sensitive personal data ... always raise ethical social and legal issues'.<sup>96</sup> Some vital privacy issues include collection and retention of DNA samples and profiles for an unknown period of time, especially those taken from the individuals without their consent, and the extensive power and use of genetic samples and information by the law enforcing agencies.<sup>97</sup> Williams and Johnson highlighted some vital privacy issues:

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<sup>94</sup> Ibid 483.

<sup>95</sup> Kristina Rooker, *The Impact of DNA Databases on Privacy* (Spring 2000) Vernellia R Randall, Institute on Race, Health Care and the Law, University of Dayton School of Law, <[http://academic.udayton.edu/health/05bioethics/00rooker.htm#N\\_3\\_](http://academic.udayton.edu/health/05bioethics/00rooker.htm#N_3_)>.

<sup>96</sup> Mairi Levitt, 'Forensic Databases: Benefits and Ethical and Social Costs' (2007) 83 *British Medical Bulletin* 235, 236.

<sup>97</sup> Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness', above n 24, 546.

[T]he spread of forensic DNA profiling and databasing has also prompted a wide range of concerns about problems that may arise from the storage of tissue samples (especially those taken from individuals without consent) and the proliferating uses of genetic information by the police. ... the threat to the bodily integrity of citizens who are subject to the forced and non-consensual sampling of their genetic material; the intrusion and denigration of privacy rights caused by the storage and use of tissue samples; the potential for the future misuse of such samples held in state and privately owned laboratories; the prospect of long term bio-surveillance occasioned by the storage of genetic information in police databases and biological samples in forensic laboratories; and the possibility for the deceptive use of DNA forensic evidence in police investigations and criminal prosecution.<sup>98</sup>

It is therefore argued that forensic DNA databases naturally pose a privacy threat because of the inherent nature of information contained in DNA samples. The need for some protection of personal privacy when setting up and using DNA databases is also fairly uncontroversial.<sup>99</sup> Viktor Mayer-Schönberger, however, argued that:

... striking the right balance between too little protection for privacy to be preserved and too much protection for law enforcement to effectively function is not only complex, experts also disagree on exactly how that balance can be found.<sup>100</sup>

Since the early 1990s, governments and legislators throughout the world have been struggling to keep a balance between two opposing but mutually significant interests: the establishment and uses of DNA databases in their own jurisdiction as well as concerns with regards to

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<sup>98</sup> The literature on these matters is extensive. Some significant literature that cited in Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness', above n 24, 546, include: P R Billings (ed), *DNA on Trial: Genetic Identification and Criminal Justice* (Cold Spring Harbour Laboratory Press, 1992); Human Genetics Commission, *Inside Information: Balancing Interests in the Use of Personal Genetic Data* (Department of Health, 2002); Graeme Laurie, *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge University Press, 2002); O'Neill, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2001); Thomas H Murray, 'Genetic Exceptionalism and Future Diaries: Is Genetic Information Different from other Medical Information?' in M A Rothstein (ed), *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (Yale University Press, 1997) 60–73.

<sup>99</sup> This assumption while uncontroversial is not universally held. For further details see Anita L Allen, 'Privacy-as-Data Control: Conceptual, Practical and Moral Limits of the Paradigm' (2000) 32 *Connecticut Law Review* 861, cited in Viktor Mayer-Schönberger, 'Strands of Privacy: DNA Databases and Informational Privacy and the OECD Guidelines' in David Lazer (ed), *The Technology of Justice: DNA and the Criminal Justice System* (MIT Press, 2004) 225, 225–6.

<sup>100</sup> Mayer-Schönberger, above n 99.

human rights and privacy.<sup>101</sup> This remains a legal and policy concern up to the present time, and determining the balance between the investigative benefits of DNA identification versus its privacy implications is the subject of continuous debate for almost all developed and developing countries across the globe. Governments, policymakers, and legislators worldwide are, therefore, trying to strike a rational and effective balance between the possible pitfalls or intrusiveness and the potentials or effectiveness of the use of forensic DNA profiling and databasing.<sup>102</sup> Such a balanced approach will foster use of the advances in genetic technology that serve social justice and similar interests, along with providing a sufficient guarantee for the world community that such advances 'are subject to proper ethical scrutiny and legal control'.<sup>103</sup>

DNA profiling has undoubtedly become a useful tool in the justice delivery system, especially in criminal investigations. Nevertheless, it is important to differentiate between the role of DNA samples and profiles, particularly in case investigation process, and the role of DNA databases in general. Searching for a DNA profile match in order to solve a particular case from among known suspects, and destruction of sample or profiles after resolution of that case does not require a database. On the other hand, the retention of DNA samples and profiles is justified in some circumstances, for example, if a case needs to be reopened, or a fresh investigation is required, or there is a doubt about the DNA analysis result.<sup>104</sup> The challenge at this point is to weigh up how to determine in which cases it is important to retain the DNA profile or sample (and if it is so essential, how to ensure the security of such material and the privacy of the information supplied) and also in which cases it is not so relevant to retain the DNA sample and data. Such estimations, of course, depend on the country's justice system, needs and overall situation.

Another important issue is how much access police should be given to the DNA samples after their retention. In some cases, information about a person's genetic disorder or risk could potentially be used to identify suspects, for example, if police are looking for a person with a particular disease. Currently, the police are allowed to ask for personal genetic data from an individual's medical record, but only in

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<sup>101</sup> Williams and Johnson, 'Inclusiveness, Effectiveness and Intrusiveness', above n 24, 546.

<sup>102</sup> *Ibid.*

<sup>103</sup> David Weisbrot, George Spiteri and Gabrielle Carney, 'Australian Inquiry into the Protection of Human Genetic Information' (2002) 2 *Macquarie Law Journal* 119, 131.

<sup>104</sup> Helen Wallace, 'The UK National DNA Database Balancing Crime Detection, Human Rights and Privacy' (2006) 7 *European Molecular Biology Organization* S26, S27.

preventing, detecting or prosecuting a serious crime.<sup>105</sup> How far such ethical protection can be maintained by police also raises an important question. Moreover, the lack of a consistent regulatory framework and an inadequate monitoring mechanism regarding third parties (including government) access and use of human DNA information constitute major problems.<sup>106</sup> In addition, the costs of administering and maintaining a big database and retaining millions of DNA samples are increasing day by day; and so some 'cost-benefit analysis' should be conducted.<sup>107</sup> Therefore, balancing the benefits and dilemmas regarding the access and use DNA data is a complex issue. Mark A Rothstein and Sandra Carnahan also argued about these two opposite but essential elements:

Balancing the interests in expanded forensic DNA databases is extremely complicated. On one side are the appealing and concrete ... benefits of preventing and solving a range of crimes. On the other side are abstract interests in the freedom to be left alone from governmental demands for bodily specimens.<sup>108</sup>

The current use of DNA samples and profiles in the justice delivery system is not beyond debate. It obviously poses some uncertainties regarding the future use of this promising technology (that is, human DNA sampling and data analysis) for forensic purposes. Naturally, any initiative concerning DNA data sampling of general populations for investigative purposes, or initiating any advanced use of DNA database should be supported by a thorough analysis of the scope, use and parameters of such a database. Most importantly, it should be remembered that "[t]here's a difference between what one can do, scientifically or otherwise, and what one ought to do".<sup>109</sup>

#### IV CONCLUSION

DNA profiling and databases provide law enforcement agencies with an effective tool that may revolutionise the justice delivery system around the world. With continuing advances in DNA technology, such

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<sup>105</sup> Liberty, *Whose Hands on Your Genes? Response to the Human Genetics Commission's Discussion Document on the Storage, Protection and Use of Personal Genetic Information* (March 2001) 10.4].

<sup>106</sup> Christine Rosen, 'Liberty, Privacy, and DNA Databases' (2003) 1 (29 October 2009) *The New Atlantis* 37, 51.

<sup>107</sup> Carole McCartney, 'Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach' (2004) 12(2) *Critical Criminology* 157, 174.

<sup>108</sup> Mark A Rothstein and Sandra Carnahan, 'Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA DataBanks' (2001-2002) 67(1) *Brooklyn Law Review* 127, 166-7.

<sup>109</sup> McCartney, 'A Sceptical Approach', above n 107 (citation omitted).

databases may become even more valuable. Since the application of improved technology in analysing DNA samples 'can yield a wealth of information about an individual'<sup>110</sup> it is crucial to appreciate that greater protective measures would be necessary to prevent potential misuse of this information. The DNA databases of genetic profiles should, therefore, be handled with the greatest respect and precautions in order to protect human privacy.

In most cases, delivering justice 'demands a complex balancing of multiple considerations'.<sup>111</sup> For instance, the proper use of DNA data without violating anyone's privacy may require this complex balancing on behalf of the persons and agencies concerned. The emerging use of DNA profiling, which causes human rights and privacy violations, requires special measures to address such violations. In addition, it is essential to take measures to control or reduce the gaps between developed and developing countries regarding the use of DNA technology in their justice delivery systems. It is, therefore, essential to guide and control the use of technological discoveries so that they can bring benefits for all. If research related to genetics and forensic use of DNA data in the justice delivery system is not controlled, protracted controversy and counterproductive inter-jurisdictional conflict may arise. Therefore, national and international measures are potentially important in order to control misuse and also to ensure proper use of genetic samples and related information in the justice delivery system.

It should be noted that the study of human genetic information and its use does not necessarily contradict support for pro-social technological development for forensic purposes. Genetic technology is similar to any other technology in that it has both merits and demerits. The purpose of this article is not to develop any completely new philosophy about how to deal with challenges associated with human genetic material and information; rather it addresses a few issues, some mechanisms or solutions that that could help to ensure the proper management of human genetic information and also ensure the appropriate use of DNA technology.

In the post-September 11 world, concepts of security and privacy have been redefined. Many new security measures are routinely taken worldwide that clearly contravene traditional concepts of privacy. Identifying personal information, such as finger prints and blood samples, are collected to make comprehensive databases of personal information (of citizens, visitors and/or foreigners) to enhance national

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<sup>110</sup> Yee, above n 68, 489.

<sup>111</sup> *Ibid.*

security. It is difficult to determine, however, if large scale human genetic projects or their databases could be utilised in the fight against terrorism in the future instead of focusing purely on medical research. Generally, all individuals have the right to determine what information should be collected about themselves and how it should be used. However, no right, including that of privacy, is absolute, but rather is subject to a number of conditions. When it comes to the handling of sensitive information like genetic data, extra attention is required. Privacy is always an important human rights issue and current trends in genetic research have raised several new questions. An appropriate international legislative or other mechanism has to be sought in order to solve the new challenges related to genetic information. Therefore, the main goal of this thesis is to review the challenges and to recommend some mechanisms to protect human genetic material and information.

Finally, it can be argued that there are two opposite but essential interests. One is human rights and privacy and the other is law enforcement for public safety and security. It is, therefore, important to take appropriate measures for balancing the constitutional guarantee of a right to privacy and other human rights with the government's duty to ensure public safety as well as secure the well-being of the people in their jurisdiction. The main idea or notion is respect and lawful protection of society without hindering individual privacy. In this respect Laura A Matejik highlighted that:

In the case of DNA collection there is a delicate balance between an individual's freedom to drink, spit, or blow his nose without fear that law enforcement will collect his genetic information and society's interest in efficiently resolving tragic crimes.<sup>112</sup>

It can be argued that technology can be a powerful force for protecting human rights. However, such technology can also subject humankind with 'an all-pervasive monitoring system' leading towards a surveillance society.<sup>113</sup> Laura A Matejik in her earlier quotation, the editorial of the journal *Nature*, similarly pointed out that in order to honour and uphold the spirit of the *Universal Declaration of Human Rights (UDHR) 1948*, a balance needed to be struck between individual freedom and social interests.<sup>114</sup>

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<sup>112</sup> Laura A Matejik, 'DNA Sampling: Privacy and Police Investigation in a Suspect Society' (2009) 61 *Arkansas Law Review* 53, 57.

<sup>113</sup> Editorials, 'Watching Big Brother' (2008) 456(7223) *Nature* 675, 675-76, cited in George J Annas, 'Protecting Privacy and the Public – Limits on Police Use of Bioidentifiers in Europe' (2009) 361 *New England Journal of Medicine* 196, 199.

<sup>114</sup> *Ibid.*

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# TOWARDS A NEW FRAMEWORK IN THE LAW OF WAR: INCORPORATING TRANSNATIONAL ORGANISED CRIME

REGINA MENACHERY PAULOSE\*

*This article will focus on why transnational organised criminal groups need to be incorporated into the law of war paradigm. States work under the continued assumption that wars are fought only between two parties. This 'us versus them' mentality obscures multiple parties that truly participate in war. This article will suggest that transnational organised crime groups participate in war thereby creating a third party on the battlefield because of their contributions before, during and after conflict. This article will explore how transnational organised criminal groups have positioned themselves to be allies to terrorists during conflict and how they benefit from regime changes in order to gain control at a later stage. This article will conclude with a discussion on how transnational organised crime groups could be classified as combatants in international humanitarian law, so that efforts to counteract their impact can be handled under more than one framework.*

## I INTRODUCTION

Terrorism and organised crime are considered two distinct categories within criminal law. Terrorism is addressed both in international criminal law and in international humanitarian law ('IHL') because most terrorist attacks are considered 'armed attacks'.<sup>1</sup> This is different from organised crime which is analysed through domestic criminal law or transnational criminal law.<sup>2</sup> The changing portrait of organised crime in the 21<sup>st</sup> century has led to a growing amount of scholarship which has started to explore whether terrorism and organised crime networks have potential links. While Hübschle argues that there is a lack of empirical evidence to determine whether this relationship exists and how this alliance would function,<sup>3</sup> there is a growing concern that these groups are in fact working together and are even adopting each

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<sup>1</sup> Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Law and Criminal Procedure* (Cambridge University Press, 2<sup>nd</sup> ed, 2007) 337.

<sup>2</sup> Tom Obokata, *Transnational Organised Crime in International Law* (Hart, 2010) 31.

<sup>3</sup> Annette Hübschle, 'From Theory to Practice: Exploring the Organized Crime-Terror Nexus in Sub-Saharan Africa' (2011) 5(3-4) *Perspectives on Terrorism* 81.



other's motives to achieve multiple aims.<sup>4</sup> With this in mind, it is clear that IHL would invoke potential military responses towards terrorists, the same should hold true for organised criminal groups who willingly participate in war.

This article critiques the rigid framework that is applied to handling organised crime. This article examines situations where organised criminal networks contribute to war. Since nation-states have been willing to apply IHL to terrorists and classify them as unlawful or enemy combatants, can the same analysis hold true for organised criminal groups? This article will explore these questions by first examining the rise of global crime then detailing situations in which terrorists and organised criminals have and are working together. Finally, this article will discuss why it is necessary to consider the true role of organised crime within IHL by moving beyond the traditional criminal law framework.

## II GLOBALISATION OF CRIME

The global crime agenda emerged 'more than 50 years ago within United Nations rhetoric as a social issue.'<sup>5</sup> Since garnering the attention of the global community, various bilateral treaties have been formed to address global criminal activity, which culminated in the two largest multilateral treaties to address crime: the *United Nations Convention against Corruption* ('UNCAC') and the *United Nations Convention against Transnational Organized Crime* ('UNTOC').<sup>6</sup> While organised crime is not a new phenomenon,<sup>7</sup> the reaction by the international community towards organised crime is not unfounded. The projected trend between now and the year 2025 is that the power of non-state actors,<sup>8</sup>

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<sup>4</sup> US Department of Defence, 'Link Grows Between Terrorism, Organized Crime, Officials Say' (American Forces Press Service, 28 March 2012) <<http://www.defense.gov/News/NewsArticle.aspx?ID=67721>>.

<sup>5</sup> Paul Knepper, *The Invention of International Crime: A Global Issue in the Making 1881-1941* (Palgrave Macmillan, 2009) 1.

<sup>6</sup> *United Nations Convention against Corruption*, opened for signature 3 October 2003, 2349 UNTS 41 (entered into force 14 December 2005); *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

<sup>7</sup> Carrie Lyn Donigon Guymon, 'International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention' (2000) 18 *Berkeley Journal of International Law* 53.

<sup>8</sup> This article incorporates organised crime groups into the category of 'non-state actors' which are generally considered distinctive organizations that are: (1) willing and capable of using violence to pursue objectives, (2) not integrated into formalised institutions (police, armies, etc.), and (3) possess a certain degree of autonomy with regard to politics, military operations, resources and infrastructure: Claudia Hoffman and Ulrich Schneckener, 'Engaging Non State Armed Actors in State and Peace Building: Options

such as businesses and criminal networks, will increase with 'relative certainty'.<sup>9</sup>

The rise of criminal networks can be attributed to the presence of unstable states and resource scarcity, although organised crime does have a presence in stable states.<sup>10</sup> Instability, however, allows organised crime to 'flourish' as they do not have 'solid legal, administrative frameworks to regulate licit and illicit markets.'<sup>11</sup> Further, corruption 'fosters the ideal environment' for organised crime.<sup>12</sup> Corruption tends to allow organised criminals to dictate governance measures and if 'left unchecked organised crime, even at a small scale, can produce long-term negative impacts, particularly in development settings where institutions remain weak and democratic processes are still consolidating.'<sup>13</sup> The ability of organised criminals to exploit weak governance is not necessarily targeted at national governments. In Italy, for example, the state of Calabria is said to be run by 'Ndrangheta, a powerful transnational mafia group, which uses Calabria as its home base to make important decisions regarding its illicit markets.'<sup>14</sup>

The illicit market created by organised crime should not be underestimated. It is projected that there are at least 52 different criminal activities that fall within the illicit market, which range from counterfeit medicine to counterfeit batteries.<sup>15</sup> Globalisation has thus

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and Strategies' (2011) 93(883) *International Review of the Red Cross* 604. 'Transnational organised crime' is not defined under the international conventions. This portion of the debate is examined further in another article, see Regina Menachery Paulose, 'Beyond the Core: Incorporating Transnational Crimes into the Rome Statue' (2012) 21(1) *Cardozo Journal of International and Comparative Law* 77.

<sup>9</sup> Jay Albanese, *Transnational Crime and the 21<sup>st</sup> Century, Criminal Enterprise, Corruption, and Opportunity* (Oxford University Press, 2011) 2.

<sup>10</sup> Ibid.

<sup>11</sup> Obokata, above n 2, 23.

<sup>12</sup> Council on Foreign Relations, *The Global Regime for Transnational Crime* (25 June 2013) <<http://www.cfr.org/transnational-crime/global-regime-transnational-crime/p28656#p1>>.

<sup>13</sup> Camino Kavanagh, 'Getting Smart and Scaling Up Responding to the Impact of Organized Crime in Developing Countries' (June 2013) New York University: Center on International Cooperation, 7 <[http://cic.nyu.edu/sites/default/files/kavanagh\\_crime\\_developing\\_countries\\_report.pdf](http://cic.nyu.edu/sites/default/files/kavanagh_crime_developing_countries_report.pdf)>.

<sup>14</sup> Andreas Ulrich, 'Encounters with the Calabrian Mafia: Inside the World of 'Ndrangheta', *Spiegel International* (online) 4 January 2012 <<http://www.spiegel.de/international/europe/encounters-with-the-calabrian-mafia-inside-the-world-of-the-ndrangheta-a-806233-2.html>>.

<sup>15</sup> Council on Foreign Relations, above n 12.

created a 'growing interconnectedness'<sup>16</sup> in which advanced communication, transportation, and technology allow these networks to expand their influence internationally.<sup>17</sup> This has turned organised criminal groups into *transnational* organised criminals.<sup>18</sup> This ability to become transnational is attributed to the low level barriers that allow for criminal groups to easily travel, use the free market system to sell and produce illicit goods, in addition to the ease of internet banking.<sup>19</sup>

The success of these criminal groups makes them 'fluid', which allows them to create new alliances, engaging in a wider range of illicit activities, including supporting terrorism.<sup>20</sup> Sadly, 'organised criminals don't want to just make money, they want to control something.'<sup>21</sup> The United Nations Office on Drugs and Crime ('UNODC') notes that organised crime poses a threat where the rule of law is already weakened, such as in Syria and Mali, which will be explored later in this article.<sup>22</sup>

Criminal networks are a reality and have taken advantage of globalisation to be successful. Organised crime now 'has an impact on international peace and security.'<sup>23</sup> As will be discussed, it is time to incorporate organised crime into additional frameworks beyond criminal law, specifically IHL, in order to expand our ability to handle organised crime in a flexible manner. Organised crime has taken root within the battlefield in order to benefit from the instability created by war - a place where weak governance and an illicit market create an intersection for illicit success.

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<sup>16</sup> Francis Pakes, 'Globalisation and Criminology: An Agenda for Engagement' in Francis Pakes (ed), *Globalisation and the Challenge to Criminology* (Routledge, 2013) 1, citing D Held, *Democracy and the Global Order* (Stanford University Press, 1995).

<sup>17</sup> Obokata above n 2, 4-5.

<sup>18</sup> Ibid 28-29.

<sup>19</sup> Albanese, above n 9, 1-2.

<sup>20</sup> President Barack Obama, *Strategy to Combat Transnational Organized Crime* (19 July 2011) White House

<[http://www.whitehouse.gov/sites/default/files/Strategy\\_to\\_Combat\\_Transnational\\_Organized\\_Crime\\_July\\_2011.pdf](http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf)>.

<sup>21</sup> D K 'How has organised crime adapted to globalization?' on The Economist Explains, *The Economist* (online) (15 April 2013) <<http://www.economist.com/blogs/economist-explains/2013/08/economist-explains-9>>.

<sup>22</sup> United Nations Office on Drugs and Crime, *The Globalization of Crime* (United Nations Publications, 2010) 221.

<sup>23</sup> Walter Kemp, Mark Shaw and Arthur Boutellis, *The Elephant in the Room: How can Peace Operations Deal with Organized Crime?* (3 June 2013) International Peace Institute, 4 <[http://www.ipinst.org/images/pdfs/ipi\\_e\\_pub\\_elephant\\_in\\_the\\_room.pdf](http://www.ipinst.org/images/pdfs/ipi_e_pub_elephant_in_the_room.pdf)>.

## III. ORGANISED CRIME TAKES ROOT

Criminal organisations have a tendency to garner success in conditions of war and unrest.<sup>24</sup> When this kind of environment presents itself, various mutations of relationships form between organised criminals and terrorists, making 'peace elusive'<sup>25</sup> and thereby creating the 'crime-terror nexus.'<sup>26</sup> In some circumstances, organised criminals may simply aide terrorist groups with materials and supplies that they need, as will be evident in the example of Mali below. In other circumstances, the criminal or terrorist group may mutate into a 'hybrid organization' that is 'part criminal, part terrorist.'<sup>27</sup> The Tamil Tigers (also known as the Liberation Tigers of Tamil Elam, 'LTTE') is an example of such a hybrid organisation. They are considered one of the most 'effective' and 'brutal' terrorist organisations in the world.<sup>28</sup> Aside from the separatist political agenda that it carries out, the LTTE is also known to procure its finances through human, drug, and arms trafficking.<sup>29</sup> Interestingly, the reason for LTTE's foray into organised crime was the need for a steady stream of finances.<sup>30</sup> In 2009, the death of the LTTE's

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<sup>24</sup> Robert Kelly, Jess Maghan and Joseph Serio, *Illicit Trafficking: A Reference Handbook* (ABC-CLIO, 2005) 14.

<sup>25</sup> *Ibid.*

<sup>26</sup> Wibke Hansen, *The Crime – Terrorism Nexus* (13 September 2012) International Relations and Security Network <<http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=152622&contextid774=152622&contextid775=152620&tabid=1453318054>>. Hansen argues that there are three categories that are formed as a result of the crime terror nexus which are co-existence, cooperation, and confluence. Under co-existence, Hansen argues that terrorists and organised criminals do not work together but operate within the same arena. Within the category of cooperation, Hansen argues that terrorism and organised crime fulfill roles of a customer – provider and the relationship between the two is on an ad hoc basis and temporary because their motives are different. Under confluence, Hansen articulates the notion of the same entity completing the tasks of terrorism and organised crime.

<sup>27</sup> Kelly, Maghan and Serio, above n 24, 14.

<sup>28</sup> Kate Pickert, 'The Tamil Tigers' *TIME* (online), 4 January 2009, <<http://www.time.com/time/world/article/0,8599,1869501,00.html>>.

<sup>29</sup> Angel Rabasa, Peter Chalk, Kim Cragin, Sara A Daly, Heather S Gregg, Theodore W Karasik, Kevin A O'Brien and William Rosenau, *Beyond al-Qaeda: Part 2, The Outer Rings of the Terrorist Universe*. (RAND Corporation, 2006) 101-107.

<sup>30</sup> The authors discuss the fact that India, who had once supported the LTTE, withdrew support out of fear of secessionist practices by its own Tamil Nadu state. When India withdrew support the LTTE lost a huge financial base. *Ibid* 108-109.

leader signaled the end of the group,<sup>31</sup> however, it is reported that the LTTE is still actively raising funds for potential attacks in Sri Lanka.<sup>32</sup>

Whatever the mutation of the organised criminal network, the motivation of organised criminals to partake in war may have various reasons. First, since organised criminal groups thrive on weak governance, the eruption of conflict allows them to take advantage of this instability. Another possible reason is that organised criminal networks can be used as runners during conflict because they have the ability to overcome logistical hurdles, such as economic sanctions, which allows them to work for multiple parties.<sup>33</sup> This kind of behaviour is evident in Syria while Syrian leader Bashar al-Assad loses economic options because of sanctions imposed by western powers. As noted by Berman, the regime

is likely to turn to illicit networks to obtain the cash and materials it needs to continue prosecuting the war. As more money and goods flow through these groups in and out of Syria, they will become stronger, increasing the already high levels of corruption in Lebanon. Within Syria, criminals connected to the regime will also see their resources and power increase creating worrying trends for the post-Assad era.<sup>34</sup>

Beyond working for Assad, the United Nations High Commissioner for Refugees recently reported that in the largest refugee camp in Jordan, Za'atari, organised criminal rings are operating within the camps, endangering the lives of women and children, causing 'lawlessness', and stealing goods.<sup>35</sup> The impact of organised crime within the refugee

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<sup>31</sup> K Venkataramanan, 'Tigers Extinct, now what lies ahead for Tamils in Lanka?' *The Times of India* (online), 19 May 2009 <<http://timesofindia.indiatimes.com/world/south-asia/tigers-extinct-now-what-lies-ahead-for-tamils-in-lanka-articleshow/4546294.cms>>.

<sup>32</sup> 'Sri Lanka PM says LTTE training centres exist in India' *The Indian Express* (online), 10 March 2011 <<http://www.indianexpress.com/news/sri-lanka-pm-says-ltte-training-centres-exist-in-india/760492/>>.

<sup>33</sup> Philip Gounev, 'Beyond Mafia Stereotypes: Organized Crime's Impact on Security' (12 September 2012) International Relations and Security Network <<http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=152525&contextid774=152525&contextid775=152524&tabid=1453317097>>.

<sup>34</sup> Asher Berman, *Criminalization of the Syrian Conflict* (16 May 2012) Small Wars Journal <<http://smallwarsjournal.com/jrnl/art/criminalization-of-the-syrian-conflict>>.

<sup>35</sup> Jeff Crisp, Greg Garras, Jenny McAvoy, Ed Schenkenberg, Paul Spiegel and Frances Voon, *From slow boil to breaking point: a real-time evaluation of UNHCR's response to the Syrian refugee emergency* (July 2013) United Nations High Commissioner for Refugees and Policy Development and Evaluation Services ('PDES'), UN Doc PDES/2013/10, 10 <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=52b83e539>>.

camp is now resulting in people escaping from Za'atari to return to war-torn Syria.<sup>36</sup>

Finally, another reason why organised criminals may partake in war is because it is a source of cash flow. An example of this alliance at work was (and perhaps continues to be) in the African country of Mali, located in the Sahel region of Africa. Located in West Africa, the Sahel is considered one of the poorest regions in Africa.<sup>37</sup> The Sahel is also known for being a popular route for trafficking among organised criminals, which is reported to total approximately \$3.8 billion dollars.<sup>38</sup> Mali's rise to prominence was due to the convergence of radical Islamic groups linked to Al-Qaeda that are operating within the country.<sup>39</sup> The Sahel region has been a hotbed of illicit activity for over two decades but little attention was given to the area until the rise of terrorist groups.<sup>40</sup>

Initially, irregular and corrupt customs policies between corrupt state officials and merchants allowed for various products, such as tobacco, to be smuggled throughout the region.<sup>41</sup> As with all organised criminal activity, a 'low' economic market and the need for organised groups to make a profit intersected in Mali, allowing for various criminal actors to become involved in the arms trade, which created a major arms trafficking hub beginning in the 1990s.<sup>42</sup> The conflict in Libya fueled the trade of illegal arms in Mali.<sup>43</sup> Of course, the trafficking in arms is not the only place where profit was made. As a result of eroded

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<sup>36</sup> Ibid.

<sup>37</sup> 'SAHEL: Background on Sahel, West Africa's Poorest Region' *IRIN*, 2 June 2008, <<http://www.irinnews.org/report/78514/sahel-background-on-the-sahel-west-africa-s-poorest-region>>.

<sup>38</sup> UNODC, *Sahel region countries agree to cooperate in response to illicit trafficking, organized crime and terrorism* (19 June, 2013) <<http://www.unodc.org/unodc/en/frontpage/2013/June/sahel-region-countries-agree-to-cooperate-in-response-to-illicit-trafficking-organized-crime-and-terrorism.html>>.

<sup>39</sup> Diakaridia Dembele, 'Thousands Hold Protests in Mali to Demand Military Actions' *Bloomberg Business Week*, 11 October 2012 <<http://www.businessweek.com/news/2012-10-11/thousands-hold-protest-in-mali-to-demand-military-action>>.

<sup>40</sup> Wolfram Lacher, *Organized Crime and Conflict in the Sahel –Sahara Region* (Carnegie Endowment for International Peace, 2012) 3 <[www.CarnegieEndowment.org/pubs](http://www.CarnegieEndowment.org/pubs)>.

<sup>41</sup> Ibid 5.

<sup>42</sup> Ibid 4. Even more recently the arms trade has allowed both criminal groups and terrorist networks to flourish, see 'Spiking Arms Proliferation, Organized Crime, Terrorism Part of Fallout from Libyan Crisis Afflicting Sahel, Security Council Told' UNSC, 6709<sup>th</sup> mtg, UN Doc SC/10533 (26 January 2012), <<http://www.un.org/News/Press/docs/2012/sc10533.doc.htm>>.

<sup>43</sup> Lacher, above n 40, 5.

customs policies, drug smuggling and kidnapping for ransom continue to be big money makers for criminal networks in this region.<sup>44</sup>

Organised crime was a prevalent part of the governance in Mali. The former Malian Government used 'organised crime as a resource for the exercise of influence in the north by allowing its local allies to engage in criminal activity.'<sup>45</sup> Between 2006 and 2010 the leadership in Mali 'lost control' of this policy and as a result the 'rule of law and legitimacy of state institutions eroded.'<sup>46</sup> Terrorists groups, such as Ansar Dine which is affiliated with Al-Qaeda, joined organised criminals in Mali. Terrorists would participate in activities such as kidnapping by acting as brokers in order to obtain ransoms from western countries that would pay for their nationals.<sup>47</sup> The absence of state power and deep rooted corruption is why criminal networks and terrorist groups found common ground in Mali.<sup>48</sup>

Terrorist organisations in Mali are worrisome because 'it occurs in the context of expanding organized criminal activity and ethnic or social conflicts.'<sup>49</sup> The lines between these groups are 'often blurry, alliances are temporary, and networks overlap.'<sup>50</sup> In Mali, the objective of the terrorist groups and transnational organised criminals is to clearly 'create a safe haven and a coordinating center in the north of Mali for continental terrorist networks.'<sup>51</sup> The impact of this alliance has created many deaths and refugees as a result of the conflict. The two groups

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<sup>44</sup> Ibid 5-9; see also UNODC, *The Role of Organized Crime in the Smuggling of Migrants from West Africa to the European Union* (2011) <<http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/the-role-of-organized-crime-in-the-smuggling-of-migrants-from-west-africa-to-the-european-union.html>>; for a general introduction on the role of organised crime and migrant smuggling, see UNODC, *Organized Crime Involvement in the Trafficking in Persons and Smuggling of Migrants* (2010), <[http://www.unodc.org/documents/human-trafficking/FINAL\\_REPORT\\_06052010\\_1.pdf](http://www.unodc.org/documents/human-trafficking/FINAL_REPORT_06052010_1.pdf)> and NATO Review, 'Organised Crime: West Africa: trafficking central station?' (2009) <[http://www.nato.int/docu/review/2009/Organised\\_Crime/EN/index.htm](http://www.nato.int/docu/review/2009/Organised_Crime/EN/index.htm)>.

<sup>45</sup> Lacher, above n 40, 11.

<sup>46</sup> Ibid.

<sup>47</sup> The total profit that would have been made by terrorist groups through kidnappings totaled between \$40 and \$65 million since 2008, see *ibid.*, 9-10.

<sup>48</sup> David Lewis and Adama Diarra, 'In the Land of the gangster-jihadists' *Reuters Special Report*, 24 October 2012, 2 <<http://graphics.thomsonreuters.com/12/10/SaharaMali.pdf>>; see also Kemp et al, above n 23, 11.

<sup>49</sup> Wolfram Lacher, *Organized Crime and Terrorism in the Sahel* (January 2011) SWP Comments, 1 <[http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C01\\_lac\\_ks.pdf](http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C01_lac_ks.pdf)>.

<sup>50</sup> Lacher, above n 40, 16.

<sup>51</sup> Salamatu Suleiman quoted in 'UN Chief Urges Sanctions on Mali Rebels' *Aljazeera* (online), 9 August 2012 <<http://www.aljazeera.com/news/africa/2012/08/2012895248385467.html>>; see also, 'Report on Peace and Security in Africa', UN SC 6820<sup>th</sup> mtg, UN Doc S/PV 6820 (8 August 2012).

look out for each other and many witnesses have reported that local politicians throughout the Sahel region cooperate with both groups.<sup>52</sup> In 2013, France militarily intervened in Mali after Taureg rebels allied with Ansar Dine took over Mali.<sup>53</sup> It is important to note that the French military objectives<sup>54</sup> seemed to be narrowed to accomplish the end of instability under the rule of groups such as Ansar Dine and Al-Qeada.<sup>55</sup> While France has presumably accomplished its objective in Mali, and peace seems promising,<sup>56</sup> the question which remains is whether France truly fought one of the largest perpetrators and beneficiaries of the conflict - organised crime. Has the time come for the international community to stop separating organised criminals from IHL? Can organised criminals be classified as direct participants in armed conflict?

#### IV IHL AND ORGANISED CRIME

The application of IHL to non-state actors, in particular terrorists, has garnered much debate in academic and military circles. This debate is divided into many issues (the most popular debate regards the due process rights of enemy combatants) and a subset of that debate is how to properly classify non-state actors on the battlefield. Some scholars consider 'new warfare' to be unlike traditional notions of battle because the lines are blurred and the state is engaged with non-state actors.<sup>57</sup>

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<sup>52</sup> Lewis and Diarra, above n 48, 2.

<sup>53</sup> United Nations Security Council, 'Statement by the President of the Security Council' UN Doc S/PRST/2013/10 16 July 2013) <[http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_prst\\_2013\\_10.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2013_10.pdf)>; see also Simon Allison, 'Five key facts about the conflict' *The Guardian UK* (online), 22 January 2013 <<http://www.theguardian.com/world/2013/jan/22/mali-war-five-facts>>.

<sup>54</sup> United Nations Security Council, Resolution 2071, UN Security Council Meeting 6846, UN DOC SC/10789 (12 October 2012) <[http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2071.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2071.pdf)>.

<sup>55</sup> Gerald Caplan, 'France's military objectives in Mali make no sense' *Globe and Mail* (online), 1 February 2013, <<http://www.theglobeandmail.com/news/politics/second-reading/frances-military-objectives-in-mali-make-no-sense/article8107744/>>.

<sup>56</sup> See Kemp et al, above n 23; Kemp argues that peacekeeping operations cannot handle the threats posed by organised crime. UN Peacekeepers are expected to arrive in Mali as of July 2013. 'France Begins Mali Withdrawal in North' *Aljazeera* (online), 27 April 2013 <<http://www.aljazeera.com/news/africa/2013/04/20134273102667144.html>>.

<sup>57</sup> Blank and Guiora define 'new warfare' as: 'conflicts generally involve a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects,' Laurie Blank and Amos Guiora, 'Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare' (2010) 1 *Harvard National Security Journal* 45, 48.



This article now focuses on how non-state actors such as *organised criminal networks* can be classified during armed conflict. Organised criminal networks aide opposing parties during conflict and also profit from conflict. They repeatedly prove that they are willing to participate prior, during, and after war in order to obtain control.

Classifying a conflict as a non-international or international conflict is usually a central issue of debate before beginning an analysis in IHL because conflict classification is important to 'determine applicable law and the rights and obligations of those responsible for, or affected by it.'<sup>58</sup> For the purposes of this article, reference is made to these classifications in passing.

From a broad perspective, there are two principles that are the bedrock of IHL: the principle of protection and the principle of distinction. The first principle protects those who are not taking part in armed conflict, generally classified as 'civilians'. This principle is outlined in Additional Protocol II and subsequent amendments.<sup>59</sup> The second principle behooves militaries to make distinctions between military and civilian people, objects, and objectives. The main goal is to weaken the military forces of the enemy.<sup>60</sup> It has been held in practice regardless of the type of armed conflict that these principles always apply.<sup>61</sup> It is important that these principles are kept in mind as we classify potential combatants because the principles are meant to protect the innocent and minimise the impact of conflict.

### *A Direct Participation*

First, a discussion on how 'direct participation in hostilities' is defined is required in order to better understand the categories which follow.

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<sup>58</sup> Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmschurst (ed), *International Law and the Classification of Conflict* (Oxford University Press, 2012), 80.

<sup>59</sup> International Committee of the Red Cross ('ICRC'), *Customary IHL Database Rule 1. The Principle of Distinction between Civilians and Combatants* <[http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter1\\_rule1](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter1_rule1)>, citing Protocol II to the *Convention on Certain Chemical Weapons* ('CCW'); Article 3(2), Amended Protocol II to the CCW, Article 3(7); Protocol III to the CCW, Article 2(1), *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* ('Ottawa Convention'), opened for signature 3 December 1997, (entered into force 1 March 1999), Preamble.

<sup>60</sup> Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities* (April 2004) Asser Institute <[http://www.asser.nl/default.aspx?site\\_id=9&level1=13337&level2=13379#\\_Toc158269143](http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13379#_Toc158269143)>.

<sup>61</sup> See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

The phrase is undefined in IHL.<sup>62</sup> However, the terms 'active' and 'direct' are considered synonymous as interpreted by international legal doctrine.<sup>63</sup> The International Committee of the Red Cross ('ICRC')<sup>64</sup> has defined 'direct participation' to mean, 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.'<sup>65</sup> The question of whether one party is directly participating, according to IHL, is determined on a case by case basis.<sup>66</sup> Direct participation is an ambiguous phrase and of course, conjures much debate between parties involved in conflict because the very definition of direct participation dictates the way in which a party in conflict is treated under IHL by opposing forces.

As McDonald noted,

it is generally and increasingly considered that there are many activities which involve a more indirect role for civilians, where the civilian is one or more steps (geographically or temporally) away from the actual application of violence (which may be virtual rather than physical) and may not even consider him or herself to be a direct participant in hostilities, and which do not actually involve attacks in the literal or kinetic sense, or where the causality relationship is more indirect, yet which are also considered as direct participation in hostilities.<sup>67</sup>

Based on these interpretations, there are examples which could be considered direct participation by organised criminals. A notable example is the sale/transfer of Weapons of Mass Destruction by

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<sup>62</sup> Schmitt reiterates the common rule in international law that the phrase must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1); Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1(5 May) *Harvard Law School National Security Journal* <<http://harvardnsj.org/2010/05/the-interpretive-guidance-on-the-notion-of-direct-participation-in-hostilities-a-critical-analysis/>>.

<sup>63</sup> Schmidt, above n 62.

<sup>64</sup> The International Committee of the Red Cross ('ICRC') is a neutral organisation whose mandate stems from the Geneva Conventions of 1949. One of its missions is to aide states in the interpretation of IHL so as to limit suffering. <[www.icrc.org](http://www.icrc.org)>.

<sup>65</sup> Schmitt, above n 62, citing ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶ 1945 (Yves Sandoz et al, eds, 1987).

<sup>66</sup> *Prosecutor v. Tadic (Opinion and Judgment)*, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 7 May 1997) 616.

<sup>67</sup> McDonald, above n 60.

organised criminals to terrorists.<sup>68</sup> These weapons could be used by terrorists to advance their violent agenda. A more obvious example is the use of organised criminal networks to use their illicit cash flow to fund or support terrorist activities.<sup>69</sup>

There is a distinction between direct and indirect participation. The ICRC suggests that a person who is 'indirectly' participating in conflict is one who,

contributes to the general war effort of a party, but does not directly cause harm and, therefore, does not lead to a loss of protection against direct attack. This would include, for example, the production and shipment of weapons, the construction of roads and other infrastructure, and financial, administrative and political support.<sup>70</sup>

These examples show that the range for interpreting what constitutes 'indirect' participation is extremely broad. Of course, organised criminal networks seem to have a broad role in conflict, from financing to providing weapons, like their terrorist counterparts. As observed by Berman,

organized crime played a major role in creating nearly insolvable insurgencies in both Iraq and Afghanistan, as the governments became hopelessly corrupt, and insurgents secured regular sources of weapons and cash. As time went on, it became difficult to differentiate between insurgents, criminals, and government officials, as the profit motive became at least as salient as political motives, creating a volatile mix of war, crime, and corruption.<sup>71</sup>

As jurists of IHL rightfully articulate that direct participation should be determined on a case by case basis, the classification of organised criminals as civilians or combatants within IHL is the next line of discussion.

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<sup>68</sup> Homeland Security Today, Interview with Guy Roberts, 'The Nexus of Organized Crime: WMD' *Homeland Security Today* (online), 9 April 2013 <<http://www.hstoday.us/briefings/correspondents-watch/single-article/the-nexus-of-organized-crime-wmd/a1067ecb6b530670467e78e4b2d5cff7.html>>.

<sup>69</sup> See Jermyn Brooks, 'Terrorism, Organized Crime, and Money Laundering', *New York Times* (online), 30 October 2001, <[http://www.nytimes.com/2001/10/30/opinion/30iht-edbrooks\\_ed3\\_.html](http://www.nytimes.com/2001/10/30/opinion/30iht-edbrooks_ed3_.html)>.

<sup>70</sup> ICRC, *Direct Participation in Hostilities: questions and answers* (2 June 2009) ICRC Resource Centre <<http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>>.

<sup>71</sup> Berman, above n 34.

### B *Civilians and Combatants*

As illustrated so far, IHL creates various categories when it comes to the conflict narrative. One level of categorisation deals with the kind of conflict. The other set of categories deals with the type of people involved in conflict and the rules which protect and govern their behaviour. There are two main categories: civilians and combatants. Civilians are those who are not participants in conflict and enjoy special protections as a result.<sup>72</sup> However, there are times when civilians do engage in hostilities resulting in an interesting military and legal dilemma for all parties involved. If they decide to engage in battle, then they are classified as a Prisoner of War ('POW'), civilian under the Fourth Geneva Convention, or as an 'unlawful combatant'.<sup>73</sup> 'Enemy combatant'<sup>74</sup> or 'unlawful combatants' are 'all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war in falling into the power of the enemy.'<sup>75</sup> This term of art is probably more fitting of transnational criminal networks. These groups which participate in activities, such as the ones outlined in Mali, can be considered to be *direct participants* (without entitlement) in hostilities because their activity is 'hostile to the security of the State/Occupying Power' and/or are considered saboteurs.<sup>76</sup> Typically, these categories are defined under traditional concepts where people in the army may dress up as civilians to trick the opposing army or for those who act as spies.

A second well known category is combatants. IHL states that members of an army (except religious or medical personnel) that are party to an armed conflict, in addition to those who take direct part in hostilities,

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<sup>72</sup> A civilian is any person who does not belong to 'one of the categories of persons referred to in Article 4 (A): (1) members of regular armed forces, (2) members of militia and volunteer corps, (3) members of regular armed forces of a non-recognized government and authority, and (6) levee en masse of the Third Convention and in Article 43 of this Protocol' (i.e. members of the armed forces); Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85(849) *International Review of the Red Cross* 45, 72.

<sup>73</sup> Schmitt, above n 62.

<sup>74</sup> For an overview of the US position on the term, see William Haynes, *Enemy Combatants* (12 December 2002) Council on Foreign Relations <<http://www.cfr.org/international-law/enemy-combatants/p5312>>.

<sup>75</sup> Dörmann, above n 72.

<sup>76</sup> *Ibid*; it should also be noted that if this is the status assigned then they may deserve protections under the Fourth Geneva Convention, as argued by Mr. Dörmann. I dispense with that discussion for the purpose of this article and focus only on whether the classification of the law of war to transnational organised crime remains plausible.

are considered (lawful) combatants.<sup>77</sup> As Sassoli and Olson note, 'an essential feature of combatant status is immunity from punishment for those who respect that law.'<sup>78</sup> It would be hard to argue that on *any* territory organised crime groups would have lawful status, as by their very definition they are bonded together for unlawful reasons. In the United States some cases have shown that the interpretation of who is eligible to be a lawful combatant is strict. In *United States v Arnaout*,<sup>79</sup> the defendant claimed that he was immune from prosecution when he assisted Al-Qaeda, Hezb-e-Islami, or the Sudanese Popular Defense Force, which he considered to be lawful combatants in their respective wars. The Court held that these groups were already determined not to be lawful combatants in previous U.S. cases and further cited the *Convention Relative to the Treatment of Prisoners of War*, which outlines four criteria for this particular status: (1) hierarchical military structure; (2) distinctive military uniforms or emblems recognizable at a distance; (3) carrying arms openly; and (4) operations conducted in accordance with the laws and customs of war.<sup>80</sup>

### C Organised Crime Classification in IHL

Given the current interpretation that has been afforded to the term 'direct participation in hostilities,' it is clear that organised criminal groups, given their level of involvement in conflict, should not be considered to be 'civilians' during armed conflict. Organised criminal groups probably have benefitted from being placed in a different legal framework because nation states do not consider them to be like their terrorist allies. What this has translated into on the ground is that if law enforcement is unable to handle these criminal networks prior to conflict, then they are able to participate during conflict, and have already gained a strong foothold after conflict. This makes it harder for a proper response by law enforcement that also would have to deal with post conflict transition. In contrast, terrorists have been seemingly

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<sup>77</sup> ICRC, *Rule 3. Definition of Combatants*, Customary IHL Database, <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3)>, citing Additional Protocol I, Article 43(2).

<sup>78</sup> Marco Sassoli and Laura M. Olson, 'The judgment of the ICTY Appeals Chamber on the merits in the Tadic case' (2000) (839) *International Review of the Red Cross* <<http://www.icrc.org/eng/resources/documents/misc/57jqc.htm>>.

<sup>79</sup> *United States v Arnaout*, 236 F Supp 2d 916 (ND Ill, 2003).

<sup>80</sup> Robert M. Twiss, 'National Security: The Impact on U.S. Foreign Policy Arising from Private Actions Initiated against Foreign Nations from Within the United States' (2012) 3 *Creighton International and Comparative Law Journal* 47 citing *Arnaout*, *ibid*, and *Geneva Convention Relative to the Treatment of Prisoners of War* ('Third Geneva Convention'), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 4(A)(2).

treated by the international community largely as a criminal act.<sup>81</sup> However, in the post 9-11 world, the acts of terrorists have been treated as acts of aggression by nation states, thereby invoking IHL.<sup>82</sup> A clear example of this are the recent attacks by Al-Shabaab, a Somali based terrorist organisation with links to Al-Qaeda, which has invoked a military response by the African Union with military backing by the United Nations.<sup>83</sup> Unfortunately, what contributes to the situation in Somalia is the lack of governance which in turn has bred organised networks that have created an illicit network around the United Nations' presence in order to fund future political ambitions in the region.<sup>84</sup> In essence, the goal of combating organised crime has always been to prevent their illicit networks, but unfortunately, in times of conflict, there is no way to combat organisations such as these, particularly when law and order is absent.

Of course, when applying IHL, it is also important to consider whether organised criminals could obtain 'combatant' status because they may act as agents of the state. This is dictated by how the opposing forces assess the situation. Borrowing from the logic applied in warfare, the US, it is believed, routinely takes the position that, 'a state is responsible for the actions of private actors operating on its territory even if does not exercise effective or overall control over them...'<sup>85</sup> In a situation such as Mali, the cooperation between terrorists and organised crime could suggest that those who were in power were indeed responsible for the actions of organised crime and therefore, the next level of analysis would be whether the criminals would be given the privileges that are given to combatants under IHL. The presumption does not favour classifying terrorists as combatants. The same logic should hold true for organised criminals. Therefore, the classification 'unlawful combatants' is more closely aligned with the activities of organised criminal groups because they are direct and indirect participants in war but do not fall within the range of characteristics that are associated with combatants in war.

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<sup>81</sup> Upendra Acharya, 'War on Terror or Terror Wars: The Problem in Defining Terrorism' (2009) 37(4) *Denver Journal of International Law and Policy* 666.

<sup>82</sup> Ibid.

<sup>83</sup> Colum Lynch, 'Exclusive: U.N. Uncovers "Credible" New al-Shabab Terror Plot' *Foreign Policy* (online), October 17 2013, <[http://thecable.foreignpolicy.com/posts/2013/10/17/exclusive\\_un\\_uncovers\\_credible\\_new\\_al\\_shabab\\_terror\\_plot](http://thecable.foreignpolicy.com/posts/2013/10/17/exclusive_un_uncovers_credible_new_al_shabab_terror_plot)>.

<sup>84</sup> Rob Hanser, 'Organized Crime in Africa' in Frank Shanty and Patit Pabran Mishra (eds), *Organized Crime: From Trafficking to Terrorism Vol 1* (ABC-CLIO, 2008) 61.

<sup>85</sup> Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self Defense Post 9-11' (2011) 105 *American Journal of International Law* 244, 251.

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## V CONCLUSION

Transnational organised crime is not a new phenomenon in the global landscape. For centuries, from the cartels in Mexico to the mafia in Italy, these groups have benefitted from subverting laws and creating a market that exploits resources and people. While criminal law has traditionally governed this group, it is time to incorporate them under the conflict narrative so as to broaden how the international community can respond to actions of these criminal networks. Perhaps the time has come to consider them under IHL, which is considered 'prescriptive' and 'proscriptive'.<sup>86</sup>

Globalisation has contributed to the rise and the strengthening of transnational organised crime. The impact is seen in armed conflict, especially in Mali. Given the roles of these criminal networks during conflict, the international legal community needs to consider how best to address this problem.

IHL should be broadened to include these criminal networks. As a lack of power or rampant corruption within governments continues to exist, organised networks will use these vulnerabilities to their advantage. Organised crime has already proven that it can be flexible in how it operates and achieve financial success, with or without armed conflict, and the international community should be just as adaptable. Perhaps the time has come for nation-states to consider whether categories that strictly limit how organised crime is dealt with is broad and flexible enough to cover transnational organised crime.

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<sup>86</sup> David P Cavaleri, *The Law of War: Can 20<sup>th</sup> Century Standards Apply to the Global War on Terrorism?* (Combat Studies Institute Press, 2005) 7.

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**THE DEVIL IN THE DETAIL: TARKINE  
NATIONAL COALITION INC V MINISTER FOR  
SUSTAINABILITY, ENVIRONMENT, WATER,  
POPULATION AND COMMUNITIES  
(2013) 214 FCR 233**

AMANDA CAVANOUGH\*

I INTRODUCTION

In this case, a judge of the Federal Court of Australia declared the decision of the respondent Minister to approve the development and operation of a mine in north west Tasmania invalid on the ground that the Minister had not considered the text of a document known as the Approved Conservation Advice for the Tasmanian Devil ('the ACA') as required by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'). Although the briefing information before the Minister referred to the ACA, this was held not to be sufficient to satisfy s 139(2) of the EPBC Act because it could not be said that genuine consideration had been given to the document. The applicant for judicial review, Tarkine National Coalition ('TNC') raised three other grounds which attacked conditions that the Minister attached to the approval to 'compensate for unavoidable impacts on Tasmanian devils and their habitat'. However, the Court rejected these other grounds, finding the conditions were authorised by s 134 of the Act, were not inconsistent with Australia's international obligations and were otherwise reasonable.

II BACKGROUND

The Tarkine is an area of north-west Tasmania that is of World Heritage significance. It contains large tracts of pristine wilderness and cool temperate rainforest and is noted for its natural beauty, plants and wildlife, including the iconic endangered Tasmanian devil. The Tarkine also has a significant mining history.

An overseas mining company ('Shree Minerals') proposed to develop and operate an iron ore mine near Nelson Bay River in north-west

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Tasmania. The proposal was controversial.<sup>1</sup> Those supporting it championed employment, industry and investment in the state of Tasmania. Those opposing it were concerned about the threat to the Tasmanian devil from mining, trucking and logging activity, particularly by the threat of that activity in hastening the spread of Devil Facial Tumour Disease. The Court stressed that its role was not to 'resolve that controversy' but to determine the application by TNC for judicial review of the Minister's decision.

### *A The Interim Injunction*

On 21 May 2013, the Court heard an urgent application for an interim injunction pending the hearing and resolution of the case. The Court gave judgment *ex tempore* on that day, granting the injunction. The parties did not request written reasons for the decision. However, the Court gave some brief reasons on transcript. The Court was satisfied that the application raised serious questions to be tried at least concerning the correct construction of the *EPBC Act* in the context of the proposed action. The Court also considered that the balance of convenience favoured grant of the injunction and that failure to grant an injunction would frustrate the Court's processes, by allowing work on the mine to begin before the Court dealt with the validity of that action.<sup>2</sup>

### *B The Substantive Application*

In the substantive application, TNC applied under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') and s 39B of the *Judiciary Act 1903* (Cth) for review of the Minister's decision under s 133(1) of the *EPBC Act* to approve the taking of an 'action' by Shree Minerals, namely the development and operation of the mine.

On 18 December 2012, the Minister approved the taking of the proposed action by Shree Minerals to develop and operate the mine. The Minister's approval was subject to several conditions, including the condition that Shree Minerals donate money to a fund for the purpose of assisting with the maintenance of the Tasmanian devil insurance population, being a program to establish a population of

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<sup>1</sup> Anne Mather, 'Tarkine protest halts iron mine', *The Hobart Mercury* (Hobart) 11 May 2013; H Kempton, 'Tarkine ban stay until July hearing', *The Hobart Mercury* (Hobart) 22 May 2013.

<sup>2</sup> The Court cited *Patrick Stevedores v MUA* (1998) 195 CLR 1, [35] and *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, [5] (Deane J) in support of this conclusion.

healthy devils in captivity to be released into the wild, if necessary, to support the survival of the species. Prior to the Minister's decision, the impacts of the proposed action were assessed by an Environmental Impact Statement ('EIS').<sup>3</sup> The draft EIS was made available to the public for comment in December 2011. In March 2012, Shree gave the Minister the finalised EIS, a submission from TNC in respect of the draft EIS and Shree's response. Shree later provided further information which had been requested by a delegate of the Minister. In November 2012, an Assistant Secretary of the Department provided the Minister with a brief and recommended that he approve the action subject to conditions. Shree Minerals was informed that the Minister intended to approve the action subject to conditions and was asked to provide further comment. The Minister was provided with a final brief in December 2012 and published his decision on 18 December 2012. On 21 January 2013, TNC requested a statement of reasons pursuant to s 13 of the *ADJR Act* which the Minister provided.

### III THE DECISION

The Court identified the critical issues for determination as follows:

1. Whether in deciding to approve the taking of the action, the Minister had regard to the 'ACA for the Tasmanian Devil' and in the event of failure to do so, the consequence of such failure; and
2. Whether, in approving the taking of the action, the Minister was entitled to attach conditions which required Shree to donate money to a program known as the Save the Tasmanian Devil Appeal.

The Court considered the statutory context in which the decision was made, being the *EPBC Act*, including its objects which include the protection of the environment, particularly those aspects of the environment which are of national significance. The critical provision was s 139(2), which provides:

If:

- (a) the Minister is considering whether to approve, for the purposes of a subsection of section 18 or section 18A, the taking of an action; and
- (b) the action has or will have, or is likely to have, a significant impact on a particular listed threatened species or a particular listed threatened ecological community;

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<sup>3</sup> Under Div 6 of Pt 8 of the *EPBC Act*.

the Minister must, in deciding whether to so approve the taking of the action, have regard to any approved conservation advice for the species or community.

An ACA is required for a listed threatened species under the *EPBC Act*. It is a document approved by the Minister which sets out the grounds on which the species is eligible to be listed as a threatened species under the *EPBC Act* and information about measures to stop the decline or support the recovery of the species. Taking into account the text, context and purpose of the *EPBC Act*, the Court found that the ACA was an important document which was intended to inform the Minister's decision-making. At [46], the Court said:

It is a document which is approved by the Minister after advice from a scientific committee. Such an advice, prepared specifically in relation to a threatened species, would ordinarily be expected to be a significant document to take into account in making a decision which has the capacity to affect that species.

The Court at [47] also observed that the text of s 139(2) 'in mandatory language requires that, in deciding whether to approve the taking of the action, the Minister *must* have regard to any approved conservation advice for the species' [emphasis in original].

As to whether the Minister in fact 'had regard to' the ACA, the Court noted that the Minister, in his statement of reasons, said that he referred to 'any relevant conservation advice' in making the decision [emphasis added]. TNC argued that in doing so the Minister merely paid lip service to his statutory obligation. The Minister referred to 'any' advice in a generic way and the actual document was not included in the final brief to the Minister, although, as mentioned above, the brief referred to it. The Court noted, in this context, that there were other listed threatened species considered by the Minister in making his decision. Given the significance of the document in the Act, the Court held that it was not sufficient that the material provided to the Minister referred to the ACA. It could not be said that the Minister gave genuine consideration to the document. The Court concluded that the Minister's failure to have regard to the document for the purpose of making his decision was 'fatal to its validity'.<sup>4</sup>

Although the Minister's decision might appear to have been invalidated on a narrow point, it was not a mere matter of form. As the Full Court explained in *Minister for Immigration and Citizenship v Khadji*<sup>5</sup>

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<sup>4</sup> (2013) 214 FCR 233, [48].

<sup>5</sup> (2010) 190 FCR 248.

the expression 'have regard to' is capable of having different meanings, depending on the statutory context. In some contexts, it means the decision-maker is to have regard to the matter as a fundamental element in the decision-making process.<sup>6</sup> In others, the matter will require consideration by the decision-maker not necessarily as a fundamental element.

The Court applied *Lansen v Minister for Environment and Heritage*<sup>7</sup> where the Full Court considered the consequences of a failure to consider matters in s 134(4) of the *EPBC Act* in deciding to attach a condition to an approval. There, the majority said:

The question as to whether a decision made in breach of a condition regulating the exercise of a statutory power is invalid involves a question of statutory construction to determine whether the purpose of the legislation is to invalidate any act done in breach of the condition.<sup>8</sup>

As in *Lansen*, there was no indication from the terms of s 139(2) of the *EPBC Act* that failure to have regard to the ACA would *not* lead to invalidity. To the contrary, the plain words of the provision and the purpose and objects of the *EPBC Act* revealed a legislative intention that any decision made without proper regard to the ACA would be invalid. Given the particular statutory context, the Court rejected a submission made by counsel for the Minister that the failure to consider the ACA would not have materially affected the decision.

#### IV LESSON FOR THE FUTURE

The Court's decision was not challenged on appeal. It therefore stands as authority for the proposition that government decision-makers must give genuine consideration to the precise terms of any ACA for a listed threatened species under the *EPBC Act* and examine that document in considering whether to approve a proposed action that has or is likely to have a significant impact on that species.

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<sup>6</sup> (2013) 214 FCR 233, [42].

<sup>7</sup> (2008) 174 FCR 14.

<sup>8</sup> *Ibid* [33].

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# THE CONSCIENCE OF THE KING: *KAKAVAS v CROWN MELBOURNE LTD* [2013] HCA 25 (5 June 2013)

LUDMILLA K. ROBINSON\*

## I INTRODUCTION

In the case of *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) (*Kakavas*), the Full Bench of the High Court considered the application of equitable principles relating to unconscionable conduct to the situation of a ‘problem’ gambler and his dealings with Crown Melbourne Ltd (‘Crown’). Although the substantive sections, which address the issue of alleged unconscionable conduct by the respondent, constitute a very small percentage of the judgment,<sup>1</sup> the decision effectively limits the availability of equitable relief in instances of unconscionable behaviour. It is argued below that this is achieved by substantially narrowing the ambit and the definition of ‘disability’ as enunciated Fullagar J in *Blomley v Ryan* (*Blomley*),<sup>2</sup> and addressed in *Commercial Bank of Australia Ltd v Amadio* (*Amadio*)<sup>3</sup> by both Deane and Mason JJ.

Indeed, the *Kakavas* judgment is disturbing on a number of levels. In addition to the circumscription of the equitable principles relating to unconscionable conduct, the High Court, in the joint/collective judgment, demonstrates an unusual degree of what may only be described as subjectivity in its weighing of the evidence presented at first instance. Both the tenor and content of the judgment also suggest that the High Court was in some degree influenced by the potential for a decision in the applicant’s favour to ‘open the floodgates’ to further actions by problem or compulsive gamblers against casinos and other venues at which gambling is encouraged.

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<sup>1</sup> The majority of the judgment sets out in great detail the dealings between Mr Kakavas and Crown over a number of years and reviews at length the evidence adduced at the hearing at first instance.

<sup>2</sup> *Blomley v Ryan* (1956) 99 CLR 362.

<sup>3</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

## II THE FACTS

The facts of the case are fairly complex, being concerned with the numerous dealings between the appellant and the respondent over a number of years, as well as a number of ancillary events and issues. At all three levels of the litigation,<sup>4</sup> the courts were at pains to describe the facts in detail. Indeed, the judgment of the Supreme Court of Victoria Court of Appeal<sup>5</sup> presents a description of all of the transactions between Mr Kakavas and Crown; these being taken from the judgment of the primary judge.<sup>6</sup> The facts summarised below are abstracted from the Supreme Court of Victoria Court of Appeal judgment, upon which the High Court relied for the facts recited in its judgment.<sup>7</sup>

The appellant is what is described in all three decisions as ‘a pathological gambler.’<sup>8</sup> In common parlance, he would be described as a ‘gambling addict’ or ‘compulsive gambler.’<sup>9</sup> Interestingly, he is also described in all three decisions as a ‘high roller,’ i.e. a person who habitually gambles for extremely high stakes.<sup>10</sup> His relationship with the respondent began in 1994, when the Crown first opened its casino in Melbourne. In addition to gambling at Crown, the appellant would also gamble at casinos on the Gold Coast and in Sydney. In 1998, Mr Kakavas was sentenced to two years imprisonment for fraud, 18 months of which was suspended.<sup>11</sup> The appellant alleged that the fraud was committed to help fund his gambling addiction. During the time that he was awaiting trial he underwent therapy for his addiction and self-excluded from Crown.<sup>12</sup> On his release from gaol, the appellant applied to Crown to have the self-exclusion order revoked. This was accomplished in June 1998. However, on revoking the self-exclusion order, the respondent revoked the appellant’s licence to remain on the

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<sup>4</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559 (8 December 2009); *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) and *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013).

<sup>5</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012); see especially the judgment of Bongiorno JA, [45]–[165].

<sup>6</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2009] VSC 559 (8 December 2009).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012); see especially the judgment of Mandie JA, [22]–[24].

<sup>9</sup> The appellant had been treated for a gambling addiction by various psychologists since August 1996. *Ibid* [42] – [43] (Bongiorno JA).

<sup>10</sup> This use of dual terminology produces interesting results. The connotation of ‘pathological’ or ‘compulsive’ gambler connotes someone who cannot resist the urge to gamble, and therefore is unable to control his or her actions. The term ‘high roller,’ on the other hand connotes someone in complete control of their actions and who approaches gambling as a ‘business’ rather than the means of satisfying an addiction.

<sup>11</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [44].

<sup>12</sup> *Ibid.*

casino's premises.<sup>13</sup> The licence was revoked because the appellant had been charged with an armed robbery offence. The charges were dismissed at the committal hearing.

On dismissal of the criminal charges, from December 1998 until October 2004 the appellant constantly applied and reapplied to Crown for revocation of the Withdrawal of Licence ('WOL'). Throughout these six years, Mr Kakavas established and ran a profitable property development company on the Gold Coast and continued to gamble at other venues in Australia and Las Vegas, in the United States of America. It was not until the management of the respondent discovered that the appellant had been gambling (and losing) \$3 and \$4 million dollars at the casinos in Las Vegas that it finally considered the revocation of the WOL.<sup>14</sup> In November 2004, the respondent opened negotiations with the appellant for the revocation of the WOL and the terms upon which he would be allowed to gamble in the casino. It is interesting to note that the judge, at first instance was:

... critical of the processes followed by Crown in deciding to restore the appellant's licence to enter Crown Casino. He described them as 'uncoordinated, unstructured and unsatisfactory,' even if the decision to revoke the WOL could, in itself, be justified.<sup>15</sup>

It is uncertain from the evidence as to the exact date on which the WOL was revoked. However, towards the end of January 2005, the appellant was the guest of the respondent at the Australian Men's Open Tennis tournament.

The incentives offered by Crown to the appellant included preferential treatment in the casino, an increased stakes limit, the use of a private jet and a cash 'rebate' of 20% on his losses.

The period of gambling which formed the basis of the appellant's claim against Crown commenced in June 2005 and August 2006, during which time he attended the casino on '30 separate occasions, turned over \$1.479 billion and in the process lost \$20.5 million.'<sup>16</sup>

The facts as presented to the court at first instance also raised the issue of an exclusion order in relation to Star City casino, Sydney, imposed by the New South Wales Commissioner of Police in September 2000 pursuant to s 81 of the *Casino Control Act 1992* (NSW). The effect of the order is to make entry into the relevant casino by the excluded person

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<sup>13</sup> Ibid [47]-[48].

<sup>14</sup> Ibid [62].

<sup>15</sup> Ibid [81].

<sup>16</sup> Ibid [35].

a criminal offence.<sup>17</sup> In 2002 and 2004 amendments to the Victorian *Casino Control Act 1991* (Vic) not only extended the effect of an exclusion order from another state ('IEO') to Victoria, and thereby rendered the appellant's entry into a casino in Victoria illegal pursuant to s3, but also required the subject of the order to forfeit any winnings to the State (s 78B(2)). The respondent's knowledge of the IEO and its implications in regard to its conduct toward the appellant was considered at length in the hearings at first instance and in the appeal, but was addressed only briefly by the High Court.

### III THE PROCEEDINGS AT FIRST INSTANCE AND ON APPEAL

The appellant commenced proceedings against Crown Melbourne Ltd and two other defendants (they were John Williams, chief operating officer of the casino and Rowen Craigie, a former chief operating officer) initially alleging:

... negligence at common law, unconscionable conduct, misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth), breach of statutory duties imposed by the *Casino Control Act 1991* [(Vic)] and restitution.<sup>18</sup>

The claim against Williams and Craigie was based upon the allegation that they had been accessories to the respondent's breach of the *Trade Practices Act*. In an interlocutory hearing it was held that the claims in negligence, restitution and pursuant to the *Trade Practices Act* could not be sustained and were struck out. A Second Amended Statement of Claim was filed on 28 August 2008 which relied upon allegations of unconscionable conduct by the respondent.

The basis for the claim for equitable relief in regard to unconscionable conduct was founded in the appellant's gambling addiction, which he alleged was a 'special disability' of which the respondent was aware and of which the respondent took advantage by offering him inducements to gamble at its casino. Further, the appellant alleged that the respondent had taken advantage of his disability for the purposes of its own financial advantage. The appellant also claimed that he was under a further disability in that he was subject to the IEO, that the respondent was aware of this disability and that he was therefore liable to forfeit to the State any winnings from the casino.

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<sup>17</sup> Ibid [184].

<sup>18</sup> Ibid [37].



Naturally, the respondent denied these allegations and whilst admitting that the appellant had lost \$20,539,484 at its casino, counterclaimed against the appellant for \$1 million, being the interest in respect of a cheque which had been dishonoured on presentation. The hearing ran for 27 days in May and August 2009: the judge handing down his decision on 8 December 2009. The appellant's claim was dismissed and the respondent's counterclaim was upheld, with interest and costs being awarded to it.

The appellant's appeal to the Supreme Court of Victoria, Court of Appeal was dismissed on 12 May 2012 and thereafter he filed an application for Special Leave to Appeal to the High Court, which was granted on 14 December 2012.

#### IV THE HIGH COURT JUDGMENT

The High Court dismissed the appeal on the following grounds:

- Although the Court found that it was likely that the appellant was suffering from a pathological gambling disorder, it held that he did not have a special disability or disadvantage, for the purposes of unconscionable conduct, because he was capable of making decisions in his own best interests.
- There was no inequality of bargaining power between the appellant and the respondent because the appellant negotiated the terms of his readmission to the casino with the respondent and because he was what is known as a high roller, i.e. a gambler who wagers very large sums of money.
- The respondent was not taking advantage of the appellant's special disadvantage, disability or weakness of the appellant by encouraging and allowing him to gamble in the casino. It was merely pursuing its normal course of business.

In its judgment the Court also addressed three ancillary issues:

- whether the respondent had received constructive notice of the appellant's pathological gambling problem;
- whether the respondent received constructive notice of the IEO issued against the appellant in NSW; and
- whether the IEO, in itself, constituted a special disability.

These ancillary issues were dealt with cursorily by the Court and did not have any relevance to its final decision.

As noted above, the major issues to be decided by the Court were:

- whether the respondent had conducted itself unconscientiously in its dealings with the appellant; and
- whether the appellant suffered from a special disability or disadvantage which would attract equitable relief.

These issues are inextricably related and will therefore be discussed together in the section below.

## V UNCONSCIONABLE CONDUCT

Unconscionable conduct is a 'species of equitable fraud,'<sup>19</sup> which seeks to prevent a wrongdoer from profiting from advantage taken of another's disability. As noted in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*:

The notion of fraud is deeply embedded in equity; it is perhaps the clearest reminder today of the origins of Chancery as a court of conscience, acting in personam by the grant of relief to the victim or denial of it to the perpetrator of conduct which came within the Chancellor's view of fraud.<sup>20</sup>

It must be remembered that in general equitable fraud is not the same as common law fraud.<sup>21</sup> Whilst common law fraud requires a conscious decision 'to do wrong,' '[m]any activities regarded as fraudulent [in equity] were not done with the intention to cheat or deceive.'<sup>22</sup> Thus, equitable fraud may be perpetrated inadvertently or even when the fraudulent party was acting bona fide.<sup>23</sup> In a situation of unconscionable conduct, however, there needs to be some intention on the part of the wrongdoer to take advantage of another. Thus, relief for unconscionable conduct may be sought

. . . whenever one party to a transaction is at a special disadvantage with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances [which] affect his ability to conserve his own interests. And the other party

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<sup>19</sup> *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [16].

<sup>20</sup> Roderick Meagher, Dyson Heydon and John Lehane, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 4<sup>th</sup> ed, 2002) 445, [12-005].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See *Boardman v Phipps* [1967] 2 AC 46; 3 All ER Rep 721, in which a trustee and solicitor for a trust acted in what they believed to be the best interests of the beneficiaries. They had, in fact, placed themselves in a position of conflict of duty, and thereby breached their respective fiduciary duties.

unconsciously takes advantage of the opportunity thus placed in his hands.<sup>24</sup>

In the same case, Fullager J gave examples of special disadvantages which would attract the protection of equity. These include:

. . . poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic is that they have the effect of placing one party at a disadvantage vis-à-vis the other.<sup>25</sup>

Fullager J was merely using these as examples, since '[t]he circumstances adversely affecting a party, which may induce a court to either refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified.'<sup>26</sup> Thus, it was made clear that the categories of special disadvantage are not closed and since the judgment in *Blomley*, other disadvantages have been added to the list, such as the inability to understand English<sup>27</sup> and emotional/sexual obsession.<sup>28</sup> The disadvantage must therefore constitute more than 'some difference in bargaining power of the parties,'<sup>29</sup> but should be a 'disabling condition or circumstance . . . which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and its affect on the innocent party.'<sup>30</sup>

On the basis of the principles set out above, and as a result of the diagnosis of the appellant as a pathological gambler,<sup>31</sup> the inducements offered by the respondent to gain his patronage when its management learned that he had been losing heavily in Las Vegas, together with Crown's knowledge of the appellant's psychological condition,<sup>32</sup> it would appear that there would have been a strong claim against the respondent founded in unconscionable conduct. However, this was not the case.

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<sup>24</sup> *Blomley v Ryan* (1956) 99 CLR 362, 415 (Kitto J).

<sup>25</sup> *Ibid* 405 (Fullager J).

<sup>26</sup> *Ibid*.

<sup>27</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

<sup>28</sup> *Louth v Diprose* (1992) 175 CLR 621.

<sup>29</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J).

<sup>30</sup> *Ibid*.

<sup>31</sup> Certainly, it appears that copious psychological evidence was adduced by the appellant at first instance.

<sup>32</sup> Evidence was adduced at the hearing at first instance that Crown had required the appellant to present a psychologist's report in regard to his addiction.

Whilst Fullagar J and Mason J's explanations of the principles upon which unconscionable conduct are based, discussed above, appear to be fairly clear, they are, nevertheless, open to interpretation. Whilst it is clear that the innocent party must have a special disadvantage which renders him or her incapable of making a judgment in his or her 'best interests,' it also raises an important question.<sup>33</sup> This question is as follows: to constitute a 'special disadvantage' must the disability operate or be apparent only in a particular context or in regard to a particular set of circumstances, or must it affect the ability of the innocent party to take care of their own best interests in a broader social context. It is argued here that the former interpretation should be accepted. For example, in *Louth*<sup>34</sup> there was no suggestion that the solicitor, who had given thousands of dollars to a client with whom he was infatuated, was unable to conduct his legal practise efficiently or even profitably. It was only when confronted by the object of his obsession that he became unable to take care of 'his own best interests.' Similarly, in *Amadio*,<sup>35</sup> there was no suggestion that Mr and Mrs Amadio were prevented from carrying out their day to day lives by their lack of proficiency in English. Their 'disability' was therefore only 'special' when they were required to understand the complex provisions relating to their guarantee of their son's loan.

In *Kakavas*, however, the courts at all three levels of the proceedings appear to have taken the latter view in regard to the appellant's gambling addiction, and found therefore, that because he was able to function normally in his everyday life when away from the casino, he did not suffer from a 'special disability or disadvantage' sufficient to attract equitable relief. For example, Bongiorno JA notes that:

The trial judge found that in late 2004 and early 2005 the appellant was functioning at an unremarkable level with respect to his personal, familial, vocational and legal affairs. He had a stable family life and when his father fell gravely ill he devoted much of his time to caring for him. He had great wealth, as high-rolling gamblers often do.<sup>36</sup>

Indeed, the High Court notes this, but goes further and comments that in his negotiations with Crown, and, one might add **because** of the fact that he negotiated, 'the appellant was capable of making rational decisions in his own interests.'<sup>37</sup> With great respect to this honourable tribunal, this latter pronouncement appears to disregard completely the nature and affects of pathological addictions. Certainly, not only

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<sup>33</sup> Certainly, it is an important question in regard to the High Court's assessment of Mr Kakavas' alleged special disability.

<sup>34</sup> *Louth v Diprose* (1992) 175 CLR 621.

<sup>35</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

<sup>36</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [173].

<sup>37</sup> *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [73].

the judges on appeal, but also the justices of the High Court appear to have unwittingly or deliberately misinterpreted the psychological evidence presented to the court.<sup>38</sup> There appears to be a misconception amongst certain members of the judiciary that a person suffering from a pathological psychological disability must necessarily be indigent, marginalised and unable to function within society and that an addiction can be easily resisted.<sup>39</sup>

However, the decision of the High Court has implications beyond those of the case under discussion. If, as argued here, the High Court has taken the concept of 'special disadvantage' to indicate a general inability to function within society, then it is also highly arguable that the decision has effectively overturned the judgments in all those cases, such as *Louth*<sup>40</sup> and *Amadio*,<sup>41</sup> in which the weaker party's disability related to a specific situation or condition and/or in which no evidence was presented in regard to the innocent party's inability to function efficiently within society. If this is the case, then the High Court has effectively circumscribed the application of the principles relating to unconscionable conduct.

A further indication for the Court that the appellant was capable of looking after his own interests was the fact that he entered negotiations with the respondent in regard to the terms upon which he would be admitted back into the casino. The Court demonstrates this view by stating that: 'these negotiations reveal that the appellant was capable of making rational decisions in his own interests, and of bargaining in pursuit of these interests.'<sup>42</sup> Apart from the fact that it is highly questionable whether negotiations entered into by a pathological gambler to gain re-admittance into a casino are actually in his best interests, it is fairly evident from the facts that the negotiations were entered into by the appellant to enable him to satisfy the addiction. One could not state that a heroin addict negotiating with a drug dealer

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<sup>38</sup> See *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [3] (Mandie JA), [23] (Bongiorno JA) and *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [126]-[135].

<sup>39</sup> The High Court, in its preliminary discussion of the appellant's compulsion to gamble, at [24] cites Speigelman CJ in *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43, 53 [48], who states, in relation to an appellant's claim in negligence against an RSL club: 'It may well be that the appellant found it difficult, even impossible, to control his urge to continue gambling beyond the point of prudence. However, there was nothing which prevented him staying away from the club.' One could add here: nothing, apart from his addiction. The Honourable judiciary mentioned in this case note are indeed fortunate to have such strength of will that they are unable to comprehend the nature and effects of addiction.

<sup>40</sup> *Louth v Diprose* (1992) 175 CLR 621.

<sup>41</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

<sup>42</sup> *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) [73].

was 'bargaining in pursuit' of his own interests. It is arguable that in terms of addiction, the appellant's situation was the same as that of the hypothetical heroin addict.

A further concern in regard to the judgment is the High Court's view<sup>43</sup> of the appellant's behaviour as a gambler and the resultant characterisation of Mr Kakavas as a 'high-roller. The examination it undertakes as to the appellant's character and behaviour is prefigured by the citation from Pommeroy's *A Treatise on Equity Jurisprudence*,<sup>44</sup> which states:

. . . the 'conscience' which is an element of the equitable jurisdiction came to be regarded, and has so continued until the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors – a juridical and not a personal conscience.

The Court goes on to note that '[t]he conscience spoken of here is a construct of values and standards against which the conduct of "suitors" – not only defendants – is to be judged.'<sup>45</sup> This approach is consistent with the equitable maxims that 'he who comes to equity must come with clean hands' and 'he who seeks equity must do equity.' Further, where the 'suitor's' claim is based in unconscionable conduct, it would be expected that the conduct to be examined by the court is that which forms the basis of the claim of 'special disability or disadvantage.'

In the appellant's case, the High Court examined his conduct, and, taking its cue from the judgments in the lower courts,<sup>46</sup> characterised him as a 'high roller,' a description which necessarily carries negative connotations. As their Honours explain:

High rollers typically exhibit an abnormal interest in gambling. That abnormality might be described as pathological . . . . That a high roller may incur substantial losses is always, and obviously (and quite literally) on the cards. . . . Whatever a high roller's motivation may be, members of that class of gambler present themselves to the casino, are welcomed by it in the ordinary course of its business, as persons who can afford to lose and to lose heavily. It is for that reason that

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<sup>43</sup> And the view of the two lower courts.

<sup>44</sup> John Norton Pommeroy, *A Treatise on Equity Jurisprudence* (Bancroft-Whitney, 5<sup>th</sup> ed, 1941) vol 1, 74.

<sup>45</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [15]-[16].

<sup>46</sup> *Ibid* [44].

operators of casinos are prepared to incur heavy expenses to attract their patronage away from other casinos.<sup>47</sup>

Apart from the fact that, by implication, this statement appears to be condoning the exploitation by casinos of persons with a pathological psychological condition purely on the basis that such exploitation is in 'the usual course of business,' it also suggests that high rollers, because they can 'afford to lose and to lose heavily,' are not entitled to the protection of equitable principles. This implication is further supported by the following comment made two paragraphs later:

It is necessary to be clear that one is not concerned here with a casino operator preying upon a widowed pensioner who is invited to cash her pension cheque at the casino and to gamble with the proceeds. One might sensibly describe that scenario as a case of victimisation.<sup>48</sup>

Evidently, therefore, a widowed pensioner could seek equitable relief under such circumstances, but not a wealthy, pathological gambler. It is highly arguable that the only difference between a casino's exploitation of a widowed pensioner and its exploitation of a wealthy pathological gambler lies merely in the amount of the losses and the victim's ability to afford them, rather than any difference in the conduct of the casino.

This approach to the determination of who 'deserves' equitable relief is of concern. By denying the appellant access to the protection of equity, merely because he could afford to lose, whilst stating that a widowed pensioner in a similar situation would be entitled to relief, is setting what can only be called a dangerous precedent. Such a precedent holds that in determining a claim for relief based upon unconscionable conduct, the court should not only ask whether the weaker party has a special disability, but should also scrutinise that party's assets. It suggests that only the poor are entitled to protection and that the rich must bear the consequences of their disability or disadvantage. Naturally, in circumstances other than a court of equity, this might be an admirable sentiment.<sup>49</sup> The poor need greater protection from the exigencies of the world than the rich. However, this is not the spirit of equity and constitutes a further attempt to circumscribe the ambit of the availability of equitable relief.

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<sup>47</sup> *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013)[28]. It should also be noted that the Court's assertion that because a person is a "high roller", even though they have a pathological gambling compulsion, they are not worthy of equity's protection and may be exploited by casinos at will is, at best, illogical and at worst, inhumane.

<sup>48</sup> *Ibid* [30].

<sup>49</sup> It is also a fairly comfortable assertion for the casinos, given that a widowed pensioner would probably be unable to afford the cost of litigation.

## VI THE RESPONDENT'S NOTICE OF THE APPELLANT'S GAMBLING PROBLEM

What was effectively a side issue in the appeal related to the appellant's claim that the respondent had constructive notice of his gambling problem. Whilst this was discussed at all three levels of the litigation, it appears to have been a side-issue in the High Court appeal, in that the respondent had admitted to being, and evidence had been adduced that, it was aware of the appellant's problem.<sup>50</sup> The knowledge of the respondent would only have been relevant had the High Court found that the appellant suffered from a special disability or disadvantage which adversely affected his bargaining position vis à vis the respondent.

## VII THE FINGER IN THE DAM WALL – STEMMING THE FLOOD

Australia is known as a 'gambling nation.' In 2010 the Productivity Commission estimated that approximately 70% of Australian adults engage in some form of gambling activity every year.<sup>51</sup> It is conservatively estimated that of this 70%, 115,000 people are pathological or problem gamblers, whilst a further 280,000 are deemed to be 'at risk' of developing a pathological problem.<sup>52</sup> In 2010 gambling in some form consumed on average 3.1% of household income.<sup>53</sup> Furthermore, between 2008 and 2009, all forms of gambling generated \$19 billion dollars in income for gambling venues.<sup>54</sup> Thus, it is possible to conclude, without the slightest exaggeration, that not only is gambling a major industry in Australia and but also that pathological gambling disorders constitute a major problem within Australian society.

In this context, the High Court decision appears to exonerate Crown's attempts to induce the appellant to satisfy his addiction on its premises on the basis that the respondent was pursuing its normal business practice, rather than exploiting a psychological weakness of a pathological gambler. Whether this type of 'business' is unconscionable, if not reprehensible, must be an individual moral judgment. However, it is arguable that in its decision, the High Court has set a dangerous precedent. By removing the protection of the equitable principles of unconscionability from a particular (and

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<sup>50</sup> *Kakavas v Crown Melbourne Ltd & Ors* [2012] VSCA 95 (21 May 2012) [71]-[74].

<sup>51</sup> Productivity Commission, Commonwealth, *Inquiry Report: Gambling* 50 (2010) 5.

<sup>52</sup> *Ibid* 11.

<sup>53</sup> *Ibid* 6.

<sup>54</sup> *Ibid*. The term 'gambling venues' includes casinos, clubs and public houses.



increasing) section of society, viz: those with a pathological gambling problem, the High Court has, in effect, condoned the 'business' of gambling. It is true that the Court would extend equitable relief to a widowed pensioner, but this leaves open the question as to what degree of impecuniosity is sufficient to attract equity's protection. Further, it is highly arguable that the decision could be used as a basis to challenge the efforts of State and Territory governments to impose limits upon the gambling industry.

It is possible that had the High Court allowed the appeal, the decision could have 'opened the floodgates' of litigation. It would have provided a precedent pursuant to which problem gamblers could commence proceedings against gambling corporations on the basis of unconscionable conduct. It is not suggested here that the High Court was in any way conscious of the potential for such a deluge of litigation, had it allowed the appeal. However, it is undeniable that the decision in *Kakavas* has effectively thwarted any further attempts by problem gamblers to bring the casinos and other gambling venues to account for the manner in which they operate their businesses. Undoubtedly, the opportunity still exists for the widowed pensioner to take action and claim equitable relief. But, as noted above, this is highly unlikely, since she would be unable to afford the legal costs involved. It is only the wealthy gamblers, like the appellant, who could afford to do this, and the floodgates, for them have been effectively closed.

## VIII CONCLUSION

In *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, James Boyd Wright notes that:

Every legal case starts with a story – the client's story – and it ends with a legal decision that, in effect, offers another version of that story, one cast into a legal framework. In between, in the middle, lies the story told at trial – or rather the stories told at trial, since most stories contain competing narratives.<sup>55</sup>

Usually, it is the narratives of the opposing parties which conflict with each other. Each side tells a different tale, and it is the court which must mediate between the two and devise a moderated version. In *Kakavas*, however, there was little dispute about the facts, nor even as to the nature of the appellant's gambling problem. It was the High Court which developed a third story and version of the appellant's character and conduct. Using what was arguably semantic sleight of hand, it changed a gambler with a pathological psychological condition

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<sup>55</sup> James Boyd Wright, *Heracles' Bow: essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985) 174.

into a 'high roller,' a professional gambler. Rather than having succumbed to the categorical imperative of his addiction and attempting by any means to gain re-entry into Crown's casino, the Court saw the appellant as a cunning negotiator who was able to bargain with Crown on an equal footing. The respondent, in its turn, was not exploiting the appellant's weakness, but merely conducting its usual business.

It is argued above<sup>56</sup> that in the process of constructing this third narrative, the High Court severely circumscribed the equitable principles of unconscionable conduct. Not only is the relief available only to the 'widowed pensioners' of society, but is arguably not available to those who can afford to litigate to preserve their rights. It is further arguable that a plaintiff claiming relief from the consequences of the unconscionable conduct of a defendant must now prove not only that he or she is affected by a special disability or disadvantage in regard to his or her dealings with the defendant, but also that this disability affects all other areas of their everyday life. Thus, if the plaintiff, like the solicitor in *Louth*,<sup>57</sup> is suffering from an infatuation of such severity that it leads him to give tens of thousands of dollars to the object of his affections, he must prove that other aspects of his life were affected by the special disability – not merely his dealings with the defendant. This is a further narrowing of the ambit of the availability of equitable relief.

Finally, whilst the decision has firmly closed the floodgates of possible future litigation against gambling venues founded in unconscionable conduct, it has also placed a dangerous precedent in the hands of those who may wish to challenge gambling control measures implemented by States and Territories.

Not only is the decision in *Kakavas* arguably one based upon misconceptions and preconceptions at all stages of the litigation, but it is also a powerful example of the danger of the misinterpretation of a narrative. It is a danger compounded by the fact that the misinterpretation of the facts was perpetuated by the High Court. The play, therefore, is not the thing, wherein we'll catch the conscience of the king.<sup>58</sup> The conscience of the Crown, in this particular case, is made of far sterner stuff than envisaged by the Bard.

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<sup>56</sup> In section V UNCONSCIONABLE CONDUCT.

<sup>57</sup> *Louth v Diprose* (1992) 175 CLR 621.

<sup>58</sup> Profound apologies to William Shakespeare.

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