

UNIVERSITY OF WESTERN SYDNEY
LAW REVIEW

Volume 13

2009

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See back pages for advice to contributors, style guide and subscription information.

This law review may be cited as (2009) 13 UWSLR.

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Wm Gaunt & Sons Inc
3011 Gulf Drive
Holmes Beach, Florida
34217-2199
USA

ISSN 1446-9294

The views expressed in the *University of Western Sydney Law Review* are those of the individual authors. They do not necessarily reflect the views of the editors or the School of Law, University of Western Sydney.

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Printed by Finline, Unit 2, 2a Burrows Road, St Peters, NSW 2044.
Tel: 02 9519 0552; Fax: 02 9550 6138.

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OCCASIONAL ESSAY

**SOME REFLECTIONS ON LEGAL
PROFESSIONAL ETHICS: PLUS ÇA
CHANGE ...**

THE HONOURABLE BRIAN SULLY QC*

The issue for the week 23–29 January 2010 of *The Economist* carries a major article with the heading ‘Laid-off Lawyers, Cast-off Consultants’. The general thrust of the article is stated sufficiently for present purposes in the sub-heading: ‘The downturn is sorting the best professional-services firms from the rest’. The article concludes with the following admonition:

As they adapt to survive a tougher climate, lawyers ... will need to ensure that any changes do not put their culture of professionalism at risk.¹

Anyone who has practised for any significant time as a barrister or a solicitor in New South Wales is apt to react to this rather prim and patronizing exhortation by, as it were, battenning down the professional hatches in the expectation of yet another bout of what its advocates from time to time are pleased to describe as ‘reform’. The legal profession in New South Wales has been ‘reformed’ without cease during recent decades, and by governments of various political persuasions. There has resulted a gimcrack mess of sorry interferences with legal professional practice such as to vindicate convincingly the observation, rather rueful one is inclined to think, made by Senator Roscoe W Conkling (United States Senator for New York in 1867, 1873 and 1879 and famously corrupt):

When Dr Johnson defined patriotism as the last refuge of a scoundrel, he ignored the enormous possibilities of the word reform.²

As one surveys the current state of play of ‘reform’ of professional legal practice in New South Wales, and as one reflects upon the

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¹ ‘Laid-off Lawyers, Cast-off Consultants’ (2010) 394 (8666) *The Economist* 62.

² Gore Vidal, *United States: Essays 1955-1992* (1994) 730.

smallness of mind, the meanness of spirit, and the constitutional obtuseness that have marked, and marked overtly, the seemingly insatiable appetite for further such 'reform', it is useful to be reminded that at the heart of authentic professional practice of the law lies a body of ethical principles such that one can say of that body, *Plus ça change plus c'est la même chose*, a well-known French aphorism which translates imprecisely but practically as, 'The more such authentic practice changes, the more it remains the same'.

The purpose of this essay is to say something about that concept.

It is useful to commence by citing some advice that the Chief Justice conventionally gives in his Honour's address of welcome to newly admitted practitioners on the occasion of their formal admission as legal practitioners of the Supreme Court:

On this occasion I wish to draw your attention to two matters which distinguish the legal profession from other occupations. First, as legal practitioners, you have professional obligations, to your clients and obligations to the Court. These obligations are what distinguish a profession from a business or a job.

There is no doubt that many of the aspects of the law constitute a business, but it is not *only* a business or a job.

One of the most important aspects of the legal system is that it depends on the performance of professional obligations by professional people.

In a period of this nation's history when more and more things are judged merely by economic standards, it is important that some spheres of conduct affirm that there are other values in life. The values of justice, truth and fairness are central to the activities of the legal system. That is why that system cannot be assessed only by economic criteria.

An attempt to flesh out the propositions thus stated by the Chief Justice can be approached by means of an examination of the relevant principles in various reported decisions of the High Court of Australia: for example, *Ziems v Prothonotary of the Supreme Court of NSW*³ and *Clyne v NSW Bar Association*⁴.

The present essay will take a less conventional approach by adopting as its starting point a statement which is found, not in any curial decision, not in any conventional academic legal writing, but in a

³ (1957) 97 CLR 279.

⁴ (1960) 104 CLR 186.

celebrated book written by a non-lawyer. The book is *Etiquette* written by Mrs Emily Post and first published in 1922. It contains this statement:

The code of a thoroughbred is the code of instinctive decency, of ethical integrity, of self-respect and of loyalty.⁵

It is not to the present point to be concerned about what Mrs Post had particularly in mind in connection with the term 'thoroughbred'. What is to the present point is this proposition: that if the words 'person fit to engage in professional legal practice' are inserted in lieu of the word 'thoroughbred', then Mrs Post's proposition, as thus amended, is as good a definition as the present writer can propound of the ethical underpinnings of legal professional practice in the sense that the Chief Justice discusses in the previous quotation.

What is meant, in the stated context, by the expression 'instinctive decency'?

The meaning comes down to this: instinctive decency is the conduct properly to be expected of a lady or a gentleman. A lady or a gentleman, in that context, indeed in any context, can be old or young; rich or poor; powerful or powerless; well educated or hardly educated at all. The ultimate mark of a lady or a gentleman is that he or she never says or does anything without first testing it, however quickly, against that standard of behaviour that we normally call 'the golden rule': Always do to others what you would have them do to you.

A practitioner who at least recognizes that ideal, and who tries to achieve it, not in some flashy or ephemeral way, but in a steady, patient, disciplined and thoughtful way, will come sooner or later to the point where, confronted with a choice between or among possible courses of action, it will hardly be necessary to think before recognizing at once — or instinctively, which is the present point — what is the decent rather than the shabby choice, the honourable rather than the sleazy choice, the professional rather than the unprofessional choice.

What is meant, in the stated context, by the expression 'ethical integrity'?

For the person who is fit to practise law, ethical integrity is best defined, to begin with, by excluding some things. For such a person,

⁵ Quoted in J P O'Rourke, *Age and Guile Beat Youth, Innocence and a Bad Haircut* (1995) 213.

ethical integrity does not mean what can be got away with. It does not mean a sullen, unenthusiastic, bare clinging to the words of the rules and the rulings that are brought out from time to time by the Law Society for solicitors and the Bar Council for barristers.

Ethical integrity is the product of the fusion of some simple, critically important and interdependent propositions.

Proposition One: It is morally unwholesome to go through life in what might be called a state of religious or moral mania. It is as unhealthy to approach life as though it were nothing other than a disheartening and unbroken lurch from moral crisis to moral crisis, as it is undoubtedly unhealthy to approach life as though it were nothing more than suspended animation in a moral vacuum.

Proposition Two: Whether or not it is popular or fashionable to say so – and, in this day and age, aggressively secular at the best, aggressively pagan at the worst, it is decidedly unpopular and unfashionable to say so – it is the truth, the eternal truth, that there are certain things that are right and certain things that are wrong, certain things that are good and certain things that are evil, certain things that are proper and will, therefore, always be done, certain things that are improper and that are, therefore, simply not done.

Proposition Three: Every human being – not a select, well-educated professional elite, but every human being – has two defining characteristics: free will is one; understanding is the other.

Understanding gives everybody the power to distinguish between what is right and what is wrong, what is good and what is evil, what is proper and what is not proper.

Free will gives everybody the power to prefer what is good over what is bad, what is right over what is wrong, what is proper over what is not proper.

Those are the propositions the fusion of which produces what is meant in the stated context by the idea of ethical integrity. In that connection, 'fusion' does not mean that molten, white-hot fusion of the moral fanatic, than whom there are few more dangerous people abroad in the world. 'Fusion' means action that integrates, as a matter of individual and personal interior formation and disposition, the three stated disparate propositions, and does so in a way that is thoughtful, sensible, and morally balanced.

What is meant, in the stated context, by the expression 'self-respect'? Once again the definition can take as its starting point the exclusion of certain things. Self-respect does not mean self-regard; it does not mean

self-indulgence; it certainly does not mean self-righteousness, and it emphatically does not mean mere self-will. Self-respect in the stated context entails, once again, a question of balance. This time, the balance has to be struck between a concept of professional privilege and a corresponding concept of professional responsibility.

The concept of privilege that is to be brought into the relevant balance is not related at all to any of the social ephemera that are often put forward in current society as marks of privilege, but are in fact merely marks of snobbery. The relevant concept of privilege can be sketched in this way: every client who comes to a professional legal practitioner for help, comes either in need or in pain, and not infrequently in both need and pain. Every such client comes, also, in faith and in hope. The hope will be that there is in fact a lawful solution for the problem at hand. The faith will be that the chosen practitioner can be trusted, not only to perceive what is the relevant lawful solution, but to pick it up in the correct way, and to apply it in the correct way in the client's proper interest.

Any professional practitioner who accepts instructions in such circumstances adds those instructions to other things that the practitioner carries in any event in his/her own hands: the practitioner's own good name; the good name of the profession of which it is the privilege — not the right, the privilege — of the practitioner to be a member.

A person who, in such a weighty setting, does not have a sound sense of professional privilege cannot be expected, in the nature of things, to have what is the absolutely critical corresponding sense of duty and of responsibility. The practitioner who has self-respect reflecting that interior balance of privilege and responsibility will never be troubled about rejecting, in any situation where proper, ethical, professional choices have to be made, the cheap, corner-cutting, unprofessional choice.

What, finally, is meant in the stated context by the expression 'loyalty'? Essentially, the idea is simple: an ethical professional practitioner keeps his/her word.

That notion has, in its turn, a serious practical aspect, which is usefully recapitulated. Nobody may lawfully practise law without having first been admitted so to practise. That admission is notified by order of the Supreme Court made at a formal and public sitting of the Court and by a bench of at least three judges of that Court, the Chief Justice himself normally presiding. Each applicant for admission to practise is required either to swear or to affirm, in a prescribed form, that if

admitted, he or she will thereafter conduct himself or herself properly as a practitioner, after the laws of the State and otherwise to the best of the particular individual's professional knowledge and skill and ability. To swear or to affirm thus is not to enact a quaint but inconsequential formality. It is to make a public pledge of professional propriety in all respects and at all times, and to seal that pledge in the way chosen by the individual as the most solemn, appropriate form.

That pledge having been given to and accepted by the Court, it will be expected thereafter that the person who has so promised will do, in full measure, and in spirit as well as in bare form, what the pledge undertakes.

The four characteristics which have now been examined, provide in combination a template for the formation of ethical professional practitioners of the law. That template is a fixed and certain point of ethical professional reference. While ever it stands rock-like at the core of legal professional practice, then the self-styled 'reformers' can do their dangerously uncomprehending worst, and yet the mighty shield of the law will remain in place, ensuring as it has done for centuries that the individual citizen is protected against what Brandeis J of the United States Supreme Court famously defined as constituting the 'greatest dangers to liberty': namely, 'insidious encroachment by men of zeal, well-meaning but without understanding'⁶.

⁶ *Olmstead v United States*, 277 US 438, 479 (1928).

THE ROLE OF VICTIMS IN NSW FORENSIC PATIENT PROCEEDINGS

MICHAEL BARNETT* AND ROBERT HAYES†

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I INTRODUCTION

While victims of crime has become a topic of increasing academic interest over the past 40 years, particularly with respect to the role of victim impact statements, one group of victims has thus far received relatively little attention.¹ This group comprises the victims of offences by forensic patients, the latter being persons who have been found by a court to be 'not guilty by reason of mental illness' of the offences for which they are on trial ('NGMI'). This is an especially complex and problematic area because the proceedings are fundamentally different to criminal law proceedings. The law recognises under an NGMI that the person does not have legal responsibility for the commission of a crime. Nevertheless, there are clearly victims of the acts, being either

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The authors gratefully acknowledge the assistance of Clarence Brown and Taryn Rodney, law students, University of Western Sydney.

¹ See, eg, Edna Erez & Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Outcomes and Disposition' (1995) 23(4) *Journal of Criminal Justice* 363; Edna Erez & Leigh Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes' (1999) 39(2) *British Journal of Criminology* 216; Edna Erez & Pamela Tontodonato 'The Effect of Victim Participation in Sentencing on Sentencing Outcome' (1990) 28(3) *Criminology* 451; Donald Hall, 'Victims Voices in Criminal Court: The Need for Restraint' (1991) 28(2) *American Criminal Law Review* 233; Tyrone Kirchengast, 'Sentencing Law and the 'Emotional Catharsis' of Victims Rights in NSW Homicide Cases' (2008) 30 *Sydney Law Review* 614; Joanna Shapland, Jon Willmore & Peter Duff, *The Victim in the Criminal Justice System* (1985); Brian Forst, *The Criminal Justice Response to Victim Harm* (1985); Tracey Booth, 'The Contentious Role of Victim Impact Statements in Sentencing Offenders in NSW' (2007) 45 *Law Society Journal* 68.

direct victims or family or friends. Moreover, in a number of cases involving NGMI, the circumstances are horrendous involving homicide or serious physical and mental harm. A large number of index offences involve murder, attempted murder, manslaughter and serious assaults.²

This paper examines the current legal, administrative and policy responses to the victims of forensic patients before the New South Wales Mental Health Review Tribunal. In particular, the paper assesses the new legislative measures relating to such victims under the *Mental Health (Forensic Provisions) Act 1990* (NSW).³ First, the paper outlines the NSW forensic patient scheme and the new provisions on victims. The paper then considers the approaches of other Australian jurisdictions. The next section identifies and discusses key issues such as balancing victims' rights against the rights of patients, the provision and content of written and oral submissions by victims, confidentiality, methods of participation (in person, by video and telephone), and information and education for both victims and Tribunal members and staff. The paper concludes by discussing some reforms and proposals to help make these provisions work fairly and effectively.

The paper draws upon the personal experience of one of the writers who was President of the NSW Mental Health Review Tribunal from 1990-2000.⁴ We have also had informal consultations with a number of members of the Tribunal and those discussions have provided us with valuable information and insights. We thank those people for their contribution. However, the views expressed in this paper are those of the writers alone and do not purport to reflect the views of the Tribunal or any members of it.

We use therapeutic jurisprudence as an analytical tool, which argues that the law acts as a therapeutic agent, meaning that the law can have therapeutic or anti-therapeutic consequences. The objective of the theory is that the therapeutic consequences should be maximised but that in achieving that end, due process principles and primary legal principles should not be subordinated.⁵ In mental health proceedings

² Based on unpublished data provided by the NSW Mental Health Review Tribunal.

³ The new provisions were enacted by the *Mental Health Amendment (Forensic Provisions) Act 2008* (NSW) and are now incorporated in the *Mental Health (Forensic Provisions) Act 1990* (NSW) (previously titled the *Mental Health (Criminal Procedure) Act 1990* (NSW)).

⁴ Robert Hayes.

⁵ Michael Perlin, 'Preface' in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment*

this involves balancing the legal and therapeutic rights and interests of participants and in particular shaping legal processes and outcomes as much as possible to maximise positive therapeutic outcomes such as improving the well being of the patient.⁶ For the purposes of this paper, the discussion of therapeutic consequences is focussed on the rights and interests of patients and victims in forensic proceedings both of which groups may have significant legal, psychological and emotional interests at stake, together with a consideration of the interests of the community as a whole. In general terms, the legal rules relating to victims in forensic proceedings should as much as possible contribute to the psychological health of both patients and victims without infringing procedural fairness. As indicated in the literature relating to the psychology of procedural fairness, providing participants such as patients and victims with a fair process that satisfies their need to be treated with dignity and respect is likely to improve their satisfaction with the system and compliance with outcomes.⁷ The community interest is met by providing fair and efficient processes that appropriately balance patients' and victims' rights and interests with the need for community protection.

II OUTLINE OF NSW FORENSIC PATIENTS SCHEME

A forensic patient is a person detained in a mental health facility, correctional centre or other place or released from custody subject to conditions after an order by a court that the person is not guilty of an offence on the grounds of mental illness or who is found to be unfit for trial or has been the subject of a limiting term imposed by the court at a special hearing.⁸ The court in a case of NGMI has determined that the person is so affected by mental illness that they lacked the requisite intent to be found guilty of the offence and hence are not legally responsible for their actions and no conviction can be recorded in relation to that offence. Once a court makes such a finding it then has three options before it, all to be exercised on the basis of an assessment of the potential risk of harm to the person or to the community:

(2003) xxxiii, xxxiv; See also David Wexler & Bruce Winick (eds), *Law in a Therapeutic Key: Developments in therapeutic jurisprudence* (1996).

⁶ See, eg, Bruce Winick, 'A Therapeutic Jurisprudence Model for Civil Commitment' in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (2003), 23, 26.

⁷ *Ibid* 34; Tom Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' (1992) 46 *Southern Methodist University Law Review* 433.

⁸ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 42.

- Where it considers that the person does not present a risk to him/herself or the community it may release the person unconditionally (not often done).
- Release to the community but subject to conditions such as compulsory treatment, abstinence from alcohol or other substances and restrictions on movement and travel and restrictions on contact with persons.
- An order for detention in a secure psychiatric unit in a hospital, which in some cases may be situated in correctional centres.

As of June 2009 there were about 320 people currently subject to the provisions of the new legislation, with the vast majority being NGMI patients.⁹ There are also about 80 people currently released in the community subject to conditions.¹⁰

A Role of the NSW Mental Health Review Tribunal

The Tribunal is a quasi-judicial body established under the *NSW Mental Health Act 1990* and generally comprised by a lawyer, a psychiatrist and 'other member' with appropriate expertise and experience. Forensic patients are usually detained in specialist forensic mental health facilities or in units in correctional centres where some mental health services are provided. Consequently, the Tribunal conducts forensic hearings at a number of venues around NSW including maximum-security centres such as at Long Bay Correctional Centre and Morrisett Hospital.

Under the *Mental Health (Criminal Procedure) Act 1990* (NSW) the Tribunal had only a recommendatory role to the Minister for Health about the disposition of forensic patients. Under this old Act the Minister for Health or the Governor acting on the advice of the Executive Council was authorised to make orders as to a forensic patient's detention, care treatment or release. This system was criticised as leaving too much discretion with the executive and being inconsistent with Principle 17(1) of the Principles for the Protection of Persons with Mental Illness & the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 which

⁹ J Fenely & S Hanson, 'Changes to Determinations of Forensic patients: *Mental Health Legislation Amendment (Forensic Provisions) Act 2008*' (2009) 47(5) *Law Society Journal* 62, 62-65.

¹⁰ *Ibid.*

requires review of mentally ill patients by a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law.¹¹

Under the new legislation it is the Tribunal through the establishment of its Forensic Division that now exercises determinative powers in relation to forensic patients as to their treatment, care, detention or release.¹² That Division is to consist of the President or a Deputy President, a psychiatrist, a registered psychologist or other suitable expert in relation to a mental condition and a member who has other suitable qualifications or experience. The Tribunal must not order the release of a forensic patient under the Act unless it is constituted by at least one member, including the President or a Deputy President, who is the holder of former holder of a judicial office.¹³

The Act provides that without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what orders it shall make:

- (a) whether the person is suffering from a mental illness or other mental condition,
- (b) whether there are reasonable grounds for believing that care, treatment or control is necessary for the person's own protection from serious harm or the protection of others from serious harm,
- (c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,
- (d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or member of the public will be seriously

¹¹ Dan Howard, 'The Detention of Forensic Patients in New South Wales and other Australian Jurisdictions - Some New Developments and Some Thoughts on Uniformity' (Paper presented at the International Criminal Law Conference, Sydney, 11 October 2008).

¹² *Mental Health (Forensic Provisions) Act 1990* (NSW) s 47. Under the new provisions the Tribunal also has determinative powers in relation to a correctional patient, those persons who develop a mental illness while in custody on remand or while serving a sentence.

¹³ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 73(3).

endangered by the person's release,

(e) in the case of the proposed release of a forensic patient subject to a limiting order, whether or not the patient has spent sufficient time in custody.

The Tribunal must not make an order for the release of a forensic patient unless it is satisfied on the evidence available to it that the safety of the patient or any member of the public will not be seriously endangered by the patient's release and other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.¹⁴ The Tribunal, as soon as practicable after a person has been found not guilty of an offence but detained or released on conditions, must review the person's case and make orders as to the person's care, detention and treatment or as to the person's release (either unconditionally or conditionally).¹⁵ The Tribunal must also consider whether or not the person has become fit to be tried for an offence and advise the Director of Public Prosecutions of its findings.¹⁶ The Tribunal must subsequently review each forensic patient every six months but may review the case of any forensic patient at any time.¹⁷ The Tribunal must provide written reasons for its decisions. A forensic hearing will usually involve expert evidence from the patient's treating team, both written and oral, from other professionals and from the patient and family members.

Therefore, the Tribunal may order the continuing control and detention of patients or make a range of orders relating to unconditional release or conditional release with the latter comprising unsupervised ground leave, escorted outside day leave and supervised outside day leave. If the Tribunal makes an order for conditional release the conditions may include requirements as to taking medication, restrictions or prohibitions on the use of alcohol or other substances, and conditions on living arrangements.

It should also be noted that a forensic patient must be legally represented unless the forensic patient decides that he or she does not wish to be represented.¹⁸

¹⁴ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 43.

¹⁵ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 44.

¹⁶ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 45.

¹⁷ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 46.

¹⁸ *Mental Health Act 2007* (NSW) s 154(2).

III NSW FORENSIC PROVISIONS RELATING TO VICTIMS

The *Mental Health (Criminal Procedure) Act 1990* (NSW) contained no formal recognition of the rights or roles of victims of the acts of forensic patients and correctional patients. The Tribunal implemented its own policy of involving victims in hearings by attaining their views about any proposed recommendation about leave or release of forensic patients. There was a clear attempt to balance patient and victim interests according to the principles of procedural fairness and the therapeutic interests of the patient.¹⁹ However, victims could also make representations directly to the executive without any reference to the Tribunal, which meant that there might be no fair, transparent and accountable process for assessing those representations including the weight given to those representations by the executive.

A general review of the New South Wales forensic mental health legislation was conducted by Mr Greg James QC, President of the NSW Mental Health Review Tribunal.²⁰ As a result of the review, the *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* retitled that 1990 Act and amended it to recognise, inter alia, victims and their rights. The legislation came into effect on 1 March 2009.

Section 41 provides that 'victim' means a primary victim within the meaning of the *Victims Support and Rehabilitation Act 1996* and includes a member of the immediate family of a victim within the meaning of s 9 of that Act. Furthermore 'victim of a patient' means a victim of an act of violence within the meaning of the *Victims Support and Rehabilitation Act 1996* committed by a patient. Thus the immediate family members of homicide victims may come within the definition of a victim for the purposes of the new legislation.

Amendments to section 160 of the *Mental Health Act 2007* in schedule 2 to the Act allow further regulations to be made to provide for the establishment and use of a victims register, the notification of victims of Tribunal decisions in proceedings relating to forensic patients or correctional patients, and notification of victims of the termination of status of persons as forensic patients. These changes have allowed for the introduction of a statutory based victims register enabling the Tribunal to notify victims of key information affecting them, including Tribunal decisions, prospective releases and when a forensic patient's

¹⁹ Consultations with Tribunal members.

²⁰ Hon Greg James QC, *Review of the New South Wales Forensic Mental Health Legislation* (2007) <http://www.health.nsw.gov.au/pubs/2007/pdf/forensic_review.pdf>. See also the *Mental Health (Criminal Procedure) Act 1990* (NSW).

status is terminated. The Centre for Mental Health is to maintain the victims register and must notify the Tribunal as soon as a new victim is registered. The Tribunal must notify the Centre for Mental Health of any forthcoming hearings in which a victim is registered where possible with a minimum of three weeks' notice.

These regulations were intended to enhance the former processes under the old Act put in place by the Tribunal, which allowed victims of crime to make submissions to the Tribunal on release issues.

The Minister for Health and the Attorney-General may appear before the Tribunal and make submissions concerning the possible release or grant of leave to a forensic patient.²¹ However, the provisions go further in that they provide that a victim may apply to the Tribunal for restrictions to be placed on forensic patients as to with whom they may associate or contact, thus preventing contact with victims or their families.²² This is an important development, giving the victims a right to seek amendment or variations of condition and leave orders. This allows victims the opportunity to bring to the Tribunal any issues they have about release or leave and their safety. This discretion on the Tribunal becomes complex if the victim is a family member of the patient and the patient wants contact with the family but all or some family members do not want any contact. The Tribunal would necessarily have to balance the rights of a patient to exercise their ordinary civil rights of freedom of association against the right of victims to ensure their security and safety. One would normally expect that if victims were strongly opposed to having any further contact with forensic patients, then their views would be respected and appropriate orders made, as it would appear to be futile and unacceptable for the Tribunal indirectly to sanction any further unwanted contact. Under s 77A(3) a victim in relation to their rights to seek amendments or variations of conditions and leave orders may by leave, appeal to the Supreme Court from any determination under that section in those proceedings on a question of law or 'any other question'.

Thus the provisions establish a victim registration and notification system and give victims a right to apply for variations and amendments of orders but limited to matters of association and contact. All other matters of victims' participation in relation to forensic proceedings before the Tribunal are left to the discretion of the

²¹ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 76A(2).

²² *Mental Health (Forensic Provisions) Act 1990* (NSW) s 76.

Tribunal under its general powers of practice and procedure.

IV OTHER AUSTRALIAN JURISDICTIONS' APPROACHES

All Australian jurisdictions have a process that provides a form of review of forensic patients either by a court or a review tribunal or board. The criteria for review in each jurisdiction broadly encompasses, inter alia, an assessment of the likely risks of harm to the forensic patient or a member of the community if the patient were to be granted conditional or unconditional release as primarily determined by considering the nature and extent of the mental illness or disability of the forensic patient. A further common principle is that the restrictions placed on a patient should be of the least restrictive kind that is consistent with their safe care and treatment and with the protection of the community. Some of the jurisdictions give statutory recognition to the right of victims to make written or oral submissions. No jurisdiction gives a victim the status of a party to forensic review proceedings. The following summarises the legislative role of victims:

- ***The Australian Capital Territory.*** The relevant legislation requires the ACT Civil and Administrative Tribunal ('ACAT') which has the mental health jurisdiction to review an 'order for detention'. There is no direct recognition of victims but with the permission of the Tribunal, non parties (that is including victims) may give evidence and can make a written submission and those who wish to make a written submission are to be given an opportunity to do so.²³
- ***The Northern Territory.*** A person subject to a 'supervision order'²⁴ must be reviewed every year by the Supreme Court. The court is required to consider an appropriate medical report and treatment plan²⁵, and to receive and consider any report from the victim and from members of the accused person's family about the impact of the person's conduct upon them and the impact of the release of the person.²⁶
- ***South Australia.*** 'Supervision orders' relating to forensic patients can be revoked by the Supreme Court, and the person can thereby be released, and the court in making such

²³ *Mental Health (Treatment & Care) Act 1994* (ACT), s 80(2), (3) and s 84.

²⁴ *Criminal Code* (NT) s 43ZC.

²⁵ *Criminal Code* (NT) s 43ZK.

²⁶ *Criminal Code* (NT) s 43ZL.

decisions can require the Crown to provide, inter alia, a report on the views of the victim or the next of kin of the victim and take those matters into account.²⁷ Thus, there is no avenue for direct victim participation.

- **Victoria.** The court must review 'custodial supervision orders'.²⁸ A victim of the offence may make a report to the Court for the purpose of assisting counselling and treatment processes for all people affected by an offence and assisting the Court in determining any conditions it may impose on an order made in respect of a person under this Act or in determining whether or not to grant a person extended leave.²⁹ The Court, at the request of any party to the proceedings, may call upon a person who has made such a report to give evidence. This person giving evidence may be cross-examined and re-examined.³⁰
- **Queensland.** A 'forensic order' made by the Mental Health Court in respect of a forensic patient remains in force until it is revoked by the Mental Health Review Tribunal.³¹ The Tribunal must not revoke a forensic order unless it is satisfied that the patient does not represent an unacceptable risk to the safety of the patient or others.³² There is no specific right of victims to provide reports or statements to the Tribunal, although the Tribunal can make non-contact conditions.³³
- **Western Australia.** Although its legislation is under review and is soon expected to be change, Western Australia still retains the executive release model whereby the Governor may order the release of the person from custody if the Minister, based on a recommendation by the relevant Board, advises the Governor to do so.³⁴ There is no express provision for the views of victims or relatives of the patient to be taken into account.
- **Tasmania.** Forensic patients must be reviewed every 12

²⁷ *Criminal Law Consolidation Act 1935 (SA)* s 269R.

²⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 39.

²⁹ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 42.

³⁰ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 46.

³¹ *Mental Health Act 2000 (Qld)* s 207.

³² *Mental Health Act 2000 (Qld)* s 204(1).

³³ *Mental Health Act 2000 (Qld)* s 203(3).

³⁴ *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* s 33 & 35.

months by the Forensic Tribunal, which can issue a certificate if it determines that the order is no longer necessary³⁵ whereupon the person may apply to the Supreme Court to discharge or revoke the order.³⁶ The court must consider any report on the attitudes of victims, if any, and next of kin.³⁷ There is a system for registered victims and a notification system for them when a forensic patient seeks a leave of absence³⁸ and when a decision is made to grant, extend, cancel or amend the conditions of a leave of absence, or to release or transfer a forensic patient.³⁹ A registered victim has a right to make a written submission in relation to such an application but has no express right of appearance at Forensic Tribunal hearings.

V KEY ISSUES AND COMMENTARY

A The Need for Victims to Have an Opportunity to Participate

There are strong ethical and practical reasons for allowing victims a clear and formal opportunity to participate in forensic proceedings before the Tribunal. Victims clearly may have genuine and legitimate concerns with the release of forensic patients about their own safety and security and that of others and therefore need to have the opportunity to contribute.⁴⁰ In some cases their input may provide relevant and significant evidence or information for the decision makers. Even in cases where the input has no significant probative value, the participation may have significant therapeutic consequences in reassuring victims about their safety and security and confidence and respect for the legal process. It also should be borne in mind that in forensic cases the victims will not have had the opportunity to make a victim impact statement in the course of any criminal proceedings because there has been no ordinary sentencing process. Involvement in forensic hearings is thus the only avenue open to victims who wish to participate in decisions about the disposition and release of a forensic patient. Moreover, victimization by a family member or acquaintance,

³⁵ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(1).

³⁶ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(3)(d).

³⁷ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(2)(b).

³⁸ *Mental Health Act 1996* (Tas) s 72P(7)(a).

³⁹ *Mental Health Act 1996* (Tas) s 72R(1), s 73P.

⁴⁰ Consultations with Tribunal members.

which is a typical scenario in forensic cases, tends to be more personal and therefore more painful and generally is a continuing cause of stress and fear because such victims know that they may encounter the perpetrator in the future and moreover they may feel that they are a likely potential target.⁴¹

B *Registration and Notification*

A register for victims is a vital aspect of any victim participation scheme because it helps to ensure that all victims who wish to participate can be advised in due time of their opportunities to participate. A register also helps to ensure that victims who do not wish any involvement are not inadvertently contacted, which is a waste of resources and may cause concern and anxiety for such victims.⁴²

Notification of impending proceedings or the release of patients is a crucial factor because without advance notice of a hearing, the opportunity to contribute is lost or compromised by lack of reasonable time to prepare. All jurisdictions need an effective managed victims register with clear notification requirements that give victims at least reasonable notice of forthcoming proceedings. The system has to be proactive and accurate and impose statutory obligations on those maintain registers and on the Tribunals or boards involved.

C *Providing Assistance to Victims in Preparing their Submissions*

Another significant issue will be the extent to which victims are given assistance in preparing written statements or giving evidence. Thus, for example, in South Australia victim impact statements in relation to ordinary criminal proceedings are prepared for sentencing courts by police and in that jurisdiction over 90% of higher court cases have a victim impact statement.⁴³ A possible suggestion to increase the level of victim participation is to have victim submissions prepared by a 'victim advocate' within a designed content framework so that victim

⁴¹ Robert Davis & Barbara Smith, 'Crimes Between Acquaintances: the Response of Criminal Courts' (1981) 6(1-4) *Victimology* 175; Edna Erez & Pamela Tontodonato, above n 1, 468.

⁴² The importance of registers was noted during the Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech NSWPD (LC) in New South Wales, *Parliamentary Debates*, Legislative Council, 15 May 1996, 979 (Hon J W Shaw, Attorney-General).

⁴³ Edna Erez & Leigh Roeger, above n 1.

input occurs more consistently and there is standardisation in the presentation of submissions.⁴⁴

Further, assistance to victims in preparing statement is also likely to increase the level of participation. If victims have to prepare their own reports and are given little assistance in this task then it is likely that there will be lower participation rates. The writers do not consider that Tribunals and courts in forensic proceedings should prepare reports on behalf of victims or offer specific assistance. Such a course of action would at least have the perception of compromising the independence of the Tribunals and courts. Tribunals and courts should be able to provide information about services for victims but should not provide any further assistance. State victims services and private services should provide direct assistance to victims in preparing victim impact statements. It is important that such organisations should be aware of the role and issues in forensic proceedings and give victims accurate and relevant information and advice. Again, it is important that such groups and services give a realistic picture of the role and impact of victim participation.

However, it may be appropriate for Tribunals to develop broad pro forma guidelines for statements which provide information to victims about relevant issues (for example, safety and security concerns and the location of patients on limited release) but also allow victims to put any matters that they consider relevant or important.

D Balancing Victims' Rights with Rights of the Patient

The Tribunal is not bound by the formal rules of evidence but may inform itself of any matter in such manner as it thinks appropriate and as the proper consideration of the matter permits.⁴⁵ Moreover, hearings of the Tribunal are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and the proper consideration of the matter permits.⁴⁶

Thus, the Tribunal has a general power to involve victims in its hearings as it sees fit and appropriate, which could include written or oral submissions by victims. It can and does take evidence as it sees fit from registered victims, the patient's family, medical practitioners and

⁴⁴ Matt Black, *Victim Submissions to Parole Boards: The Agenda for Research* (2003) No 251 *Australian Institute of Criminology: Trends and Issues in Criminal Justice* <<http://www.aic.gov.au/publications/>>.

⁴⁵ *Mental Health Act 2007* (NSW) s 151(2).

⁴⁶ *Mental Health Act 2007* (NSW) s 151(1).

other independent experts, the patient's family members and doctors and members of the treating team.⁴⁷ The Tribunal will always have to assess the relevance, value, and reliability of any input by a victim as it must do in relation to any information before it.

The fundamental guiding common law principle is procedural fairness which essentially consists of the following: the right of a party to know the case against them; the right of a person whose interests are affected by a decision to be heard; and the right for decision making to be free from either bias or reasonable apprehension of bias.⁴⁸

The writers would suggest, given the nature of forensic proceedings and the operating guiding principles, that a Tribunal should generally err on protecting the rights and interests of a forensic patient if it is satisfied that a particular involvement by a victim is likely to result in long term damage to the well being of a patient. There is nothing in the legislation to suggest that a victim's right or claim for involvement should be paramount or usurp the rights and interests of a patient. Under s 3 of the *Mental Health Act* a primary object is the care, treatment and control of persons who are mentally ill or disordered. Moreover under s 68 principles of care and treatment include the following:

- People with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be given,
- Any restriction on the liberty of patients and other people with a mental illness or disorder and any interference with their rights, dignity and self-respect are to be kept to the minimum necessary in the circumstances.

The Tribunal also has to take into account where appropriate, the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

The Tribunal has the challenging and complex task of protecting and fostering the rights of the patient including providing high quality service, but also protecting the rights and interests of the community, including victims.

The therapeutic role of the Tribunal's decision making must be

⁴⁷ Consultations with Tribunal members.

⁴⁸ See, eg, Michael Barnett, 'Dobbing-in and the High Court - *Veal* Refines Procedural Fairness' (2007) 30(1) *UNSWLJ* 127, 128-129.

acknowledged and considered a primary factor in its processes and decision-making. The Tribunal must strive to achieve positive therapeutic outcomes for patients, their carers, and victims and treating teams. It follows that all participants must be treated with respect and sensitivity to their needs and interests. Tribunal members tend to put the forensic patient at the centre of the hearing in a way that promotes the therapeutic well being of the patient.⁴⁹ The therapeutic relationship between the patient and treating team is clearly of fundamental importance to the well-being and improvement in health of the patient, and the Tribunal must recognise that relationship and, wherever possible and practical, foster and enhance that relationship.

However, in the writers' views, a concern that a patient might suffer some temporary discomfort because a victim is going to make a written or oral submission should generally not be sufficient by itself to make the Tribunal exercise a discretion to prohibit such involvement.

E Victims Should Not be Given the Status of Parties

The new legislation does not give victims the status of parties in forensic proceedings. Thus, victims have not been given a right to legal representation or any automatic standing to appear. They do not have a right to cross-examine (in fact no person has a right to cross-examine before the Tribunal, but it may be permitted), to have access to the relevant Tribunal file or to receive a transcript of the hearing.

The writers would not support victims having a formal role of parties in proceedings nor the right to cross-examine witnesses or the patient. This would give far too great a pre-eminence to the role of victims in such proceedings. This would take forensic proceedings outside of the usual procedure for victims in criminal proceedings who are not given party status or the right to cross-examine. This would give the role of victims a pre-eminence which is disproportionate to the real focus of the proceedings which is the assessment of the risks involved in release of patients whether conditional, or unconditionally. Allowing victims a party status would likely be counter-productive, exacerbate resentment and hostilities, make what are considered non-adversarial proceedings adversarial, threaten the therapeutic alliance of health practitioners and patients, and increase the delays and costs of hearings. It may not even increase the satisfaction rates of victims in general because even with such a significant increase in role it may not follow that this input will influence the Tribunal's decision making and it is dashed expectations

⁴⁹ Consultations with Tribunal members.

more than any other factor that is likely to cause victim dissatisfaction with the process. It is always open to the Tribunal to take into account the statement or submission of a victim and then if necessary put any matters to witnesses or to the patient. It would be a very rare situation where a victim would be permitted to ask questions of witnesses or the patient directly. This would certainly increase the prospect for a hostile, adversarial process that would run the risk of going over matters dealt with in the trial.⁵⁰

F Dealing with Written Submissions

Tribunals must exercise appropriate care and caution in such situations ensuring that as much as possible the therapeutic well being of the patient is respected and protected but that any relevant matters put by a victim are assessed and if necessary appropriately put to witnesses or to the forensic patient. The victim's views could be put but with the inappropriate content or language removed. Sometimes a Tribunal panel will summarise the effect of a written submission but remove derogatory or inflammatory material.⁵¹ It would be a matter of procedural fairness for a Tribunal to understand the relevant points made by such a statement and if necessary to put those matters to witnesses or indeed to the patient without the threatening or abusive content.

It may happen that victims attend proceedings and may be abusive or threatening themselves. Some victims come primarily to vent their anger and frustration.⁵² Tribunals must deal firmly with such behaviour giving victims a clear framework of what is acceptable and what is not. Tribunal members must give victims a proper and fair opportunity to make their points but nevertheless guide the matters consistently back to the point of the proceedings. These are interpersonal skills and having a respect for individuals, which in many ways have been underestimated by formal legal systems. Law is not simply about rules or interpreting and applying rules. It also involves human responses and feelings that should not be ignored, particularly in areas involving mental health issues. It is important for Tribunals to acknowledge the distress and anxiety that many victims may feel but without removing the therapeutic focus on the patient.⁵³

⁵⁰ Consultations with Tribunal members.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

G *Dealing with Confidential Submissions by Victims*

Decision makers such as the Tribunal have a general responsibility under the doctrine of procedural fairness to disclose to the affected party adverse information that is credible, relevant and significant to the decision.⁵⁴ In the case of confidential material this may mean that the Tribunal will disclose to the patient and/or to their representative the substance of the allegations or assertions in the confidential material but not the detail so as not to reveal the source of the information. Thus, there can be limited disclosure of matters raised by the submission without quoting 'chapter and verse' and without disclosing details of the submission that might identify its source and without providing the submission to the patient or their legal representative. This is a frequent and generally acceptable approach to confidential material.⁵⁵ Victims are often concerned to ensure that private information such as their contact details are not disclosed.⁵⁶

If a victim makes a statement, whether oral or written, in relation to a forensic proceeding the requirements of procedural fairness will generally require that the patient is entitled to have access to the report and other documentation.

If there is a request for confidentiality in relation to a victim's submission then the presiding member should consider the request and determine the issue. If the presiding member considers that the request for confidentiality is justified then a preliminary hearing should be held to consider the victim's submission to determine whether the submission will be considered confidential or not. The Tribunal might determine at such a hearing to provide evidence about the content and nature of the submission.

If the Tribunal decides that the nature of the case and in particular the nature and contents of the victim's submission means that it could not be put to the patient or their legal representative in any form, then the rules of procedural fairness are likely to mean that the Tribunal could put little or no weight upon it. Procedural fairness requires that any adverse material should be put to the party, in this case, the patient to be able to respond.

If the Tribunal were to decide that a request for confidentiality is not

⁵⁴ *Kioa v West* (1985) 159 CLR 550; *Veal v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; Barnett, above n 48.

⁵⁵ Michael Barnett, above n 48, 141.

⁵⁶ Consultations with Tribunal members.

justified then the victim should be offered the opportunity to withdraw the submission. If this happened the Tribunal could not take the submission or its contents into account.

H *Method of Participation*

The Tribunal offers the following options for participation of a victim.

In person: Subject to the nature of the venue and appropriate security and accommodation being available a registered victim could make oral submissions in person. This might increase a registered victim's sense of importance and significance in the process but it can raise security issues and may increase the chance of heated and emotional exchanges that may have detrimental effects upon victims and/or patients.

Video-link: This is entirely dependent on whether there are suitable facilities at the hearing venue. Video conferencing has the communication benefits of allowing the Tribunal panel to view and communicate with the registered victim throughout while minimising any distress that a victim and/or patient might experience from being in close physical proximity to each other. It may also reduce the risk of confrontation between the victim and patient and their intimates. The writers would consider that video-link would generally be the preferable mode of participation where more than a written statement from the victim is to be considered. However, there are resource issues. At the present time, video conferencing predominantly takes place only from the Tribunal's Gladesville premises.⁵⁷

Phone-link: A registered victim may choose to participate by telephone hearing and the normal practice of the Tribunal is to call the victim as the hearing commences. The registered victim can choose to hear the evidence and statements made throughout the hearing as well as the final recommendation made by the Tribunal. The registered victim can talk to the Tribunal members and make an oral statement if they wish. The advantage of the telephone conference can be that the victim and the patient will have no face-to-face contact at all. This may alleviate stress and intimidation of all participants. On the other hand, such non face-to-face participation may cause some victims to believe that their evidence or views are of less value or are not being taken seriously or that the patient is being deliberately shielded from the victim.⁵⁸

⁵⁷ Consultations with Tribunal members.

⁵⁸ *Ibid.*

Written submission: Any registered victim may submit a written statement to the Tribunal to be included in the Tribunal's papers for hearing. There is no obligation on a victim to attend a hearing once she or he has provided a statement. The Tribunal has indicated to victims that such statements should address the care, treatment, detention and release of a forensic patient.⁵⁹ The Tribunal has also indicated that the focus of such statements should be on any concerns the victim has about the risk of serious danger to individuals, including themselves or to the community. This could include any new information. However, whilst many submissions do refer to perceived risks to the victim, they also often refer to the injustice of the system that allows a patient to be found NGMI.⁶⁰ The normal practice is that the Tribunal would reveal at least the contents of the submission to the patient and/or legal representative. Any evidence by a victim may be considered as it sees fit by the Tribunal.

The statement should also indicate whether the victim can or wishes to be contacted by the Tribunal on the day of the hearing, if the Tribunal wishes to speak directly with a victim.

There is nothing in the legislation that is concerned with the evidentiary status of the statement or indeed any evidence or information provided by a victim.

I *Involvement in Hearings*

The Tribunal as part of its hearing plan for each matter where a victim has already made a written submission or indicated a desire to make an oral submission should consider any issues arising from the involvement of the victim in its hearing plan which is used to identify and plan for issues that will or may arise in the course of the hearing, including for example, the confidentiality of documents and the type, level and relevance of evidence and information available.

J *The Opportunity to Make Oral Submissions*

Under its broad evidentiary powers and its broad practice and procedure powers, the Tribunal can allow victims to make oral submissions and allow them to attend hearings whether in person or by video link or telephone. The new legislation does not alter that position.

⁵⁹ Ibid.

⁶⁰ Ibid.

The New South Council For Civil Liberties in its submission to the review of the forensic provisions of the *Mental Health (Criminal Procedure) Act 1990* stated that the role of victims should be confined to making written submissions which the Tribunal could take into account of so far as relevant. The Council submitted that otherwise the interests of victims could be appropriately represented in hearings by the Attorney-General for example in relation to matters dealing with public safety. The Council argued that the reasons for this limited role were based on the unique forensic jurisdiction where a finding of NGMI was found and where disposition of the patient was not at all concerned with punishment. The Council suggested that victim involvement in forensic proceedings was perhaps broadly comparable to executive decisions relating to parole. The Council cautioned against further victim involvement that might lead to double punishment of a crime for which they had already been acquitted.

The writers, while agreeing with the general view that caution must be exercised in prescribing a role for victims in forensic proceedings, do not support the Council's blanket view that victims should be limited to written statements. Instead, the writers consider that the Tribunal should have a capacity to allow oral statements by victims after an assessment of the particular circumstances of the case and an appropriate balancing of the rights and interests of the patient and the victim. There may well be a number of significant advantages in at least some victims being allowed to make an oral submission. First, it may well increase the victims' sense of satisfaction and involvement in the process because it is a far more direct and immediate input than merely providing a written submission before the hearing. Oral presentation involves some degree of human interaction whereas a written submission can be dealt with impersonally and perhaps perfunctorily. Also some victims may lack written communication skills and find it difficult to make their points in a written submission. An oral submission also allows the Tribunal the opportunity to consider directly the credibility and concerns of the victim and if necessary allows the Tribunal to seek clarification of any points made by the victim. This opportunity is particularly important if the victim is seeking a non-association or place restriction order.⁶¹ Oral submissions could also have substantial psychological benefits for the victim and their relatives and intimates.

As Mr Richard Amery MP, Minister for Corrective Services said of the

⁶¹ Consultations with Tribunal members; see *Mental Health (Forensic Provisions) Act 1990* (NSW) s 75.

change to the NSW law to allow victims to make oral submissions in parole hearings without needing to seek leave of Parole Board: 'Making a personal approach can often demonstrate a victim's concerns far more clearly than a written submission'.⁶²

These matters in the writers' view should not be merely dismissed as being only symbolic or psychological. The law and legal systems should be more concerned with the satisfaction and views of participants in the process. All institutions of a society should be measured in terms of the good they do, both in material and psychological terms. In some cases such participation may increase the sense of confidence and security of victims. It may alleviate some fears and concerns of the victim about the risks posed by the patient. It may assist some victims to understand the illness of the patient and the nature of treatment and rehabilitation and progress and matters such as conditional release. Oral participation may assist some victims to feel more secure because they see the victim in a secure and safe environment, which in some cases may allow the victim to put the ordeal of the index offence behind them. In some cases, victims who are at first very hostile have come to appreciate and support therapeutic outcomes for the patient.⁶³

The second major advantage of allowing oral submissions is that it should not be assumed that, in every case, the greater participation of a victim will necessarily be counter-productive for the patient. There may be some cases where some contact may assist patients in coming to terms with what has happened and for example, in dealing with guilt or expressing sorrow, in gaining insight into the effects of the index offence, and in being more motivated to take their medication and in some cases avoid substance abuse which may have precipitated the index offence. Of course, however, there may be other cases where interaction with victims, particularly or confrontational interaction may be counter-productive and anti-therapeutic. It will be necessary for the Tribunal in each particular case to work out an appropriate plan for the involvement of victims that takes into account the rights and interests of victims, patients and other participants and is based upon a considered view of the likely consequences of particular participation. In addition the Tribunal must also manage the input of victims in the hearing to ensure procedural fairness but also to where necessary

⁶² Crimes (Administration of Sentences) Amendment Bill, Second Reading Speech, New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 May 2002, 1805 (Hon R Amery, Minister for Corrective Services).

⁶³ Consultations with Tribunal members.

protect the psychological well being of both victims and patients.

It may be a very complex and problematic matter to attempt to forecast the immediate and longer-term consequences for victims and patients in relation to victim participation. Thus, for example, it may be that for some victims and patients some degree of interaction may be of benefit to one or both, particularly where both are receptive to some positive interaction. On the other hand, in some cases direct contact with a victim may be distressing to the victim and or patient and of no therapeutic value or even worse be extremely negative experience, perhaps retarding or impeding the patient's progress and/or making a victim more distressed and more antagonistic. Clearly Tribunals may need some assistance from experts and professionals, particularly treating teams, about the likely consequences of particular contact. Sometimes, treating teams approach the Tribunal before or during a hearing to advise that the involvement of the victim may have adverse consequences for the patient's wellbeing.⁶⁴

K Open or Closed Proceedings and Confidentiality

The proceedings of the Tribunal are to be open to the public.⁶⁵ However, if the Tribunal is satisfied that it is desirable for the welfare of a patient or for any other reason, it may of its own motion or on the application of the patient or another person appearing at the proceedings make orders that the hearing be conducted wholly or partly in private and/or orders prohibiting or restricting the reporting of the proceedings or publication or disclosure of evidence or reports given in the proceeding.

Thus the Tribunal ordinarily would allow victims access to forensic proceedings but this can be restricted where necessary, particularly if an open proceeding were likely to have a serious adverse effect on the welfare and well being of the forensic patient. This provision enables the Tribunal to balance the competing rights and interests of the patient and victim in the particular circumstances of each case.

The Tribunal also has to respect the forensic patient's right to confidentiality and this would include making unlawful disclosure of information to victims.⁶⁶ The publication or broadcasting of the name

⁶⁴ Ibid.

⁶⁵ *Mental Health Act 2007* (NSW) s 151(3).

⁶⁶ See, eg, *Mental Health Act 2007* (NSW) s 189 creates an offence for a Tribunal member to disclose information acquired about a person in the course of exercising the jurisdiction of the Tribunal except in circumstances provided for under s 189.

of any person who has a matter before the Tribunal or who appears as a witness, or who is mentioned or otherwise involved in proceedings is also prohibited without the consent of the Tribunal.⁶⁷ The Act also prohibits the disclosure of any information in connection with the administration and execution of the Act unless such disclosure comes within the stipulated exceptions. These provisions enable the Tribunal to protect the confidentiality of patients, witnesses and victims.⁶⁸

L *Information and Education for Victims*

A key issue for victims of forensic patients is the confusion and stress caused for the victim as to how and why the offender has been found 'not guilty'.

Many victims may not fully understand what exactly it means by not guilty by reason of mental illness. Often, these victims can feel betrayed by the criminal justice system and feel that they will receive little recognition for what happened to them. For victims, the term *not guilty* can suggest that the crime is not acknowledged or recognised by the justice system.

The expectation a victim has in making a submission is critical to obtaining positive outcomes in facilitating victim participation in hearings. Victims should as much as possible be given a realistic picture of what their role can be and the role of the Tribunal and the hearing process. They should not be given false and unrealistic expectations. For example, a South Australian study found that victim impact statements within the South Australian criminal justice system had developed into a situation of dashed expectations because victims had been allowed to believe that their statements would have a significant influence on the actual sentence given when often this was clearly not the case.⁶⁹ Such a position is likely to build up resentment and hostility within such victims.⁷⁰ One survey of victims of major indictable offences indicated that victims who thought that their statement would influence the court's sentence were significantly more dissatisfied with the sentence than victims who did not expect an

⁶⁷ *Mental Health Act 2007* (NSW) s 162.

⁶⁸ See *Mental Health Act 2007* (NSW) s156 as to restrictions on disclosure of records.

⁶⁹ Martin Hinton, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia' (1995) 14(1) *University of Tasmania Law Review* 81.

⁷⁰ Edna Erez, Leigh Roeger & F Morgan 'Victim harm, impact statements and victim satisfaction with justice: An Australian experience' (1997) 5 *International Review of Victimology* 37; Matt Black, above n 44, 2.

impact'.⁷¹ Victims may make submissions based on a belief that it will have significant influence on the outcome for the offender or patient. If this is not the case, victims may be more dissatisfied and alienated from the system than if they had no input at all.

It must be made abundantly clear what the role of the Tribunal is and what are the issues that the Tribunal must assess. It may also be useful to provide more general information about the operation of the criminal justice system to the public.

It may be that a written statement from a victim contains abusive or threatening material. In the writers' view the Tribunal in its information material provided to victims should include the direction that abusive, threatening, harassing, offensive or intimidatory views or language are not acceptable in written or oral submissions. Victims also should be given information and direction about appropriate conduct in attending hearings.

Victims when they are concerned that the patient is feigning mental illness should be given current data and information including, for example, information about the insanity defence and its potential of potentially indefinite or long term detention and the known incidences of feigning and the expertise of the medical profession and courts in detecting and dealing with feigned cases.

Victims may also need information about the influence of drugs and alcohol on the commission of the index offence and their impact on the mental health of the patient.

Clearly comprehensive and effective dissemination to victims of their rights, particularly at an early stage is likely to increase the number of victims who will register and then participate in forensic proceedings. All Tribunals need to conduct education and training on dealing with victims and this should be provided to all staff who come into contact with victims. It might be useful if a multimedia approach was adopted to provide such information. Tribunals need to have a communication protocol as to whom should have first and any subsequent contact and liaison with victims.

It is also clear that victims of forensic 'offences' will need to have access to trauma and grief counselling and programs which should be catered to deal where necessary with the forensic aspects of the event, such as the mental illness of the patient and the finding of not guilty on the basis of mental illness. Information should be provided, including by

⁷¹ Edna Erez, Leigh Roeger & F Morgan, above n 70.

the Tribunal as to services that provide post hearing counselling or debriefing after a victim has participated in a forensic hearing.

M Education and Training for Tribunal Members and Staff

It is important for Tribunal members and all staff who may have contact with victims to be aware of and comply with the general principles of dealing with victims including NSW legislation such as the *Victims Rights Act 1996* and the Charter.

Tribunals need to develop practice and procedure notes and case studies and samples to assist Tribunal members to apply legislative requirements. This should deal with matters such as the appropriate method for victims to participate, considering the balance between the rights of patients and victims, confidentiality requirements and natural justice and communicating effectively with victims. It may be a useful rule of thumb for Tribunals in their decision making to at least acknowledge the involvement of a victim and to provide some assessment or relevance of the information provided. One would expect that in many cases a Tribunal should acknowledge the concerns of the victim even if such concerns do not directly impact on the outcome of the proceedings.

N Qualities and Skills of Tribunal Members

The potential involvement of victims makes it paramount that Tribunal members who are dealing with forensic proceedings have superior dispute management and resolution skills and high quality interpersonal skills. The NSW Tribunal has adopted the Administrative Review Council's ('ARC') Guide to Standards of Conduct as a guide to the conduct of Tribunal members in carrying out their statutory role. Core criteria under that Code for Tribunal members include respect for the law, fairness, independence, respect of persons, diligence and efficiency, integrity, accountability and transparency.⁷²

The Code relevantly provides, inter alia, that Tribunal members need to be able to respect all participants, to be patient, dignified, and courteous to all participants and should require similar behaviour of those subject to their direction and control. A Tribunal member should also endeavour to understand and be sensitive to the needs of persons

⁷² Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2009), 12 <<http://www.ag.gov.au/agd/WWW/arcHome.nsf>>.

involved in proceedings before the Tribunal.⁷³

It is submitted that these qualities and skills are particularly important in dealing with victims and patients and in general for dealing with mental health issues that inevitably involve therapeutic considerations. It should not be enough that Tribunal members dealing in mental health law are very good or excellent at the relevant law. A demonstrated ability for dealing effectively and sensitively with mentally ill people and appropriate interpersonal and dispute management skills and qualities should be key criteria for selection of members, for induction processes, for ongoing training and education of members and for performance appraisal.

As noted above, treating victims with respect and dignity and providing them with a fair opportunity to voice their views is likely to increase their satisfaction with the process. It may also make them more likely to understand the issues before the Tribunal and to understand the mental illness of the patient and the risks of future harm to themselves or others. The hearing thus may play a useful educative role.

O Evaluating Victim Involvement in Forensic Proceedings

There is a clear need for empirical study of the participation of victims in forensic proceedings including satisfaction surveys not only of victims but other participants including Tribunal members to assess how victim participation is currently used and managed and what improvements might be made. However, some general points can be made without the benefit of direct empirical data.

It will be difficult to make generalisations that cover all or even the majority of victims and offenders. For example, it cannot be simply assumed that victims in relation to forensic patients are likely to be vindictive or seeking revenge. For example, the Tasmanian experience in parole decision-making indicates that most victims are not retributive but are focussed on ensuring that they or their families or intimates will not come into contact with the offender.⁷⁴ This accords with general research on victims in the criminal process that indicates that many victims are not revengeful or punitive.⁷⁵ For example, only

⁷³ Ibid.

⁷⁴ Matt Black, above n 44, 4.

⁷⁵ Brian Forst, *The Criminal Justice Response to Victim Harm* (1985); Mike Hough & David Moxon 'Dealing with offenders: popular opinion and the views of victims - findings from the British Crime Survey (1985) 24(3) *Howard Journal of Criminal Justice* 160.

about one third of an Ohio study of serious felonies requested imprisonment or some harsh treatment for the offender.⁷⁶ Nor does the research indicate that claims for retribution or additional or excessive punishment by victims influence a court's decision making.⁷⁷ Instead, courts continue to try to assess all relevant sentencing matters and come to an objective result that balances those factors.

People necessarily have different perceptions and needs and subjective responses to events and processes. Nevertheless, there is a significant and persuasive amount of evidence to indicate that overall a person's sense of fairness including procedural or legal fairness will be 'closely linked to the level and nature of their involvement in the process. If individuals who are treated fairly and respectfully and who are listened to and given a reasonable opportunity to participate will have a much stronger perception that they have been treated fairly and that the process is fair than if they are not so treated, and moreover this trend appears to be present regardless of the outcome of the process. This appears so of litigants and there is no reason to consider that it would be markedly different for victims.⁷⁸

There may be some victims who can provide new information, evidence or 'special insights' into the nature of a person's mental state and the risk they may pose to victims or to others. If there is such evidence then it will have to be properly assessed and challenged. Thus for example if a written statement contained allegations about risk then the victim may need to be examined at a hearing with the prospect of examination by the representative of the forensic patient. The matters put in a victim's statement particularly where they do appear to contain probative or significant evidence would need to be put in the appropriate form to the forensic patient as a matter of procedural fairness. The Tribunal is given broad powers to investigate and determine matters as it sees fit.

Such matters will be clearly relevant to the decision making process of the Tribunal. However, in the majority of cases victims may not be

⁷⁶ Edna Erez & Pamela Tontodonato, above n 1, 467.

⁷⁷ Ibid.

⁷⁸ Edgar Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Fairness* (1988); Edgar Allan Lind, et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court Annexed Arbitration and Judicial Settlement Conferences* (1989); R J MacCoun, Edgar Allan Lind and Tom R Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts* (1992); Andrew Cannon, 'Sorting Out Conflict and Repairing Harm: Using Victim Offender Conferences in Court Processes to Deal with Adult Crime' (2008) 18(2) *Journal of Judicial Administration* 85, 86.

providing additional cogent and probative evidence on matters of risk assessment and the mental state of patients that has a direct or significant impact on the decision making of the Tribunal. Assessing the mental condition of a person is a specialist field and each forensic patient will have a treating team providing regular monitoring and treatment of the patient. Risk assessment is a complex and problematic area that comprises static and non-static assessment. Victims are unlikely to be able to add any expertise to any of these specified tasks.

P Changing the finding of NGMI

One potential reform might be to abolish the finding of NGMI and instead use a finding of guilt but subject to exculpatory mental illness. While this is a superficially attractive idea because it would remove some victims' concerns and emotions involving a not guilty finding it would put into contention very well established principles of our criminal legal system that a person cannot be legally guilty of an offence unless they understood the nature and quality of their acts or knew what they were doing was wrong.⁷⁹ The consequences of making such a change would be immense and while it might please some victims' groups it would further stigmatise those with a mental illness. There is already significant stigmatisation and victimisation of people with a mental illness and such a move would likely only add to those problems.

VI CONCLUSION

The new provisions relating to victims are appropriate and overall provide an effective balance between the interests of victims and the rights and interests of patients and the general community. As discussed above, victims of forensic patients' index offences should have the right to seek to participate in forensic proceedings by written and/or oral submissions. However, it is clear that the right to participate cannot be absolute and must be appropriate to the circumstances of the particular case.

No system of victim input into forensic proceedings will be perfect or satisfy all participants equally all of the time or on occasions any of the time. There will be inevitably differences in views among participants and satisfaction levels will always fluctuate given the subjectivity of participants' expectations and given the task of Tribunals in balancing

⁷⁹ *R v M'Naghten* (1843) 10 CL & F 200; *R v Porter* (1933) 55 CLR 182.

competing rights and interests, particularly of patient and victim. However, it is suggested that the general approach and proposals advocated in this paper will assist in achieving that balance and providing victims with useful and accurate information and education about the forensic system and an appropriate forum and opportunity to contribute to proceedings and decisions about forensic patients.

The value and success of the victims scheme will depend on

- the administrative efficiency of the registration and notification processes;
- the effectiveness of information and education provided to victims;
- the training and education of Tribunal members and staff and other participants in dealing with victims and their commitment to acting accordingly;
- effective practice and procedure principles and guidelines established by Tribunals in relation to victims and issues arising from their participation;
- the management and dispute resolution skills and aptitudes of Tribunal members;
- the ability of Tribunal members to appropriately balance the rights and interests of patients and victims and the general community according to the requirements of the law.

The empirical data suggests that victims should, as much as possible, receive a realistic and clear picture of what their role can be and what role the Tribunal performs. Nevertheless, within those constraints and through effective management and direction from the Tribunal, it will be possible for victims to validly participate in the forensic process without compromising the rights and interests of patients and thereby achieving the optimal therapeutic result for both patient and victims in the circumstances of the particular case. Clearly such a result will often be difficult to obtain. However, it is that constant, delicate balancing of rights and interests that the Tribunal and the system as a whole must try to achieve.

REMEDYING THE PAST OR LOSING INTERNATIONAL HUMAN RIGHTS IN TRANSLATION? – ‘COMPREHENSIVE’ RESPONSES TO AUSTRALIAN NATIONAL SECURITY LEGISLATION REVIEWS

GREG CARNE*

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I INTRODUCTION

In December 2008, the Commonwealth Attorney-General, Robert McClelland, tabled Government responses¹ to the recommendations

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made by four counter-terrorism reviews, which examined controversial national security matters arising during the tenure of the previous Howard government.

Two of those reviews were by independent reviewers: the Clarke Inquiry into the case of Dr Mohamed Haneef² and the Australian Law Reform Commission ('ALRC') Review of Sedition Laws in Australia.³ The other two reviews were the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code⁴ and the PJCIS Review of Security and Counter-Terrorism Legislation.⁵ The Attorney-General announced that there would be *comprehensive* legislative and other responses to these reviews.⁶

Subsequently, the Attorney-General released a discussion paper,⁷ described as a '*comprehensive* discussion paper',⁸ on proposed national security legislative amendments. The release of the Discussion Paper was linked explicitly to the four national security legislation reviews referred to above.⁹

the anonymous referee for comments on a draft of this article.

- 1 Robert McClelland, Attorney-General (Cth) 'Comprehensive Response to National Security Legislation Reviews' (Press Release, 23 December 2008) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases>> at 30 November 2009 ('A-G's Media Release, 23 December 2008').
- 2 M J Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008), ('Clarke Report').
- 3 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report 104 (2006) ('*Fighting Words*').
- 4 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) ('PJCIS 2007 Report').
- 5 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) ('PJCIS 2006 Report').
- 6 A-G's Media Release, above n 1, and its opening sentence.
- 7 The National Security Legislation Discussion Paper (2009) <<http://www.ag.gov.au/>> ('Discussion Paper'). The discussion paper was released by the Attorney-General on 12 August 2009, and was opened for public comment and submissions until 25 September 2009. See A-G (Cth) 'National Security Legislation Discussion Paper' (Press Release, 12 August 2009) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases>> at 30 November 2009.
- 8 See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 2009, 7603 (Robert McClelland, Attorney-General) (emphasis added).
- 9 *Ibid*: 'In December 2008, the Government announced its response to a number of outstanding reviews of national security and counter-terrorism legislation ... At the time, the Government stated that it supported the majority of recommendations made by these reviews ... In addition, the Government also committed to publicly

The enactment of Howard-era national security legislation, which includes the legislation the subject of these reviews, featured two prominent characteristics. These were the paradigm of urgency in the legislative process,¹⁰ as well as asserting compliance of legislation with international human rights law, in spite of considerable contrary evidence.¹¹ The Rudd Government stated that its legislative responses to the reviews would be developed in a 'careful, transparent and consultative manner'.¹² This suggests a clear departure from its predecessor's urgency paradigm, with its distorting consequences for the institutions and practices of representative democracy.

This claim of comprehensiveness of the present Government response to the four outstanding reviews must therefore be tested in its response to and remediation of the Howard government terrorism legislation practice and consequences. This is necessary to discover if there has been any slowing, or reversal, of the concentration of executive control, power and discretion created by this substantial counter-terrorism legislative legacy.¹³ Changing the methodology of enacting legislation by replacing the urgency paradigm, as well as consciously integrating international human rights principles to increase executive accountability, are *important additional factors* in assessing the

release draft legislation implementing the Government's response to these reviews'.

- 10 Andrew Lynch, 'Legislating with Urgency - The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747; Martin Krygier 'War on Terror' in Robert Manne (ed) *Dear Mr Rudd; Ideas For A Better Australia* (2008), 137; Anthony Reilly 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81, 91-95; Greg Carne 'Hasten Slowly: Urgency, Discretion and Review - A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13 *Deakin Law Review* 49; Martin Scheinin, *Australia: Study On Human Rights Compliance While Countering Terrorism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN HRCOR 4th Sess, Provisional Agenda Item 2, [65], UN Doc A/HRC/4/26/Add.3 (2006) ('*Special Rapporteur Report*').
- 11 Greg Carne 'Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government' (2008) 27 *The Australian Year Book of International Law* 11, 13-19.
- 12 On this point regarding the *Discussion Paper* see A-G's Media Release, 12 August 2009, above n 7 and 'Introduction' *Discussion Paper*, above n 7, as well as Commonwealth, *Parliamentary Debates*, above n 8, 7605: 'The government remains committed to developing legislation in a careful and consultative manner'.
- 13 Over 40 pieces of counter-terrorism legislation were passed since 2001: *Chronology of Legislative and Other Legal Developments since September 11 2001* (Parliamentary Library)
<<http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron>> at 29 November 2009.

comprehensiveness of the government response. However, this is not to say that the inclusion of international human rights principles in review and remediation of national security legislative matters is conclusive or definitive of a comprehensiveness of response.

However, attaining a new methodology which gives due recognition to international human rights law principles will provide welcome democratic practice to partly remediate earlier conferrals of broad executive and potentially arbitrary power in Australian national security legislation. It will commence the task of re-instituting control and accountability mechanisms consistent with traditional expectations of Australian liberal democracy. Furthermore, for the response to national security legislation from the Howard era to be genuinely comprehensive, it should transcend these four reviews and anticipate other existing, as well as prospective forms of review of other national security legislation.

By looking more deeply at the question of comprehensiveness of response to reviews of Howard government national security legislation, an assessment can be made of how substantively, rather than rhetorically, comprehensive reform is being pursued by the Rudd government, including prospective reform and standards applied to reform.

Of course, an assumption underpinning the above assessment is that *at some degree*, the legislative and other counter-terrorism measures taken within Australia after the events of September 11, 2001, are a necessary and legitimate response to terrorism. That assumption means that ultimately an assessment of comprehensiveness of government response to terrorism law reviews is founded upon the necessity and legitimacy of measures and their proposed remediation and modification as part of Australian liberal democracy. Whether that assumption is open to challenge on the ground that national and international counter-terrorism measures are merely a pretext and political agenda of an undemocratic concentration of political power is a larger issue¹⁴ beyond the framework of this article. Such assumptions also focus questions about the meaning and operation of the balancing equation invoked by governments, commonly seen as seeking to balance security against individual liberty.

¹⁴ See for example, Michael Head and Scott Mann, *Law in Perspective: Ethics Society and Critical Thinking* (2nd ed, 2009) 411: 'there is much evidence to suggest that the "war on terror" has been declared for definite political purposes, both foreign and domestic, rather than to protect the security of ordinary people'.

Whilst the focus of this article is in examining a ‘comprehensiveness’ of government response in relation to four specific national security legislation reviews, consideration is also given to the fact that the Rudd government has not, as part of that ‘comprehensive response’, engaged with five other completed international reviews applying international human rights principles to aspects of Australian terrorism law which deal with several of the topics raised in the four national security reviews. Two prospective national security reviews are also considered from the perspective of the particular influence that international human rights law might have in providing a genuinely more comprehensive analysis.

II ASSESSING THE ‘COMPREHENSIVENESS’ OF RESPONSES TO REVIEWS: THE LANGUAGE OF ‘BALANCE’ AND THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN THAT ‘BALANCE’

In making assessments of comprehensiveness of legislative responses to review processes, it is important to look towards the scope for interpreting international human rights law as a modifying influence upon relevant legislation, as the legislative reviews make some significant references to that framework body of law.

The language of legislative intention in responding to reviews may provide important indications of the scope available for incorporating the influence of international human rights law into legislative responses. Equally, that language may be too opaque to discern any adoption of international human rights law from the reviews in government responses and legislative proposals.

The Attorney-General stated that the measures announced in response to the reviews ‘are designed to give the Australian community confidence that our law enforcement and security agencies have the tools they need to fight terrorism, while ensuring the laws and powers are *balanced* by appropriate safeguards’.¹⁵ He also claimed that:

Through these changes, Government seeks to ensure changes to counter-terrorism legislation are well considered, *balanced* and suited to the achievement of a just and secure society... I am confident that our implementation measures will achieve the right *balance* between fighting terrorism and protecting the rights of our citizens.¹⁶

¹⁵ A-G Media Release, 23 December 2008, above n 1 (emphasis added)

¹⁶ The Hon Robert McClelland, A-G (Cth), (Speech delivered at the 7th Annual National Security Australia Conference, 23 March 2009)

The language of balance was also consistently used by the Attorney-General with the subsequent release of the *Discussion Paper*:

The amendments proposed in this Discussion Paper seek to achieve an appropriate *balance* between the Government's responsibility to protect Australia, its people and its interests and instil confidence that our laws will be exercised in a just and accountable way ... maintaining this *balance* is an ongoing challenge for all modern democracies in preparing for the complex national security challenges of the future. By striking this *balance*, the Australian community can have confidence in our national security framework.¹⁷

In contrast, the former Howard government Attorney-General, Philip Ruddock, increasingly sought to justify counter-terrorism legislation through a distorted appropriation of the international law concept of human security.¹⁸ This meant that a traditional balancing of security against liberty gave way to a 'different paradigm'¹⁹ whereby the provision of physical safety and security obtained overwhelming precedence as a precursor to the enjoyment of other human rights.

However, the question with the responses of the present Attorney-General to the reviews is different: how, if at all, that stated language of balance accommodates international human rights law principles? The reference to '*balance*' as this reconciliatory device in these comments²⁰ admits of two possible alternatives.

Firstly, the continuation of an existing *balancing* paradigm, the trading off of rights and liberties, with the expectation of advancing security, perhaps with some minor substantive or rhetorical improvements. This

<<http://www.attorneygeneral.gov.au/www/ministers/mccllelland.nsf/Page/Speeches>> at 30 November 2009.

¹⁷ Commonwealth, *Parliamentary Debates*, above n 8, 7603, 7605 (emphasis added). See also very similar language in the Introduction by the Attorney-General to the *Discussion Paper*, above n 7: 'The amendments proposed in this Discussion Paper seek to achieve a balance ... It is a balance that must remain a conscious part of the national security policy process. The Government is committed to ensuring that Australia's national security legislation achieves this balance'.

¹⁸ See Greg Carne, 'Reconstituting 'Human Security' in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1.

¹⁹ Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (Address to the Sydney Institute, 20 April 2004) reprinted in (2004) 16(2) *The Sydney Papers* 113; and see Head and Mann, above n 14, 417-418.

²⁰ See also the balancing principle in the comment 'At the last election, the Rudd Government gave a commitment to ensure Australia has strong counter-terrorism laws that protect the security of Australians while preserving the values and freedoms that are part of the Australian way of life': A-G's Media Release, 23 December 2008, above n 1.

traditional approach of 'balancing' has been the subject of much criticism elsewhere,²¹ as producing a constant attrition of rights as the national security interest takes priority.

Secondly, the reference to 'balance' might be seen as shorthand for the use of international human rights law, as a central guiding principle in the amendment of legislation following the reviews and in the government responses. This is a less likely but not impossible result.

International human rights law significantly informed at least one of the reports²² that are the subject of the Government's 'comprehensive' response. This was because the *PJCIS 2006 Report* reviewed²³ and approved the findings of the Security Legislation Review Committee report²⁴ ('Sheller Committee'), which had stated as its guiding principle

whether the legislation was a *reasonably proportionate means* of achieving the intended object of protecting the security of people living in Australia and Australians living overseas, including protecting them from threats to their lives ... the legislation must be well framed and have sufficient safeguards to stand the test of proportionality and fairness.²⁵

²¹ Simon Bronitt, 'Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Matthew, *Fresh Perspectives on the 'War On Terror'* (2008) 65; Christopher Michaelsen 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1; and International Commission of Jurists, *Assessing Damage, Urging Action Report of the Eminent Jurists panel on Terrorism, Counterterrorism and Human Rights*, 103 ('ICJ Report').

²² *PJCIS 2006 Report*, above n 5.

²³ *Ibid*, [1.6]: 'Subsection 4 (9) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the PJCIS to take into account the Sheller Report. Consequently, the Sheller Report forms an important part of the evidence to this inquiry and reference is made to evidence submitted to that review and to parts of this report where it is appropriate to do so'; [1.8]: '... the PJCIS decided to focus attention on the recommendations and findings of the Sheller Committee'.

²⁴ Security Legislation Review Committee ('Sheller Committee'), Commonwealth Parliament, *Report of the Security Legislation Review Committee* (2006) ('*Sheller Report*').

²⁵ *Sheller Report*, above n 24, 3 (emphasis added). The statement of a 'guiding principle' of reasonable proportionality invokes the international human rights law principle of selecting means (in this instance legislative means) which are proportional to the legitimate end or objective sought to be achieved, with reasonableness describing the selected means as falling within a range of acceptable choices. Through its approval of the *Sheller Report* findings, the *PJCIS 2006 Report* is informed by the international human rights law principle of proportionality adopted by the Sheller Committee as its guiding principle.

In turn, that 'guiding principle'²⁶ was directly informed by the submissions of the Human Rights and Equal Opportunity Commission ('HREOC') to the Sheller Committee, including the use of *balancing* terminology:

HREOC asks this Review Committee to accept that international human rights law is not an optional extra during times of concern about international terrorism. Such an approach implies that human rights are somehow antithetical to issues of national security, necessitating a compromise or trade off. This approach also ignores the fact that international human rights law already strikes a *balance* between security interests and rights considered to be fundamental to the person. International Human Rights Law allows for protective actions to be taken by states, but demands that those actions remain within carefully crafted limits – most notably proportionality.²⁷

That matter was further elaborated in HREOC's supplementary submission to the Sheller Committee²⁸ and HREOC made similar statements in its submission to the PJCIS 2006 review, which reviewed the *Sheller Report*.²⁹

The *Sheller Report* acceptance of testing legislative conformity with international human rights principles, and the subsequent influence of the *Sheller Report* on the *PJCIS 2006 Report*, indicates the potential for a governmental response to national security legislation reviews embodying significant international human rights law influences in legislative amendments. However, given the above two expositions of 'balance', it is probable that there is no clear delineation of the type of model being adopted in the Attorney-General's announcements. The answer most probably lies somewhere between these two 'balancing' alternatives.

This lack of clarity about the uses of 'balance' is also the consequence of a lack of an Australian charter of rights at federal level, against which pre-legislative drafting and legislative scrutiny of national security based legislation for compliance with international rights based standards would routinely occur.

Recent debate about a federal statutory charter of rights has emerged

²⁶ In adopting an international human rights law analysis of counter-terrorism legislation.

²⁷ HREOC, Submission to Sheller Committee, [1.4] (emphasis added).

²⁸ Ibid [13] (emphasis added).

²⁹ HREOC, Submission to PJCIS Review of Security and Counter Terrorism Legislation, 1.

following various official reports at state and territory level,³⁰ the introduction of statutory charters in the Australian Capital Territory³¹ and Victoria,³² and in the release of the *National Human Rights Consultation Report*,³³ which recommended the introduction of a Commonwealth Human Rights Act. Several of the recommendations of the *National Human Rights Consultation Report* (which lists a range of non-derogable civil and political rights³⁴ and additional civil and political rights³⁵ to be included in a federal Human Rights Act) in relation to a Commonwealth statutory charter would provide concrete mechanisms to review and potentially modify national security legislation to conform more closely to international human rights standards.

In particular, these recommendations are that an obligation be imposed on federal public authorities to act in accordance with those rights,³⁶ that the Act require statements of compatibility to be tabled for all Bills introduced into the Federal Parliament,³⁷ that the Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act,³⁸ that the Act contain an interpretative provision that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation,³⁹ that the Act extend only to the High Court the power to make a declaration of incompatibility⁴⁰ and that the Act allow an individual to institute an independent cause of action against a federal public authority for

³⁰ See Australian Capital Territory, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003); Victoria, *Rights Responsibilities and Respect - The Report of the Human Rights Consultation Committee* (2005); Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Final Report No 10 (2007); A WA Human Rights Act: Report Of The Consultation Committee For A Proposed WA Human Rights Act (2007).

³¹ *Human Rights Act 2004* (ACT).

³² *Charter of Human Rights and Responsibilities Act 2006* (Vic).

³³ National Human Rights Committee, *National Human Rights Consultation Report* (2009).

³⁴ *Ibid* xxxv-xxxvi, Recommendation 24.

³⁵ *Ibid* xxxvi-xxxvii, Recommendation 25.

³⁶ *Ibid* xxxiv, Recommendation 20.

³⁷ *Ibid* xxxvii, Recommendation 26.

³⁸ *Ibid* xxxvii, Recommendation 27.

³⁹ *Ibid* xxxvii, Recommendation 28.

⁴⁰ *Ibid* xxxvii, Recommendation 29.

breach of human rights and that a court be able to provide remedies including damages.⁴¹

An earlier concrete example of how a human rights charter can modify the 'balance' in critical national security legislative drafting is to be found in the influence in 2005 of the *Human Rights Act 2004* (ACT) over the formation of Commonwealth, state and territory preventative detention legislation. The ACT Chief Minister's release of the draft COAG bill and various legal advices on it initially prompted a broadly based, critical national public debate.⁴² Subsequently, the legislation enacted in the ACT⁴³ incorporated a greater range of safeguards⁴⁴ and higher standards⁴⁵ in attempting to adhere to the standards of the *International Covenant on Civil and Political Rights* as reflected in the *Human Rights Act 2004* (ACT).⁴⁶

Key points exist in relation to the notion of 'balance' in discussion about national security legislation in the *absence* of a federal charter of rights. Such 'balance' leaves to chance, through a range of circumstantial factors, whether international human rights law will provide any influence or input in obtaining such 'balance'. Secondly, the absence of a required practice of assessing legislative proposals, including national security proposals, against international human rights standards, militates against the development of a culture and expertise whereby those standards enjoy a central role in legislative enactment and review.

Without bureaucratic and political culture being shaped through the a human rights charter to address, reconcile and integrate counter-terrorism and civil and political rights, much chance and conjecture will exist around the meaning of 'comprehensiveness' of legislative response to national security legislation reviews. Comprehensiveness ideally requires institutional capacity in Australian legislative

⁴¹ Ibid xxxviii, Recommendation 31.

⁴² See Greg Carne 'Prevent, Detain Control and Order?: Legislative Process and Executive Outcomes in Enacting The *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 31-32.

⁴³ *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT)

⁴⁴ See Andrew Byrnes and Gabrielle McKinnon 'The ACT *Human Rights Act 2004* and the Commonwealth *Anti-Terrorism Act (No 2) 2005*: A Triumph for Federalism or a Federal Triumph?' (Paper presented at the Expert Workshop 'Ensuing accountability - Terrorist Challenges and State Responses in a Free Society', National Europe Centre, ANU, 20-21 April 2006), 10; Carne, above n 42, 59-60.

⁴⁵ See Carne, above n 42, 32 fn 122.

⁴⁶ Ibid 32.

responses – by giving meaning to the concept of ‘balance’ - be obtained by drawing upon international human rights principles, such as lawfulness, necessity and proportionality, in testing legislative proposals and in subsequent judicial review of the application and operation of legislation.

III INTERNATIONAL HUMAN RIGHTS LAW PRINCIPLES COMPREHENSIVELY FORMING PART OF THAT GOVERNMENT RESPONSE – THE ROLE OF THE REVIEWING BODY

There is a real prospect that ensuring legislative conformity with international human rights principles in responding to legislative reviews will remain both inconsistent and ad hoc, influenced by the extent to which the reviewing body has adopted that framework itself. This is because international human rights law principles are not central to review in all the committee reviews the subject of the Government response.

An adoption by a reviewing body of international human rights analysis in reviewing national security legislation will itself provide an accessible platform for legislative amendment to ensure closer conformity with international human rights principles. In contrast, an absence by a reviewing body of international human rights analysis in reviewing counter terrorism legislation will mean by default, reliance upon the Government itself to incorporate such analysis into its responses and reforms.

This randomness by which international human rights analysis may or may not be incorporated in review work is an inherently unreliable approach. It cannot foster the qualities of *comprehensiveness* of legislative response in relation to the four reviews, let alone comprehensiveness, in the sense of a consistent analysis in ongoing national security legislation reviews and government responses.

Indeed, this lack of a clear delineation of what ‘balance’ really means in the Attorney-General’s announcements may inadvertently produce a further selective internationalism in counter-terrorism legislative formation, characteristic of the Howard years.⁴⁷ The consequences of

⁴⁷ Selective internationalism involves the selective drawing upon international examples to adopt and extend counter-terrorism enabling measures, whilst distinguishing, resisting or rejecting measures promoting human rights accountability and protection. See Greg Carne, ‘Gathered Intelligence or Antipodean Exceptionalism?: Securing the Development of ASIO’s Detention and Questioning

that selective internationalism form part of the Howard legislation subject matter sought to be remedied by responding to the reviews of counter-terrorism legislation. A *new failure* to respond to that legislation by the inclusion of international human rights analysis, previously marginalized in legislative responses, would be ironic within the claim of a comprehensive response.

IV PARALLEL DEVELOPMENTS — A MORE *COMPREHENSIVE* MEANING OF NATIONAL SECURITY WITHIN A RENEWED AUSTRALIA-UNITED NATIONS RELATIONSHIP

The Attorney-General's announcements regarding the comprehensiveness of response to the four reviews also acknowledge the content of the Prime Minister's December 2008 National Security Statement.⁴⁸ The Statement⁴⁹ articulates a more comprehensive conception of national security, making a *comprehensiveness* of response involving international human rights law to present and future reviews more compelling:

As stated by the Prime Minister last year, 'National Security' means freedom from attack or threat of attack, maintaining our territorial integrity, maintaining our political sovereignty, preserving our hard won freedoms and maintaining our capacity to advance economic prosperity for all Australians. 'Threats to National Security' therefore include non-traditional threats such as serious and organized crime, electronic attack and ... natural disaster. In that context, we have specifically acknowledged that climate change will have an impact upon the intensity and frequency of natural disasters ... Second, in response to the broader concept of national security, the Government has re-iterated its commitment to an "all-hazards" approach. By "all-hazards" approach, we mean having agencies well-equipped and ready to detect, deter and/or deal with a crisis or attack on Australia's security of any kind.⁵⁰

The National Security Statement also included a significant appraisal

Regime' (2006) 27 *Adelaide Law Review* 1, 2-3.

⁴⁸ The Attorney-General acknowledges the PM's broadening of 'national security': A-G's Speech, above n 16.

⁴⁹ First National Security Statement to the Parliament, Address by the Prime Minister of Australia The Hon Kevin Rudd MP, 4 December 2008 ('*National Security Statement*'). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (Kevin Rudd).

⁵⁰ A-G's Speech, above n 16. The Attorney-General made further reference to this 'all hazards' approach at the time of release of the *Discussion Paper: Commonwealth Parliamentary Debates*, 12 August 2009, above n 8, 7605.

of the interests at stake — fundamental freedoms and the rule of law — in a balancing exercise.⁵¹ To address the identified shortcomings in how international human rights law is factored into the Attorney-General's balancing language, international human rights law must remain a conscious part of the national security policy process. This is necessary because of function creep⁵² and the expansion of national security subject matters,⁵³ broadening an application of terrorism law principles. With both the actual and potential migration of national security legislative content and approaches to other, particularly criminal law areas,⁵⁴ as well as the expanding conception (and institutional interest of national security agencies in such expansion) of what are classified as national security issues, a moderating role of international human rights law principles becomes all the more compelling.

Any significant gaps in international human rights analysis in the responses to the four existing reviews (or indeed in conducting or implementing subsequent reviews) should be identified so that review

⁵¹ *National Security Statement*, above n 16, under the heading 'The principles of Australian national security', 2-3 (emphasis added).

⁵² Synonyms for this phenomenon include 'seepage', 'migration', 'colonising', 'modelling', 'bleeding' and 'snowballing'. What is being identified are the existing legislated national security methodologies and techniques being used as a model for expanding both national security subject matter as well as extending these methodologies and techniques into criminal law and other regulatory environments.

⁵³ See the extract in the text at n 50. The *National Security Statement* lists non-terrorism, 'non-traditional threats or new security challenges' including transnational crime, border security, people smuggling, cyber attacks and information technology vulnerability, climate change, declining food production, violent weather patterns, population movements and energy security as national security matters: *National Security Statement*, above n 49, 5-6. A recent example is the further enlargement of ASIO's role to include border protection: see Joint Media Release Attorney-General, Minister for Immigration and Citizenship and Minister for Home Affairs 'Legislation To Combat People Smuggling' (23 February 2010) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Media_Releases> at 3 March 2010: 'The *Anti-People Smuggling and Other Measures Bill 2010* ... will support the Government's multi-pronged approach to combating people smuggling by enabling the Australian Security Intelligence Organisation (ASIO) to specifically investigate people smuggling and other serious border security threats. The Bill will also enable Australia's national security agencies to collect foreign intelligence about non-State actors, including people smugglers and their networks'.

⁵⁴ An example is the adoption of control orders, the declaration of organisations and association prohibitions in State legislation purportedly directed against motorcycle gangs in the *Serious and Organised Crime (Control) Act 2008* (SA) — see *Totani and Another v South Australia* (2009) 259 ALR 673. Special leave to appeal has been granted by the High Court against the majority finding of legislative invalidity by the Full Court of the Supreme Court of South Australia.

responses might achieve genuine ‘comprehensive’ standards. Identified gaps may be traced to the degree in which international human rights law principles were insufficiently applied in the conduct of the original review. If this assessment does not occur and if in future reviews suitable criteria are not adopted to test legislative changes against international human rights principles, it would be incorrect to suggest that Government responses are fully ‘comprehensive’.

A further reason supporting the principle that international human rights law should be systematically factored into Government responses is premised in the Rudd government’s affirmed commitment to re-engagement with United Nations institutions. Various expressions of this were made by the Prime Minister,⁵⁵ the Attorney-General⁵⁶ and the Minister for Foreign Affairs.⁵⁷

This matter is of particular importance for Australian national security legislation and policy reform if these United Nations assertions are to be substantively, rather than rhetorically, achieved. This is because the United Nations has been the principal advocate of integrated human rights approaches (in contradistinction to balancing approaches) in

⁵⁵ ‘The Principles of Australian national security’ in *National Security Statement*, above n 49.

⁵⁶ A-G speeches: Robert McClelland, ‘Australia and International Human Rights: Coming in from the Cold’ (Speech delivered at the Human Rights and Equal Opportunity Commission, Sydney, 23 May 2008) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches>> at 30 November 2009; Robert McClelland, ‘Strengthening Human Rights and the Rule of Law’ (Speech delivered at the Human Rights Law Resource Centre, Malleons Stephen Jacques, 7 August 2008) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches>> at 30 November 2009; Robert McClelland, ‘Melbourne Law School Function’ (Speech delivered at the Melbourne Law School Student Centre, Melbourne University, 21 August 2008) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches>> at 30 November 2009; Robert McClelland, ‘Human Rights under a Rudd Labor Government - What will be different?’ (Speech delivered at the Banks/Barton FEC Regional Forum, 17 November 2008) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches>> at 30 November 2009; Robert McClelland, ‘Human Rights: A Moral Compass’ (Speech delivered at the Lowy Institute for International Policy, Sydney, 22 May 2009) <<http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches>> at 30 November 2009.

⁵⁷ Attorney-General and Minister for Foreign Affairs, ‘Invitation to United Nations Human Rights Experts’ (Joint Press Release, 8 August 2008) <<http://www.foreignminister.gov.au/releases/2008/fa-s080808.html>> at 30 November 2009.

counter-terrorism legislative and other responses.⁵⁸

Firstly, this is a position which reflected in the language and structure of the articles of the *International Covenant on Civil and Political Rights*, the primary international human rights law treaty referred to in the four Australian national security legislation reviews and in submissions to those reviews, providing the standards for analysing the Australian legislation. The *ICCPR* articles provide for a range of non-derogable rights⁵⁹ and derogable rights,⁶⁰ many of which are of potential and direct relevance in the application of counter-terrorism laws.⁶¹ The derogable *ICCPR* rights are subject to two sets of potential limitations. The first is a set of general limitations (for truly exceptional circumstances), which arises under Article 4 of the *ICCPR*.⁶² The second are common limitations (including on occasions that relating to

⁵⁸ An excellent summary of these principles is contained in the United Nations Office of the High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, Fact Sheet No 32
< <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>>.

See especially (as relevant to the ensuing discussion in this article) Chapter II, Human Rights and Counter-Terrorism under the headings 'A The promotion and protection of human rights while countering terrorism' and 'B The flexibility of human rights law'.

⁵⁹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) ('*ICCPR*'): art 6 (Right to life), art 7 (Freedom from torture or cruel, inhuman and degrading treatment or punishment), art 8 (Freedom from slavery and servitude), art 11 (Freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation), art 15 (Prohibition of guilt for retrospective criminal law), art 16 (recognition as a person before the law) and art 18 (right to freedom of thought, conscience and religion). By definition, non-derogable rights cannot be qualified or subtracted from.

⁶⁰ These are the remaining *ICCPR* rights (other than the non-derogable rights) commencing with Article 9 (liberty and security of the person).

⁶¹ For example, *ICCPR* art 7 (Freedom from torture or cruel, inhuman or degrading treatment or punishment), art 9 (Liberty and security of the person and freedom from arbitrary arrest and detention), art 10 (those deprived of liberty to be treated with humanity and respect for inherent human dignity), art 14 (rights of due process and a fair and public hearing by a competent, independent and impartial tribunal established by law), art 18 (Freedom of thought, conscience and religion), art 19 (Freedom of opinion and expression) and art 22 (Freedom of association).

⁶² Article 4, para 1 of the *ICCPR* states 'In time of *public emergency which threatens the life of the nation and the existence of which is officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent required by the exigencies of the situation, provided that such measures are *not inconsistent with their other obligations under international law* and do *not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*'. The italicized words indicate the constraints upon derogation from the derogable articles.

national security), which are contained within a range of individual *ICCPR* articles,⁶³ typically permitting restrictions as provided by law and necessary in a democratic society for identified interests.⁶⁴ The inclusion of lawfulness is intended to safeguard against arbitrary impositions and the requirement of necessity imports a test of proportionality between means adopted towards the objectives sought. In other words, national security and other objectives sought at the intersection with specific human rights are able to be constrained in a way that positively contributes to maintaining democratic values.

Importantly, the *ICCPR* provides a potential framework by which incursions on human rights may be strictly controlled by tests relating to legality, proportionality and necessity. These principles are embedded in the language of the articles and further supported by the Human Rights Committee's⁶⁵ jurisprudence under the First Optional Protocol⁶⁶ and its issuing of General Comments⁶⁷ expounding the principles of the individual *ICCPR* articles and its States Parties reporting process to the Human Rights Committee.⁶⁸

Secondly, an integrated human rights approach in counter terrorism policy and legislation is also consistently reflected in the approach advocated by several different United Nations institutional bodies and forums engaging with the intersection of terrorism and human rights.⁶⁹

⁶³ See, eg, *ICCPR* arts 12, 13, 14, 19, 21 and 22.

⁶⁴ See, eg, the limitations 'which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others' in *ICCPR* arts 21 and 22, and similar phrases in *ICCPR* arts 18 and 19.

⁶⁵ The Human Rights Committee is established under Article 28 of the *ICCPR*.

⁶⁶ State Parties to the First Optional Protocol recognise the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any rights set forth in the Covenant: *First Optional Protocol To The International Covenant on Civil and Political Rights* (1966) 999 UNTS 302, art 1 (entered into force 23 March 1976). Australia recognized the competence of the Human Rights Committee to receive and consider individual communications in 1991.

⁶⁷ The Human Rights Committee has issued 33 General Comments, being its interpretation of the content of the articles of the *ICCPR*. For example, General Comment 8 on *ICCPR* art 9 - right to liberty and security of the person emphasizes that the article applies to all deprivations of liberty, that such deprivation must not be arbitrary, it must be based on grounds and procedures established by law, that reasons must be given, that court control of the detention must be available and that compensation must be available in the event of breach.

⁶⁸ See *ICCPR* art 40.

⁶⁹ For example - UN General Assembly Resolutions; UN Security Council Resolutions; UN Secretary General statements in relation to review of UN institutions; UN Treaty

These institutional bodies and forums include the General Assembly,⁷⁰ the Security Council,⁷¹ the Secretary General,⁷² the Counter-Terrorism Committee⁷³ the Office of the High Commissioner for Human Rights,⁷⁴ the Human Rights Council⁷⁵ and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁷⁶ These bodies and forums have reflected a

bodies - Human Rights Committee, *Convention Against Torture* Committee, *Convention on the Elimination of Racial Discrimination* Committee; UN High Commissioner for Human Rights; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

⁷⁰ *United Nations Global Counter Terrorism Strategy*, GA Res 60/288 UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/288 (2006).

⁷¹ Security Council Resolutions subsequent to SC Res 1373 UN Doc S/RES/1373 (2001) have cautioned the need to implement counter-terrorism measures in a manner that respects international law, in particular international human rights, refugee and humanitarian law. See the following UN SC Resolutions: SC Res 1456 UN Doc S/RES/1456 (2003), SC Res 1566 UN Doc S/RES/1566 (2004) and SC Res 1624 UN Doc S/RES/1624 (2005), which influence the interpretation of SC Resolution 1373.

⁷² *Uniting Against Terrorism; Recommendations for a global counter-terrorism strategy: Report of the Secretary-General*, UN Doc A/60/825 (2006); General, *Protecting human rights and fundamental freedoms while countering terrorism: Report of the Secretary-General*, UN Doc A/60/374 (2005).

⁷³ *Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate*, [13] UN Doc S/2005/800 (2005) and Policy Guidance PG.2 of Counter Terrorism Committee of 26 May 2006, UN Doc S/AC.40/2006/PG.2 (2006).

⁷⁴ *Human rights: a unifying framework: Report of the UN High Commissioner for Human Rights*, 27 February 2002, UN Doc E/CN.4/2002/18; 'High Commissioner for Human Rights Calls for Balancing Anti-Terrorism Efforts With Respect For Rights' (UN Press Release, 20 March 2002); 'Proposals for 'Further Guidance' for submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 - Compliance with International Human Rights Standards, 1. General Guidance: Criteria for balancing of human rights protection and the combating of terrorism, UN Doc E/CN.4/2002/18 Annex (2002); High Commissioner for Human Rights, Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on the Counter-Terrorism Measures; Security Under the Rule of Law (September, 2002); Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, 16 February 2006; *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, 2 June 2008, UN Doc A/HRC/8/13; Launch of the *Report of the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* by UN High Commissioner for Human Rights, 16 February 2009.

⁷⁵ Statements made by the mandates of bodies absorbed and replaced by the new UN Human Rights Council: *Terrorism and human rights*, Sub-Commission on Human Rights Resolution 2004/21, 12 August 2004; and *Protection of human rights and fundamental freedoms while countering terrorism*, Human Rights Resolution 2005/80 (Commission on Human Rights).

⁷⁶ For example, Martin Scheinin, *Promotion and Protection of All Human Rights, Civil*,

view that human rights and counter terrorism are not mutually exclusive or antipathetic, but that their integration is intrinsic to effective counter terrorism legislative and policy development.

Both of these major examples – human rights treaty based and human rights institutional based responses – provide a firm rejoinder to the suggestion that their particular usages of international human rights law would, if applied, make little difference in restraining the diminution of democratic practices and institutions through opportunistic counter-terrorism enactments in a war on terrorism. Instead, the real question is one of the preparedness, in this particular instance, of the Rudd government to incorporate these principles within any ‘comprehensive’ response to the four national security legislative reviews and beyond.

In addition to these points, Howard government influence of Australia’s interaction with the United Nations human rights treaty system⁷⁷ and its preferred model for the protection of human rights⁷⁸ in marginalising international human rights law in terrorism legislation, must also be seen as a point of contradistinction from which the comprehensiveness of Rudd government responses to the four reviews can be assessed.

In considering the claim of comprehensiveness of government response to the four outstanding reviews from the Howard government, the above principles are important indications of a particular degree of comprehensiveness – that is, have the government responses absorbed, or been crafted in response to, relevant aspects of international human rights law? Alternatively, is the matter left to chance, requiring government of its own initiative, or in response to interest group or individual submissions, to incorporate international human rights law analysis as part of a comprehensive

Political, Economic, Social and Cultural Rights, Including The Right To Development: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/10/3 (2009).

⁷⁷ See Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs ‘Australian Initiative to Improve the Effectiveness of UN Treaty Committees’, Joint Press Release, 5 April 2001; Minister for Foreign Affairs and Attorney-General ‘Progress Made To Reform UN Treaty Bodies’, Joint Press Release, 9 March 2006 with attached report *Reform of the United Nations Treaty Body System: Australian Initiatives*.

⁷⁸ A-G’s Department, *Australia’s National Framework For Human Rights National Action* (2005) emphasising representative and responsible government, and parliamentary doctrines and institutions, as the most effective human rights protection mechanisms.

response to the issues identified in the reviews? It is to a brief examination of Rudd government responses to each of the four reviews of Howard government legislation that our attention now turns. A tentative conclusion able to be made is that with the subsequent release of the *Discussion Paper* and its draft legislation,⁷⁹ the apparent influence of international human rights law principles, where previously raised in the four reviews, in ensuring balanced and comprehensive national security legislative reform, is inconsistent between reviews.

V ASSESSING THE 'COMPREHENSIVENESS' OF GOVERNMENT RESPONSES: THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS LAW IN THE FOUR NATIONAL SECURITY LEGISLATION REVIEWS AND SUBSEQUENT DEVELOPMENTS

A *Responding to the Clarke Inquiry into the Case of Dr Mohamed Haneef*

The Attorney-General announced that the Government accepted and would implement all ten⁸⁰ of the Clarke Inquiry⁸¹ recommendations of the Inquiry into the Case of Dr Mohamed Haneef.⁸² Of greatest significance for present purposes is the Inquiry's recommendation about the operation of Part 1C of the *Crimes Act 1914* (Cth), in conjunction with the powers of arrest under s 3W of the *Crimes Act 1914* (Cth).

Of critical moment in Part 1C is the operation of the 'dead time' provisions,⁸³ particularly s 23CA(8)(m) which allows investigating officials to disregard

any reasonable time that

(i) is a time during which the questioning of the person is reasonably

⁷⁹ See exposure draft, *National Security Legislation Amendment Bill 2009*.

⁸⁰ Attorney-General (Cth), 'Statement on the tabling of the Government's response to reviews of national security legislation and the public report of the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef', (Speech delivered at Commonwealth Parliamentary Offices, Sydney on 23 December 2008) <<http://www.attorneygeneral.gov.au/www/ministers/mccllland.nsf/Page/Speeches>> at 30 November 2009.

⁸¹ *Clarke Report*, above n 2.

⁸² See Stephen Keim, 'Dr Haneef and me' (2008) 33 *Alternative Law Journal* 99.

⁸³ During which, time is not counted as investigatory purposes time of an arrested person under s 23CA (4)(b) and s 23DA of the *Crimes Act 1914* (Cth).

suspended or delayed; and

(ii) is within a period specified under section 23CB.

Section 23CB applies if the person mentioned in paragraph 23CA(8)(m) is detained under subsection 23CA(2) for the purpose of investigating whether the person committed a terrorism offence. These provisions operatively led to the 12-day detention of Dr Haneef⁸⁴ – relevantly section 23CB (2) states:

At or before the end of the investigation period, an investigating official may apply for a period to be specified for the purpose of subparagraph 23CA(8)(m)(ii).⁸⁵

The *Clarke Report* stated in Recommendation 3,

That the provisions of Part 1C of the *Crimes Act 1914* in relation to terrorism offences and the association of those provisions with s 3W of the Act be reviewed in the light of the discussion in Chapter 5 and relevant provisions of the United Kingdom's *Terrorism Act 2000*.⁸⁶

The Government responded by stating that

it has requested the Attorney-General's Department to conduct a review of the relevant provisions in Part 1C, and their interaction with s 3W of the Crimes Act, taking into account the issues raised in the Clarke Inquiry report ... the review will involve public consultation through a discussion paper to be released in the first half of 2009.⁸⁷

The *Discussion Paper* referred to subsequently invited public consultation and proposed placing a 'seven day cap ... on the amount of time that can be disregarded under paragraph 23DB (8)(m) (current 23CA(8)(m))'.⁸⁸

⁸⁴ For the Haneef chronology, see Maurice Blackburn Lawyers, Submission to the Clarke Inquiry, 3-10 <<http://www.haneefcaseinquiry.gov.au/>>. See also *Clarke Report*, above n 2, 238 indicating detention under Part 1C of the *Crimes Act* 'for the period 2 to 13 July 2007 before being charged with a terrorism offence on 14 July 2007' and *Clarke Report*, above n 2, 238, fn 19.

⁸⁵ After the maximum allowable investigation period extension had been obtained under s 23DA of the *Crimes Act*, four applications were made under s 23CB to specify dead time. After the adjournment for 48 hours of the fourth dead time application, '240 hours of dead time had been allowed or had elapsed' – meaning that the total detention period was 264 hours or 11 days: *Clarke Report*, above n 2, 247-248.

⁸⁶ *Clarke Report*, above n 2, Recommendation 3, 255 and *Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef - December 2008* <http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008> ('*Clark Inquiry Government Response*'), Point 3 - Issues relating to legislation.

⁸⁷ *Clarke Inquiry Government Response*, above n 86, Point 3 - Issues relating to legislation.

⁸⁸ *Discussion Paper*, above n 7, 127 and generally, *Discussion Paper*, above n 7, 123-135.

The important statement in the above quotation is 'Taking into account the issues raised in the Clarke Inquiry report'. Several important issues relating to the legislation's deficiencies were identified, with the reporter acknowledging the 'invaluable assistance I received from the written submissions lodged with the Inquiry and the papers delivered at public forums.'⁸⁹ The methodology of the chapter of the *Clarke Report* dealing with legislative deficiencies is adopted within the framework of the fourth term of reference:

[H]aving regard to (a), (b) and (c), any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines.⁹⁰

The terms of reference would therefore admit consideration of international human rights law in assessing those deficiencies, enabling that perspective to be factored into the Government's 'comprehensive review' of the provisions. However, the reviewer's working methodology was more modest,⁹¹ its assumption a traditional balancing model of civil liberties and response to terrorism,⁹² inspired by the keynote address of former High Court Chief Justice Sir Gerard Brennan.⁹³

⁸⁹ *Clarke Report*, above n 2, 231.

⁹⁰ Clarke Inquiry, Term of Reference 'd'. The Inquiry was also to examine and report on (a) the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and the issue of a criminal justice stay certificate; (b) the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters; and (c) the effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Terms_of_Reference>.

⁹¹ 'The approach I took ... is to identify deficiencies that have sufficient connection to Dr Haneef's case ... I analysed those provisions that are relevant to an exposure of what I perceive to be deficiencies, at least problem areas': *Clarke Report*, above n 2, 231. This approach is in contrast to the use of the international human rights law principle of proportionality in the *Sheller Report* and subsequently in the *PJCIS 2006 Report*, which reviewed the *Sheller Report*: see the discussion under the heading 'Assessing the 'comprehensiveness' of responses to reviews: the language of 'balance' and the role of international human rights law in that 'balance'.

⁹² *Clarke Report*, above n 2, 231, citing Brennan J in *Alister v The Queen* (1984) 154 CLR 404, 456, 'that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty'.

⁹³ Sir Gerard Brennan, Opening Address to the Clarke Inquiry Public Forum, 22 September 2008 <<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Transcripts>>.

Two of the four papers at the Inquiry Public Forum raised *ICCPR* Article 9 human rights issues in relation to the *Crimes Act 1914* (Cth) provisions - the Law Council presentation⁹⁴ and the presentation of Dr Ben Saul.⁹⁵ Submissions to the Clarke Inquiry also raised international human rights law issues in relation to the provisions of the *Crimes Act 1914* (Cth). Of particular significance was the HREOC submission,⁹⁶ which provided a detailed analysis of the provisions of Part 1C, Division 2 of the *Crimes Act 1914* (Cth) by applying the requirements of Articles 9(1)⁹⁷, 9(2)⁹⁸ and 9(3)⁹⁹ of the *ICCPR*.

However, these HREOC international human rights law analyses are not overtly included in the relevant discussion in the Clarke Report and its Recommendation 3,¹⁰⁰ nor in the Government response to the *Clarke Report*. Similarly, no indication was given that the Attorney-General's department would be required to give direct consideration to this type of *ICCPR* analysis as part of its 'comprehensive review', within the review methods occasioned by the release of the *Discussion Paper*.

Therefore, international human rights law analysis became a matter for relevant submissions during the public consultation period in response

⁹⁴ 'Policing in the Shadow of Australia's Anti-Terror Laws', Law Council of Australia, Presentation to the Clarke Inquiry Public Forum, 22 September 2008, 6.

⁹⁵ Analysis of the dead time sections 23CA and 23 CB of the *Crimes Act 1914* (Cth) as infringing the right to freedom from arbitrary detention under Article 9 of the *ICCPR*): Ben Saul, Presentation to the Clarke Inquiry Public Forum, 22 September 2008, <<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Transcripts>>.

⁹⁶ HREOC, Submission of the Human Rights and Equal Opportunity Commission to the Clark Inquiry on the Case of Dr Mohamed Haneef, May 2008 <http://www.hreoc.gov.au/legal/submissions/2008/200805_haneef.html>.

⁹⁷ *Ibid* [12], [13]. Article 9, paragraph 1 states 'Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'.

⁹⁸ *Ibid* [16]. Article 9, paragraph 2 states 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.

⁹⁹ *Ibid* [17]-[19]. Article 9, paragraph 3 states 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.'

¹⁰⁰ *Clarke Report*, above n 2, Recommendation regarding dead time provisions in the *Crimes Act 1914* (Cth).

to the *Discussion Paper*.¹⁰¹ This situation indicates the point that the 'comprehensiveness' of the Government response cannot be assumed, but requires scrutiny as to what that response encompasses.¹⁰² In this respect it is significant that the reviewing department, Attorney-General's, is the same department which denied before a Senate Committee that enactment of the dead time provisions¹⁰³ could result in extended detention,¹⁰⁴ which might comprise arbitrary detention under international human rights law. Yet the Attorney-General's Department continued to display a relaxed attitude on this point in its submission to the Clarke inquiry in the face of demonstrated inefficacy in the Haneef matter of the 'safeguard' of judicial oversight:

The Department is aware of publicly stated concerns that the length of time Dr Haneef was held under the provisions of Part 1C of the Crimes Act was significantly longer than that foreshadowed by the Department to the Senate Legal and Constitutional Legislation Committee which enquired into proposed amendments to Part 1C. Comments made by the Department to the Committee related to an earlier version of the provisions concerning detention periods – which did not provide for judicial oversight – and not to the version as passed by Parliament. The current regime with its provision of judicial oversight provides accountability of the actions of investigating officers and ensures that any period of investigative detention is appropriate to the particular circumstances of the case, and at the same time certain.¹⁰⁵

In assessing a comprehensiveness of Government response in relation to proposed amendments to the relevant sections of the *Crimes Act 1914* (Cth),¹⁰⁶ which only partly ameliorate concerns raised in various

¹⁰¹ *Clarke Inquiry Government Response*, above n 86, Point 3, second column. See also reference to public consultation from the *Discussion Paper*, above n 7, in the text of this article at above n 87.

¹⁰² The *Discussion Paper* on this point at best invokes only two comparisons – being the United Kingdom and Canada – as to the maximum period of detention without charge in relation to the investigation of an alleged terrorism offence: see *Discussion Paper*, above n 7, 127.

¹⁰³ *Anti-Terrorism Act 2004* (Cth). The legislation came into force on 30 June 2004.

¹⁰⁴ See, in relation to the removal by the *Anti-Terrorism Act 2004* (Cth) of the 12 hour (in total) time limit on pre-charge detention, Senate Legal and Constitutional Legislation Committee, *Hansard*, 30 April 2004, 29, 35-36.

¹⁰⁵ Attorney-General's Department, Submission to the Clarke Inquiry into the case of Dr Mohamed Haneef, 4-5
<<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Pages/Submissions>>.

¹⁰⁶ See Exposure Draft, National Security Legislation Amendment Bill 2009, Schedule 3 - Investigation of Commonwealth offences.

submissions to the Clarke inquiry, two critical factors emerge.

First, the omission in the Clarke Report of overt consideration and articulation of Article 9 *ICCPR* analysis against the *Crimes Act 1914* (Cth) provisions relating to 'dead time' has allowed significant legislative drafting latitude to the Commonwealth in its draft bill, as well as for some important matters affecting potential compliance with the *ICCPR* proportionality requirements not to be addressed. The fact that critical issues are not supported and articulated by the international human rights law analysis available to the Clarke review in the submissions to the review, conveys a message that something less than a rigorous and systematic line by line legislative reform of the 'dead time' provisions is satisfactory.

There is also a reluctance and hesitation in the Clarke Report to make a definitive recommendation about capping the maximum detention time¹⁰⁷ when referenced to various suggestions about the duration of detention time.¹⁰⁸ Instead, the relevant recommendation was for general review, without adequately recommending the precise terms of the review or the importance that the review be entirely independent of government.¹⁰⁹

Second, the fact that, in contrast to the sedition provisions of the *Criminal Code* (Cth), the review was not conducted by an independent body such as the ALRC, but instead was a consultative review by the Attorney-General's department, is likely to mean that amendments to the *Crimes Act 1914* (Cth) 'dead time' provisions – based on the draft bill – are not as extensive as they might otherwise have been. It also meant that the *Discussion Paper* content (and its companion Exposure Draft of the National Security Legislation Amendment Bill (2009) on the 'dead time' issue is consistent with the Clarke Report in not shaping and articulating the reforms by reference to international human rights principles.

In consequence, only some, but not comprehensive, changes have been made in the draft legislation, which coincidentally conform with the

¹⁰⁷ See *Clarke Report*, above n 2, 249: 'I believe that both a cap and judicial oversight are necessary. That said, I do not understand my task as requiring me to put forward a specific recommendation as to the allowable time. If pressed ... I would tend to say the cap should be no more than seven days'.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, xii Recommendation 3: 'The Inquiry recommends that the provisions of Part 1C of the *Crimes Act 1914* in relation to terrorism offences and the association of those provisions with s 3W of the Act be reviewed in the light of the discussion in Chapter 5 and relevant provisions of the United Kingdom's *Terrorism Act 2000*.'

Article 9 ICCPR principles.

The changes leading to greater conformity with non-arbitrariness and legality are the inclusion of a maximum time limit on pre-charge detention through capping the amount of time that may be disregarded for the investigative period;¹¹⁰ the right by the person detained or his or her legal representative to make representations both about applications for disregarded time¹¹¹ and applications for extension of the investigation period;¹¹² and the removal of non-judicial persons, namely bail justices and justices of the peace, from authorizing periods of disregarded time.¹¹³

However, the draft legislation also displays a potential failure to meet other non-arbitrary and legal requirements under Article 9 ICCPR principles. Article 9 arbitrariness, as understood within the meaning of relevant jurisprudence,¹¹⁴ may continue to arise because of the potential maximum length of the pre-charge detention is eight days;¹¹⁵

¹¹⁰ Exposure draft, *National Security Legislation Amendment Bill 2009*: s 23DB(11): ‘No more than 7 days may be disregarded under paragraph (9)(m) in relation to an arrest’. When read in conjunction with the specified investigation periods for terrorism offences in s 23DB(5)(b) ‘4 hours’ and s 23DF (7) ‘The investigation period may be extended any number of times but the total of the periods of extension cannot be more than 20 hours’, the maximum period of post arrest detention time is eight days.

¹¹¹ Exposure draft, *National Security Legislation Amendment Bill 2009*, s 23DC(6).

¹¹² Exposure draft, *National Security Legislation Amendment Bill 2009*, s 23DE(5).

¹¹³ Exposure draft, *National Security Legislation Amendment Bill 2009*, s 23DD(2); see also s 23DC(2).

¹¹⁴ *Mukong v Cameroon*, CCPR/C/51/D/458/1991, *Human Rights Committee*, UN Doc 458/1991 (1994): ‘arbitrariness must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law’ (see also Amnesty International Australia, Submission to the Clarke Inquiry into the Case of Dr Mohamed Haneef, [6]; *Melnikova v Russia* [2007] Eur Court HR, (App 24552/02, 21 June 2007) arbitrariness arises if the detention is unpredictable in its duration, and be foreseeable and certain in its application (see also Saul, above n 95, 5); *Van Alphen v Netherlands*, UN Doc 305/88 (1994) (Human Rights Committee) [5.8]: ‘arbitrariness is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances’.

¹¹⁵ The UN Human Rights Committee in its General Comment 8 on Article 9 of the ICCPR states its opinion that the Art 9, paragraph 3 requirement that persons arrested or detained be brought promptly before a judge authorised by law to exercise judicial power and empowered to order release means that delays ‘must not exceed a few days’. Under the draft legislation (and apart from a right to make representations before a magistrate concerning applications for specification of periods of disregarded time and for applications seeking to extend the investigation period), the obligation to bring before a judicial officer empowered to release the

that there are significant limits on information available to a person or the person's legal representative hindering effective representations being made to the magistrate regarding applications for disregarded time¹¹⁶ and applications for the extension of the investigation period;¹¹⁷ that the grounds upon which an application for specification of disregarded time can be made remain broad and vague;¹¹⁸ that similarly, the grounds upon which the magistrate may specify a period of disregarded time upon receipt of that application are also broad and vague;¹¹⁹ and that the time spent in making and disposing of an application for disregarded time itself counts as disregarded time,¹²⁰ thereby deterring the making of detailed representations by the detainee or his or her legal representative in either instance.¹²¹

B *Responding to the ALRC Report Fighting Words: A Review of Sedition Laws in Australia*

The ALRC review of sedition laws¹²² was conducted after swift enactment of the Anti-Terrorism Bill (No 2) 2005 (Cth), following a commitment by the then Attorney-General to review the sedition

detainee arises elsewhere: See Exposure draft, National Security Legislation Amendment Bill 2009 s 23DB(4): 'If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period, or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period'.

¹¹⁶ See Exposure draft, National Security Legislation Amendment Bill 2009 s 23DC(5) and s 23DD(4); Amnesty International Australia, Submission to the Clarke Inquiry into the Case of Dr Mohamed Haneef, 7; HREOC, above n 93, 5.

¹¹⁷ See Exposure draft, National Security Legislation Amendment Bill 2009 s 23DE(4) and s 23DF(4).

¹¹⁸ Saul, above n 95, 5 described the existing legislation grounds as 'numerous, variable and unpredictable'. See the equivalent section to the previous section applied in the Haneef matter: Exposure draft, National Security Legislation Amendment Bill 2009 s 23DB(9)(m) 'subject to subsection (11) where the time is within a period specified under s 23DD, so long as the suspension or delay in the questioning of the person is reasonable'. Section 23DC(4)(e) provides a broad range of non-exhaustive *examples* of 'the reasons why the investigating official believes the period should be specified', reflecting the genesis of these broad statements in original 2004 draft bill's more precise dealing with the issue for investigators of differences in international time zones.

¹¹⁹ Exposure draft, National Security Legislation Amendment Bill 2009 s 23DD(2)(a) to (f).

¹²⁰ Exposure draft, National Security Legislation Amendment Bill 2009 s 23DB(9)(h); See also Saul, above n 95, 5.

¹²¹ See Saul, above n 95, 5.

¹²² See *Fighting Words*, above n 3, 104.

offences in the bill¹²³ and the later announcement of the review.¹²⁴ However, tabling in Parliament of the ALRC report¹²⁵ did not lead to Howard government action to implement its provisions.¹²⁶

The ALRC review of sedition laws drew extensively upon international human rights law analysis of freedom of expression and the necessity-proportionality test under Article 19 of the *ICCPR*.¹²⁷ The inclusion of this analysis was prompted by various submissions made to the earlier Senate Legal and Constitutional Affairs Committee Inquiry into the Anti-Terrorism Bill (No 2) (2005) (Cth) arguing that its new sedition offences may be inconsistent with Article 19 of the *ICCPR*,¹²⁸ as well as the fact that the Attorney-General's department alone submitted that the sedition offences complied with Article 19 of the *ICCPR*.¹²⁹

Critical discussion is undertaken of the nature of the relationship between Article 19(2),¹³⁰ and the necessity-proportionality

¹²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (Philip Ruddock) and Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 88 (Philip Ruddock). For sedition offences analysis see Simon Bronitt and James Stellios 'Sedition, Security and Human Rights: 'Unbalanced' Law Reform In The 'War On Terror'' (2007) 30 *Melbourne University Law Review* 923.

¹²⁴ Philip Ruddock, 'ALRC to Review Sedition Laws' and Attachment 'Review of Sedition Laws' (Press Release, 2 March 2006).

¹²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2006, 83-84 (Tony Abbott).

¹²⁶ Philip Ruddock, 'ALRC Report on Sedition Laws Tabled' (Press Release, 13 September 2006). The ALRC report was still listed on the House of Representatives notice paper over a year later: Commonwealth, *Notice Paper*, House of Representatives, 19 September 2007. See Greg Carne, above n 10, 75-76.

¹²⁷ See *Fighting Words*, above n 3, [5.23] to [5.58], 107-117. Article 19 of the *ICCPR* states that (1) Everyone shall have the right to hold opinions without interference (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds... (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order or of public health or morals.

¹²⁸ See ALRC, *Review of Sedition Laws*, Issues Paper 30, (2006) [5.28] and *Fighting Words*, above n 3, 111, [5.37].

¹²⁹ ALRC, Issues Paper 30, above n 128, [5.34]; A-G's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 6; A-G's Department, *Submission 290B to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 24 November 2005, 3.

¹³⁰ 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

requirements of Article 19(3).¹³¹ Subsequently, two sets of *ICCPR* based reforms are advanced by the ALRC, one in relation to clarifying intention in a set of offences,¹³² the other in relation to the level of assistance properly required to constitute sedition¹³³ and treason based offences.¹³⁴

The Government response to the ALRC recommendations appeared to accept the recommendations in relation to both sets of offences comprehensively.¹³⁵ There remains the translation of these principles into legislation, but every indication is that these reforms will more closely adhere to *ICCPR* standards. Subsequently, the *Discussion Paper* very closely follows the ALRC recommendations,¹³⁶ suggesting once more that reforms will follow *ICCPR* standards. Importantly, the draft legislation consistently applies principles of *intentionally urging* the application or use of force or violence as the foundation of the relevant offence, as well as that that the person urging the use of force or violence *intends* that the force or violence will occur.¹³⁷ Clearly these are significant and substantive proposed reforms, focusing upon real differences of an intention and objective of bringing about violence for nominated ends and responding to the arguments in the various submissions referred to above that the existing sedition offences were inconsistent with Article 19 of the *ICCPR*.

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.

¹³¹ ‘The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.’

¹³² *Fighting Words*, above n 3, Recommendations 8-1 and 9-2 inserting ‘intentionally’ in s 80.2(1), 80.2(3) and 80.2(5) of the *Criminal Code* (Cth).

¹³³ *Ibid* Recommendation 11-1, recommending repeal of s 80.2 (7), (8) and (9).

¹³⁴ *Ibid* Recommendation 11-2, recommending modification of s 80.1 (1)(e)-(f) to require *material* assistance.

¹³⁵ See *Fighting Words: A Review of Sedition Laws in Australia - Government Response to Recommendations*, 8-1. See also *Australian Government response to ALRC Review of sedition laws in Australia – December 2008*, Recommendations 9-2, 9-5, 10-2, 11-1 and 11-2.

¹³⁶ See Part 2 of Chapter One of the *Discussion Paper*, above n 7, ‘Amendments to the urging violence offences in Division 80 of the Criminal Code’ and Exposure Draft, National Security Legislation Amendment Bill 2009 (Cth).

¹³⁷ See Exposure Draft, National Security Legislation Amendment Bill 2009 Appendix 1, Subdivision C, Item 18 (new subsection 80.2(1)) Urging violence against the Constitution; Item 20 (new subsection 80.2(3)) Urging interference in Parliamentary elections or constitutional referenda by force or violence, Item 35 (new section 80.2A and new section 80.2B), urging violence against groups distinguished by race, religion, nationality, national origin or political opinion or urging violence against the members of such groups.

The ALRC's review reveals two important circumstances conducive to a genuinely comprehensive government response to national security legislation reviews. The first is the taking of public submissions by bodies independent of the executive – here the Senate Legal and Constitutional Affairs Committee¹³⁸ and the ALRC¹³⁹ – which tested the compliance of the sedition provisions with international human rights law.

The second is the identification by a body with the ALRC's reputation, of the merit of claimed breaches by the legislation of the ICCPR, followed by drafting of accessible amendments closely conforming to the ICCPR. The importance of practical accessibility – in converting international human rights law claims into comprehensible and readily adoptable legislative amendments – cannot be understated, where executive and legislative processes are unfamiliar with such analysis.

C Responding to the 2007 PJCIS Inquiry into the Proscription of 'Terrorist Organisations' under the Australian Criminal Code

The PJCIS was required¹⁴⁰ to review the operation, effectiveness and implications of the executive capacity to proscribe an organisation as a terrorist organisation under the *Criminal Code 1995* (Cth).¹⁴¹ It was also required to take into account¹⁴² the review of the terrorist organisation proscription provisions conducted by the Sheller Committee.¹⁴³ The engagement of the PJCIS in 2007 with international human rights law in assessing the terrorism proscription provisions is modest in the few situations where it arises in the *PJCIS 2007 Report*.¹⁴⁴

¹³⁸ Cited in *Fighting Words*, above n 3, 111, fn 49. The Senate Legal and Constitutional Committee expressed no conclusion about Article 19 ICCPR arguments in its 2005 report *Provisions of the Anti-Terrorism Bill (No 2) 2005*.

¹³⁹ Submissions to the ALRC inquiry are cited in *Fighting Words*, above n 3, 112, fn 53.

¹⁴⁰ Section 102.1A(2) of the *Criminal Code* (Cth).

¹⁴¹ The power to proscribe an organisation as a terrorist organisation by regulation is specified by s 102.1 (2), (2A), (3), (4), (5) and (6) of the *Criminal Code* (Cth). See Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

¹⁴² Under s 4(9) of the *Security Legislation (Terrorism) Act 2002*. See also *Sheller Report*, above n 24, 3 for adoption of a guiding international human rights law proportionality principle.

¹⁴³ *PJCIS 2007 Report*, above n 4, 1-2.

¹⁴⁴ *Ibid*. This is in contrast to the *PJCIS 2006 Report* and the *Sheller Report* being informed by the international human rights law principle of proportionality – see the above discussion under the heading 'Assessing the 'comprehensiveness' of responses to

Reforming the procedure for listing an entity as a terrorist organisation revolved around the *Sheller Report* recommendations of (a) a judicial process on application by the Attorney-General to the Federal Court or (b) by regulation on the advice of the Attorney-General in consultation with an independent statutory advisory panel.¹⁴⁵ The *Sheller Report* recommendations were crafted within the guiding principle of reasonable proportionality¹⁴⁶ and in advocating judicially based proscription, drew upon the HREOC submission to that effect,¹⁴⁷ whilst expressing several policy concerns about the existing executive proscription process.¹⁴⁸

The *PJCIS 2007 Report* language on the question of procedural reform for listing an entity as a terrorist organisation barely touches upon, and seems disconnected from, the international human rights law language of the Sheller Committee recommended reforms and the HREOC submission to the Sheller Committee. In rejecting both the options of judicial authorization and supplementing the existing executive proscription process with an advisory panel, the PJCIS stated firmly that the 'Australian model provides strong safeguards against the *arbitrary* use of the proscription power'¹⁴⁹ and 'Judicial review under the ADJR is available, and in our view, provides an effective institutional guarantee of *lawfulness* and protection against regulations that go beyond the scope of powers provided for by the Criminal Code'.¹⁵⁰

These conclusive statements led to the PJCIS recommendation that 'the mandate of the Committee to review the listing and re-listing of entities as 'terrorist organisations' for the purpose of the Criminal Code be maintained'.¹⁵¹ The PJCIS similarly rejected claims of including

reviews: the language of 'balance' and the role of international human rights law in that 'balance'.

¹⁴⁵ *PJCIS 2006 Report*, above n 5, 38 and *Sheller Report*, above n 24, 9-10.

¹⁴⁶ *Sheller Report*, above n 24, 3.

¹⁴⁷ HREOC Submission to the Security Legislation Review Committee, paragraphs 6.20 and 6.21. HREOC confirmed its preference for a judicial, rather than executive, proscription process, on two international human rights law grounds: HREOC Submission to PJCIS Review of Power to Proscribe Terrorist Organisations [47].

¹⁴⁸ *Sheller Report*, above n 24, 92.

¹⁴⁹ *PJCIS 2007 Report*, above n 4, paragraph 5.27, page 44 (emphasis added).

¹⁵⁰ *Ibid* [5.28] (emphasis added). The further statement 'The Committee considers that the current model of executive regulation and parliamentary oversight provides a transparent and accountable system that is consistent with international practice' also implicitly rejects international human rights law analysis: *PJCIS 2007 Report*, above n 4, Foreword.

¹⁵¹ *Ibid* Report Recommendation 3 [5.34]. The Government indicated its support: PJCIS

statutory criteria and an overall proportionality test in the proscription requirements,¹⁵² accepting the Attorney-General's Department view that the existing proscription process satisfied *ICCPR* proportionality requirements.¹⁵³

This approach by the PJCIS of its inquiry process, its recommendations and the consequent government response, confirms that the comprehensiveness of review and review responses, involving integration of international human rights law principles, is neither guaranteed nor predictable. There is an unnecessary narrow application by the PJCIS of the obligation to take account of the *Sheller Report* – with its guiding principle of international human rights law proportionality – in its review of the proscription provisions.¹⁵⁴

Government support of Recommendations 5 and 7 (that strict liability not be applied to the terrorist organisation offences of Division 102 of the *Criminal Code*) of the *PJCIS 2007 Report*¹⁵⁵ means there will be *further* reviews.¹⁵⁶ Integration of international human rights principles within these third iteration reviews cannot be assumed, demonstrating that a 'comprehensiveness' of government response to terrorism legislation reviews is shaped by contingencies – including different opinions of the reviewing committee with organisations making representations, or between two reviewing committees, about the determinative influence of *ICCPR* based human rights law over the proscription legislation.

Similarly, the PJCIS recommendation that a regulation proscribing an entity expire on third anniversary of the date it took effect,¹⁵⁷ which is adopted in the *Discussion Paper*¹⁵⁸ and subsequently in the draft

2007 Inquiry, *Government Response* to Recommendation 3.

¹⁵² HREOC Submission to the PJCIS 2007 Review, 5-6 and 9.

¹⁵³ *PJCIS 2007 Report*, above n 4, 27.

¹⁵⁴ Section 4(9) of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) states that 'The Parliamentary Joint Committee on ASIO, ASIS and DSD must take account of the report of the review given to the Committee, when the Committee conducts its review under paragraph 29(1)(ba) of the *Intelligence Services Act 2001*.'

¹⁵⁵ See *Government Response* to Recommendations 5 and 7 of the PJCIS 2007 Inquiry.

¹⁵⁶ Strict liability for Division 102 *Criminal Code* (Cth) terrorist organisation offences is to be referred to the new National Security Legislation Monitor and the application of the power to proscribe terrorist organisations is to be referred to the 2010 COAG review. Both referrals follow existing PJCIS reviews, in turn informed by the *Sheller Report* and its guiding proportionality principle.

¹⁵⁷ *PJCIS 2007 Report*, above n 4, Recommendation 6

¹⁵⁸ *Discussion Paper*, above n 7, 59: 'To date the re-listing of each entity under the *Criminal Code* has been subject to the scrutiny of the PJCIS. Based on its own

legislation,¹⁵⁹ really repeats the endorsement of its own views, as expressed above, of the suitability of existing review processes. In doing so, it merely invokes comparisons with existing time limits for proscription in four other jurisdictions,¹⁶⁰ rather than further engaging with international human rights law – indeed, this is consistent with its clear, conclusive comments about arbitrariness and lawfulness above.¹⁶¹

D Responding to the 2006 PJCIS Review of Security and Counter-Terrorism Legislation

The Government responses to PJCIS *Review of Security and Counter Terrorism Legislation*¹⁶² recommendations potentially have a more direct link to the Sheller Committee report guiding proportionality principle,¹⁶³ than did Government responses to the *PJCIS 2007 Report*.¹⁶⁴ The *PJCIS 2006 Report*¹⁶⁵ confirms a more direct influence of the *Sheller Report* on its inquiry:

Subsection 4(9) of the *Security Legislation Amendment (Terrorism) Act 2002* requires the PJCIS to take into account the Sheller Report. Consequently, the Sheller Report forms an important part of the evidence to this inquiry and reference is made to evidence submitted to that review and to parts of the report where it is appropriate to do so. However, the PJCIS is not limited by the content, recommendations or findings of the Sheller Report and has departed from it where appropriate ... To avoid unnecessary duplication, the

experience since 2004, the PJCIS recommended that extending the period of a regulation from two years to three years and providing an opportunity for parliamentary review at least once during the parliamentary cycle would provide an adequate level of oversight.'

¹⁵⁹ See the proposed amendment to 'third anniversary' in s 102.1(3) of the *Criminal Code*, in Appendix 1, Item 13 of *National Security Legislation Amendment Bill 2009* Exposure Draft.

¹⁶⁰ *PJCIS 2007 Report*, above n 4, 50, the four jurisdictions being the United Kingdom, Canada, New Zealand and the USA.

¹⁶¹ See the text of PJCIS 2007 Report, above n 4, relating to footnotes 149 and 150 above.

¹⁶² *PJCIS 2006 Report*, above n 5.

¹⁶³ *Sheller Report*, above n 24, 3.

¹⁶⁴ See the discussion in the section 'Responding to the PJCIS Inquiry Into The Proscription of 'Terrorist Organisations' Under the Australian Criminal Code' above regarding *PJCIS 2007 Report*.

¹⁶⁵ *PJCIS 2006 Report*, above n 5, on the 2002 counter terrorism legislation. For analysis of the 2002 legislation, see Sarah Joseph 'Australian Counter-Terrorism Legislation and The International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428 and Greg Carne 'Terror and the ambit claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 14 *Public Law Review* 13.

PJCIS decided to focus attention on the recommendations and findings of the Sheller Committee.¹⁶⁶

Several important legislative amendments were proposed by the *PJCIS 2006 Report*, in turn being addressed in the Government Responses. There was some acceptance of the PJCIS recommendations, as well as the indication of further review. As such, the adoption of international human rights principles as informing the Government response varies between the different recommendations and ultimately affects some aspects of the *Discussion Paper*.

The influence of international human rights law is most obvious in Recommendation 2 of the *PJCIS 2006 Report*, on the appointment of an independent reviewer of terrorism law.¹⁶⁷ Recommendation 2 is prefaced by, and is consequential upon consideration of UN Security Council and General Assembly responses,¹⁶⁸ which maintain that counter-terrorism developments 'must comply with States obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law and international humanitarian law'.¹⁶⁹

Recommendation 2 is also influenced by an acceptance of the *Sheller Report* within the *PJCIS 2006 Report* on two aspects – namely an integrated approach between the collective right of security and individual rights was required in counter-terrorism responses,¹⁷⁰ and that principles of necessity and proportionality be used to test legislation and form the basis for recommended changes.¹⁷¹

It is against these international human rights law background principles that considerations of possible newly emergent issues, the breadth of anti-terrorism measures, the fragmented nature of the review methods to date and the ongoing importance of counter terrorism policy into the future¹⁷² that the case is made for general, independent review of terrorism laws.¹⁷³ The PJCIS Independent Reviewer recommendation is subsequently supported in the

¹⁶⁶ *PJCIS 2006 Report*, above n 5, 2 [1.6] and 3 [1.8].

¹⁶⁷ *Ibid* Recommendation 2.

¹⁶⁸ *Ibid* 12-13.

¹⁶⁹ *Ibid* 13.

¹⁷⁰ *Ibid* 14.

¹⁷¹ *Ibid* 14, 15, 16.

¹⁷² *Ibid* 16.

¹⁷³ *Ibid* 16-22.

Government response to the *PJCIS 2006 Report*,¹⁷⁴ the recommendation's background confirming a comprehensive Government response.

However, the bill first introduced into Parliament¹⁷⁵ failed to optimally integrate international human rights principles into the National Security Legislation Monitor functions.¹⁷⁶ The bill lacked a specificity and precision of international human rights obligations and sources to be taken into account. It invited a weighting towards the responsive counter-terrorism measures in UN counter-terrorism conventions, UN Security Council terrorism resolutions and Regional Memoranda of Understanding, to outweigh UN international human rights documents and policies providing integrated approaches to counter-terrorism and human rights.

Having considered at some length the question of integration of international human rights law into the Monitor role in reviewing Australia's counter-terrorism and national security legislation, the Senate Finance and Public Administration Legislation Committee considered that the bill should be amended to require the Monitor to assess whether the legislation under review is consistent with Australia's international human rights obligations.¹⁷⁷ Subsequently, the government made significant international human rights law

¹⁷⁴ *PJCIS 2006 Report, Government Response to Recommendations: Recommendation 2.*

¹⁷⁵ National Security Legislation Monitor Bill 2009 (Cth) was introduced into the Senate on 25 June 2009 and referred for inquiry to the Senate Finance and Public Administration Committee, which reported on 7 September 2009: National Security Legislation Monitor Bill 2009 Report of the Senate Finance and Public Administration Legislation Committee (2009) (*Monitor Bill 2009 Report*). A previous private Senator's bill, the Independent Reviewer of Terrorism Laws Bill 2008 [No 2], was introduced into the Senate on 23 June 2008 and referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report. See Independent Reviewer of Terrorism Laws Bill 2008 [No 2] Report of the Senate Committee on Legal and Constitutional Affairs (2008).

¹⁷⁶ Clause 3(c) (Objects) of the National Security Legislation Monitor Bill 2009 (Cth) stated that 'The object of this Act is to appoint a National Security Legislation Monitor who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation (c) is consistent with Australia's international obligations, including human rights obligations'. The functions in Clause 6 of the bill were (1)(b) 'to consider whether Australia's counter-terrorism and national security legislation (i) contains appropriate safeguards for protecting the rights of individuals; and (ii) remains necessary'; Clause 8 of the bill stated, 'When performing the National Security Legislation Monitor's functions, the Monitor must have regard to: (a) Australia's obligations under international agreements (as in force from time to time).' - see furthermore the Explanatory Memorandum to the Bill regarding Clause 8.

¹⁷⁷ *Monitor Bill 2009 Report*, 34, Recommendation 10.

orientated amendments in response to the inquiry report, the bill's title being changed to the Independent National Security Legislation Monitor Bill 2010 (Cth), which emphasizes 'the independent nature of the Monitor'.¹⁷⁸ Importantly, the s 3 objects clause is amended to provide greater emphasis that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations including (i) *human rights obligations*; and (ii) counter-terrorism obligations and (iii) international security obligations.¹⁷⁹ The Monitor is now able to consider, on his or her own initiative, whether the relevant legislation (i) contains appropriate safeguards for protecting the rights of individuals; and (ii) remains *proportionate* to any threat of terrorism or threat to national security, or both; and (iii) remains *necessary*.¹⁸⁰ In performing the Monitor's functions under Clause 6¹⁸¹ of the bill, the Monitor must have regard to (a) Australia's obligations under international agreements (as in force from time to time) including: (i) *human rights obligations*; and (ii) counter-terrorism obligations; and (iii) international security obligations.¹⁸²

The Government response in relation to other *PJCIS 2006 Report* recommendations is not quite as clearly comprehensive – through providing consistent adoption of the recommendations, *motivated by* international human rights proportionality considerations, absorbed by the PJCIS recommendations from the methodology of the Sheller Committee. The *Sheller Report* did exercise significant, but not conclusive, influence over the *PJCIS 2006 Report*, reflecting the fact that the Government response and subsequent *Discussion Paper* accepted in whole or in part various PJCIS recommendations¹⁸³ where international human rights law analysis *incidentally* arose.

There are four clear examples of the influence of international human

¹⁷⁸ Supplementary Explanatory Memorandum, National Security Legislation Monitor Bill 2009, 1.

¹⁷⁹ Amendment to Object clause: Item 1, List of Government amendments Document BD 213 (emphasis added).

¹⁸⁰ Amendment to Clause 6, Functions of the Independent National Security Legislation Monitor: Item 6, List of Government amendments, Document BD 213.

¹⁸¹ Including consideration of safeguards, proportionality and necessity regarding counter-terrorism and national security legislation - see Clause 6(1)(b).

¹⁸² Amendment to Clause 8, Item 10, List of Government Amendments, Document BD 213 (emphasis added).

¹⁸³ Recommendations 7, 8, 14, 18 and 19 of the *PJCIS 2006 Report*, above n 5, were accepted by the Government response. Recommendations 16 and 20 of the *PJCIS 2006 Report* were partly accepted by the Government response. Recommendation 15 of the *PJCIS 2006 Report* was rejected.

rights law analysis flowing right through to the content of the *Discussion Paper* and its proposed reforms and its draft legislation.

In reviewing the ground of advocating the doing of a terrorist act¹⁸⁴ as the basis for making a regulation specifying an organisation as a terrorist organisation,¹⁸⁵ the PJCIS makes reference to the relevant *Sheller Report* recommendation.¹⁸⁶ That recommendation, crafted within the general Sheller principle of reasonable proportionality, in turn informed by the proportionality issues in HREOC submission,¹⁸⁷ is partly adopted in the *PJCIS 2006 Report*.¹⁸⁸ The Government response accepts this recommendation of the PJCIS, with review of the advocacy criteria to be conducted by COAG in 2010 and the amendment of risk to *substantial* risk.¹⁸⁹ This question of an organisation advocating the doing of a terrorist act in s 102.1(1A) of the *Criminal Code* (Cth), as the

¹⁸⁴ See s 102.1(2)(b) of the *Criminal Code* (Cth). Under s.102.1 (1A) of the *Criminal Code* an organisation advocates the doing of a terrorist act if (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person ... to engage in a terrorist act.

¹⁸⁵ See paragraph (b) of the meaning of 'terrorist organisation' in s 102.1 of the *Criminal Code* (Cth).

¹⁸⁶ See *PJCIS 2006 Report*, above n 5, 68 and *Sheller Report*, above n 24, 73, [8.10], [8.11]: 'For the reasons set out in the submissions from HREOC, AMCRAN, Gilbert and Tobin Centre of Public Law and others, the SLRC recommends that paragraph (c) of section 102.1 be omitted from the definition of 'advocates' ... 'If paragraph (c) is not omitted from the definition, the SLRC recommends that 'risk' should be amended to read 'substantial risk'.

¹⁸⁷ See the immediately preceding footnote indicating acceptance by the Sheller Committee of the point made by HREOC and its subsequent discussion: 'The breadth of the definition of 'advocates' in section 102.1(2) of the *Criminal Code* ... may also lead to disproportionate outcomes and impermissibly restrict the right to freedom of expression ... HREOC considers that the definition remains extremely broad. This is for two reasons. First, paragraph (c) does not refer to a 'substantial risk' as recommended by the Committee, but merely a 'risk' such praise might have the effect of leading a person (regardless of age of mental impairment) to engage in a terrorist act ... Secondly, the definition does not clearly set out the circumstances in which advocacy will be attributed to an organisation and hence, when a person who is a member of an organisation will be held accountable for the actions or views expressed by other members of that organisation': HREOC, Submission to Sheller Committee, [6.13], [6.14].

¹⁸⁸ See *PJCIS 2006 Report*, above n 5, 71, Recommendation 14: 'The Committee does not recommend the repeal of 'advocacy' as a basis for listing an organisation as a terrorist organisation but recommends that this issue be subject to further review. The Committee recommends that 'risk' be amended to 'substantial risk'.

¹⁸⁹ Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation Government response to recommendations.

basis for listing an organisation as a terrorist organisation if the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act – is responded to in the *Discussion Paper* by proposing that the word ‘substantial’ be placed before risk in legislation amending paragraph 102.1(2)(b).¹⁹⁰ This change is taken up in the draft legislation.¹⁹¹

In relation to offences of providing training to and receiving training from a terrorist organisation,¹⁹² there is a more explicit reference to the guiding proportionality principle informing the recommendations of the *Sheller Report*,¹⁹³ with the recommendation to define more clearly the type of training being a practical application of the proportionality requirement.¹⁹⁴ The Government response accepted the need to clarify the training offence so as to exclude legitimate activities from the classification of terrorist training, but rejected the second aspect of the PJCIS recommendation that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.¹⁹⁵ Subsequently, the *Discussion Paper* proposed an alternative approach,¹⁹⁶ invoking Australia’s international obligations in support.¹⁹⁷ This proposal is taken up in the

¹⁹⁰ *Discussion Paper*, above n 7, 56-57.

¹⁹¹ See Exposure Draft, National Security Legislation Amendment Bill 2009, Schedule 2, Appendix 1, Item 12.

¹⁹² Section 102.5 of the *Criminal Code* (Cth).

¹⁹³ ‘The purpose of the Sheller Committee recommendations is to draw the offence more carefully so that it cannot catch innocent training or the mere teaching of people who may be members of a terrorist organisation. Drawing the training offence more precisely would achieve greater certainty and a better proportionality between the conduct that is criminalized and the penalty’: *PJCIS 2006 Report*, above n 5, 75 [5.81].

¹⁹⁴ See *Sheller Report*, above n 24, 75, Recommendation 16 ‘The Committee recommends that the training offence be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act’. The second sentence of the recommendation is adopted directly from a recommendation of the Sheller Committee – see *Sheller Report*, 118 [10.42].

¹⁹⁵ Government response to recommendations – Recommendation 16.

¹⁹⁶ ‘It is proposed that a ministerial authorisation scheme be established which would allow legitimate and reputable humanitarian aid organisations to be exempt in limited circumstances from the offence of providing training to a terrorist organisation’: *Discussion Paper*, above n 7, 67.

¹⁹⁷ The proposed ministerial authorisation scheme which would enable the ‘Attorney-General ... to declare certain aid organisations, either in their entirety, in part or in geographical regions, exempt from the application of the terrorist organisation

draft legislation, allowing for an exemption for training provided by a declared aid organisation or a declared regional aid organisation.¹⁹⁸

In relation to the s 102.7 *Criminal Code* (Cth) offence of providing support to a terrorist organisation, the *PJCIS 2006 Report* engages significantly with the international human rights law proportionality principle in the HREOC submission¹⁹⁹ to it and to the Sheller Committee,²⁰⁰ the latter by quotation of evidence from Simon Sheller QC to the PJCIS and the *Sheller Report* itself.²⁰¹ In recognizing the disproportional character of the section 102.7 offence, the PJCIS recommended 'that the offence of providing support to a terrorist organisation be amended to 'material support' to remove ambiguity.'²⁰² The Government response accepted the recommendation of the PJCIS on the grounds that the inclusion of material support will not increase the level of support required, instead clarifying that support has to go beyond mere support.²⁰³ That acceptance is reflected in the inclusion of a 'material support' amendment to s 102.7 of the *Criminal Code* (Cth) in the *Discussion Paper*.²⁰⁴ In turn, the draft legislation adopts the concept of providing material support to a terrorist organisation.²⁰⁵

training offence in section 102.5 of the *Criminal Code*' is seen as acceptably addressing 'Australia's international obligations to ensure support, resources and funding are not provided to terrorist organisations': Ibid.

¹⁹⁸ See Exposure Draft, National Security Legislation Amendment Bill 2009 Item 21; see also Items 19 and 20.

¹⁹⁹ See *PJCIS 2006 Report*, above n 5, 77 [5.86]: 'HREOC argued that 'support' could extend to publication of views that appear favourable to a listed organisation and therefore infringe freedom of expression'. In its submission to the Sheller Committee, HREOC stated that 'the ambiguity and breadth of the term 'support' may render section 102.7(1) disproportionate to the legitimate aim sought to be achieved by the legislature ... that section 102.7 may therefore disproportionately restrict the right to freedom of expression ... It may also impermissibly infringe the right to freedom of association. HREOC therefore contends that the term 'support' used in section 102.7 should be defined in such a way as to ensure that it does not deprive that section of its proportionality.'

²⁰⁰ The *Sheller Report* largely adopts verbatim the HREOC submission on this point - see *Sheller Report*, above n 24, 122: 'SLRC accepts that the combination of vulnerability and uncertainty requires that the section be amended to limit its application in a way which would reduce any infringement upon the right to freedom of expression'.

²⁰¹ *PJCIS 2006 Report*, above n 5, 77.

²⁰² Ibid 79, Recommendation 18.

²⁰³ Government response to recommendations Recommendation 18.

²⁰⁴ *Discussion Paper*, above n7, 63.

²⁰⁵ See Exposure Draft, National Security Legislation Amendment Bill 2009, Item 17 and Item 18.

The influence of international human rights law analysis is also shown in that no change is made in the *Discussion Paper* from the PJCIS²⁰⁶ and Sheller Committee²⁰⁷ positions that it was important to retain the distinguishing element of political, ideological and religious cause in defining a terrorist act. Similarly, the retention of the current exemption of advocacy, protest, dissent and industrial action as part of the definition of terrorism, as supported by both the PJCIS²⁰⁸ and the Sheller Committee²⁰⁹ is also not departed from or raised in the amendments proposed by the *Discussion Paper*. However, the draft legislation does expand the definition of a terrorist act by removing the requirement that harm be physical, thereby permitting psychological harm to be included.²¹⁰

Likewise, the Government response to the *PJCIS 2006 Report* of referring three additional items for review – the advocacy of terrorist acts as the basis for the making a regulation specifying an organisation as a terrorist organisation,²¹¹ the offence of associating with a terrorist organisation,²¹² and the application of strict liability provisions applied to serious criminal offences that attract a penalty of imprisonment²¹³ – reflects different degrees of interaction in the *PJCIS 2006 Report* with the international human rights law proportionality principles consistently invoked by the *Sheller Report*. These Government responses referring these matters for further review made it unnecessary for these issues to be considered in the *Discussion Paper*, or

²⁰⁶ *PJCIS 2006 Report*, above n 5, Recommendation 7 and *PJCIS 2006 Report*, 51, 57.

²⁰⁷ *Sheller Report*, above n 24, 57.

²⁰⁸ *PJCIS 2006 Report*, above n 5, 60, Recommendation 8.

²⁰⁹ *Sheller Report*, above n 24, 58.

²¹⁰ See Exposure Draft, National Security Legislation Amendment Bill 2009, Schedule 2, Item 4 and Item 10. The *Sheller Report* recommended this change: *Ibid*, 50. However, the *PJCIS 2006 Report* did not adopt this *Sheller Report* finding – instead, in its recommendation 9, stated that it was open to the Government to consult the States and Territories regarding acceptance of the Sheller Committee recommendation: see *Discussion Paper*, above n 7, 45.

²¹¹ See s 102.1(2)(b) of the *Criminal Code* (Cth) and s.102.1 (1A) of the *Criminal Code* (Cth). See *PJCIS 2006 Report*, above n 5, 71 Recommendation 14 and Government Response to Recommendation, with review of the advocacy criteria to be conducted by COAG in 2010.

²¹² See s 102.8 of the *Criminal Code* (Cth). See *PJCIS 2006 Report*, above n 5, 81 Recommendation 19 and Government Response to Recommendation, with referral for examination by the new National Security Legislation Monitor.

²¹³ See *PJCIS 2006 Report*, above n 5, 83 Recommendation 20 and Government Response to Recommendation, with referral for examination by the new National Security Legislation Monitor.

indeed to be presently considered in draft legislation.

VI COMPREHENDING WHAT IS 'COMPREHENSIVE': THE INFLUENCE OF EXISTING INTERNATIONAL REVIEWS AND FUTURE DOMESTIC REVIEWS OF AUSTRALIAN NATIONAL SECURITY LEGISLATION

The claim of a 'comprehensive response' to outstanding terrorism law reviews must further be considered in the context of five other completed international reviews²¹⁴ applying international human rights principles to aspects of Australian terrorism law. Criticism is made in the international reviews about the definition of a terrorist act,²¹⁵ burden of proof issues in terrorism offences,²¹⁶ prejudice and discrimination against Arab and Muslim communities as a consequence of counter-terrorism laws,²¹⁷ the listing of terrorist organisations²¹⁸ and criminal law investigative detention.²¹⁹

The Government response to the content of the four national security legislation reviews, including the *Discussion Paper*, instead of being further informed by that criticism and analysis, simply omits consideration of them. In contrast, the potential for other reviews to constructively influence and inform the Government response was highlighted in a further Senate Committee Report on a private Senator's bill:

[T]he committee makes no formal recommendation about the passage of this Bill but has used this inquiry process as a mechanism to further

²¹⁴ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Consideration of Australian States Party Report* submitted under Article 40 of the *International Covenant on Civil and Political Rights*, 2 April 2009 ('HRC Concluding Observations'); UN Committee Against Torture, *Concluding Observations of the Committee Against Torture Consideration of Australian States Party Report* submitted under Article 19 of the *Convention Against Torture*, 22 May 2008 ('CAT Concluding Observations'); UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Consideration of Australian States Party Report* submitted under Article 9 of the *Convention on the Elimination of all Forms of Racial Discrimination*, 14 April 2005 ('CERD Concluding Observations'); *Special Rapporteur Report*, above n 10; and *ICJ Report*, above n 21.

²¹⁵ *HRC Concluding Observations* [11]; *Special Rapporteur Report*, above n 10, [66].

²¹⁶ *HRC Concluding Observations* [11].

²¹⁷ *CERD Concluding Observations* para 13 (relevant to Recommendations 1, 3 and 5 of *PJCIS 2006 Report*).

²¹⁸ *Special Rapporteur Report*, above n 10, [9].

²¹⁹ *Ibid* [16].

the public discussion on ways to improve laws relating to terrorist activity in Australia. To this end, the committee will forward to the Attorney-General copies of this report, along with Hansard transcripts and submissions to the inquiry so that they might assist him in progressing the consultation currently underway on the national security legislation framework.²²⁰

There is also the question of future reviews and the particular influence that international human rights law might then have. The scheduled 2010 COAG review²²¹ will re-visit key matters such as control orders and preventative detention, which were extensively critiqued from an international human rights law perspective leading up to enactment of the *Anti-Terrorism Act 2005 (No 2)* (Cth).²²²

The ASIO questioning and detention powers²²³ are subject to review in 2016.²²⁴ International human rights law criticism of this legislation was made during the PJCIS May 2005 review,²²⁵ but that did not noticeably

²²⁰ Commonwealth Parliament, *Anti-Terrorism Laws Reform Bill 2009 (Cth) Report of Senate Legal and Constitutional Affairs Legislation Committee* (2009), 28.

²²¹ Legislation to be covered by the review comprises Schedule 1 of the *Anti-Terrorism Act 2005* (Cth), Schedules 1, 3, 4 and 5 of the *Anti-Terrorism Act 2005 (No 2)* (Cth), State and Territory legislation enacted to provide for preventative detention, enhancement of stop, question and search powers in areas such as transport hubs and places of mass gatherings and further amendments made to Commonwealth, State and Territory legislation described above: s 4 *Anti-Terrorism Act (No 2) 2005* (Cth). Two further matters are also referred to the 2010 COAG Review – Item 14 of the *Government Response to PJCIS 2006 Report* – advocacy as the basis for the listing an organisation as a terrorist organisation and Item 7 of the *Government Response to PJCIS 2007 Report* – the proscription power. See also Attachment G to COAG meeting of 10 February 2006 – Purpose and Scope of the Review: ‘... the committee should take into account the agreement of COAG leaders at the Special Meeting on Counter-Terrorism on 27 September 2005, that any strengthened counter-terrorism laws must be *necessary*, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence led and *proportionate*’. (emphasis added) The italicized words admit international human rights law analysis.

²²² Clare Macken, ‘Preventative Detention in Australian law: Issues of interpretation’ (2008) 32 *Criminal Law Journal* 71, 71-72 and Carne, above n 42, 17, 30-32.

²²³ *ASIO Act 1979* (Cth) Division 3 Part III.

²²⁴ *Intelligence Services Act 2001* (Cth): Functions of the Parliamentary Joint Committee on Intelligence and Security, s 29 (1)(bb).

²²⁵ The 2005 PJCIS review *ASIO’s Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005) received international human rights law submissions from the International Commission of Jurists (Submission 60), Castan Centre for Human Rights Law (Submission 75), Amnesty International Australia (Submission 81), Human Rights and Equal Opportunity Commission (Submission

influence the Committee's deliberations or produce amendments. The ten year interval between ASIO powers reviews is corroborative of the fact that Government claims of a 'comprehensive' response to terrorism law reviews are specific and contextual – in a similar way that the international reviews analysis²²⁶ has not prompted an extensive review of all Howard government national security legislation.

These existing international reviews engage with broad subject matters to arise in the 2010 COAG review and the 2016 PJCIS Review. These subject matters include preventative detention orders,²²⁷ control orders,²²⁸ stop, question and search powers,²²⁹ advocacy of terrorism as a basis for proscription as a terrorist organisation²³⁰ and ASIO questioning and detention warrants.²³¹ Experience suggests the need to invoke the content of these international reviews by bodies or individuals making submissions to the 2010 and 2016 reviews, to achieve any influence over the subsequent Committee reports – invocation is unlikely to be through Government initiative *formative* to a Government response.

VII CONCLUSION

In *Assessing Damage, Urging Action*, the ICJ Eminent Jurists Panel stated:

It is vital that governments and the international community now engage in a stock taking process designed to ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work²³²

and

85) and Chief Minister ACT Government (Submission 93). See the *PJCIS 2005 Report*, 28-29, 53-54.

²²⁶ Reviews mentioned above n 214.

²²⁷ *CAT Concluding Observations*, above n 214, [10]; *Special Rapporteur Report*, above n 10, [43]-[45], 71; *ICJ Report*, above n 21, 107.

²²⁸ *CAT Concluding Observations*, *ibid* [10] *Special Rapporteur Report*, *ibid* [37]-[40], [71]; *ICJ Report*, *ibid* 110, 112. 121.

²²⁹ *Special Rapporteur Report*, *ibid* [30], [68].

²³⁰ *Ibid* [67].

²³¹ *HRC Concluding Observations*, above n 214, [11]; *CAT Concluding Observations*, above n 214, [10]; *Special Rapporteur Report*, *ibid*, [30], [31], [69]; and *ICJ Report*, above n 21, 74-75.

²³² *ICJ Report*, *ibid* v.

states should undertake *comprehensive* reviews of their counter-terrorism laws, policies and practices, in particular the extent to which they ensure effective accountability, and their impact on civil society and communities. States should adopt such changes as are necessary to ensure that they are fully consistent with the rule of law and respect for human rights.²³³

This article has argued the importance of systematically testing Rudd government claims about the *comprehensiveness* of responses to national security legislation reviews. In that testing, pressing issues relate to reforming the process of legislative enactment – namely movement away from the urgency paradigm, as well the degree to which international human rights law legislative analysis as influencing reform proposals has been incorporated in Government responses for legislative change.

These factors are critical in comprehensively responding to these four legislative reviews, but also in establishing a broader methodology to remediate deficiencies in Howard government national security legislation, through the *Discussion Paper* and including subsequent national security reviews and responses.

Similarly, the Rudd government's contemplation of the subject matter of national security is itself more comprehensive, in tandem with its claim of re-engagement with United Nations institutions. These enlarged legislative subject matter and policy initiatives make their need for scrutiny for compatibility with international human rights most compelling, if legislative review responses are legitimately to be *comprehensive*.

There is evidence in the Government responses and elsewhere²³⁴ that the paradigm of urgency²³⁵ in terrorism legislation enactment has been abandoned. However, the review process and capacity for genuinely comprehensive government responses retain an *ad hoc* and inconsistent quality between reviews. Absorption of international human rights principles into recommended and implemented legislative and policy

²³³ Ibid 164.

²³⁴ The consultative language of the Attorney-General's press releases and speeches (above n 12 and above n 80) is corroborated by submissions sought within a six week time frame; that the continuous terrorism legislative activity of the Howard government has ceased under the Rudd government – one exception being the Telecommunications (Interception and Access) Amendment Bill 2008 (Cth); and the two prospective referrals of problematic legislative issues to the National Security Legislation Monitor.

²³⁵ See the references at above n 10.

changes depends upon a constellation of factors.

In the absence of an federal human rights charter mandating analysis of legislation for compliance with international human rights standards, prominent factors include the terms of reference, the membership and legal background of the reviewers²³⁶ familiarity with international human rights law, the subject matter of the reviews, the opportunity afforded to make submissions to the reviewing body, the practical utility of the international human rights law submissions and the receptivity of review committees towards such submissions.

Other factors include the role of the secretary and inquiry secretary of review committees,²³⁷ the interest of review committees in self-vindicating their previous reviews whilst preserving their status quo in conducting reviews,²³⁸ as well as the mandate to *further review* existing reviews prior to the evaluation of a Government response for comprehensiveness.²³⁹ Accordingly, remedial contribution of international human rights law upon Australian national security law reform may be wholly or partly lost in translation.

Furthermore, there are several examples of *other* existing international reviews, distinct from the four reviews the subject of Government responses. Expert international human rights law analysis in international UN Treaty and Charter body reviews and ICJ review has not been incorporated into present government responses. That omission fails to signal a government initiated inclusion of international human rights analysis in the 2010 COAG review or the 2016 ASIO review.

Consideration and adoption of international human rights law analysis within national security government response and legislative changes

²³⁶ The legal and non-legal occupational qualifications and background of the members of the PJCIS is a relevant factor. On occasions, the PJCIS membership has included only one person with a legal qualification.

²³⁷ The Inquiry Secretary to the *PJCIS 2006 and 2007 Reports* had an international human rights law background.

²³⁸ Discussion from PJCIS comments, above under the heading 'Responding to the PJCIS *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code.*'

²³⁹ For example, in the PJCIS subsequently reviewing the *Sheller Report*, in relation to the proscription of terrorist organisations (*PJCIS 2007 Report*, above n 4) and in reviewing the 2002 security and terrorism legislation (*PJCIS 2006 Report*, above n 5). It is anticipated that the PJCIS will have a similar review role for National Security Legislation Monitor recommendations and reports, to be established under the Independent National Security Legislation Monitor Bill (Cth) – see Commonwealth *Parliamentary Debates*, Senate, 25 June 2009, 4261 (Senator Wong).

is in Australia presently both indeterminate and inconsistent. The example of the highly professional, international human rights law informed review of Australia's seditious laws by the ALRC²⁴⁰ and the comprehensive acceptance by Government Response of the ALRC recommendations demonstrates a potential rigorous integration of international human rights law principles into national security law reform.

It may be concluded about the three other national security legislation reviews and predicted in relation to the 2010 COAG and 2016 ASIO legislation reviews, that various omissions of international human rights law analysis at the different stages of review or legislative response will cause reviews, responses and reforms being less than fully comprehensive. The laws, policies and practices ensuring that respect for human rights and the rule of law are integrated²⁴¹ into the legislative review and response phases are presently haphazard and inconsistent, meaning that remediation is likely to be partly, but not wholly, lost in translation.

²⁴⁰ *Fighting Words*, above n 3.

²⁴¹ *ICJ Report*, above n 21, v.

THE APPLICATION OF THE DEFENCE OF NON EST FACTUM: AN EXPLORATION OF ITS LIMITS AND BOUNDARIES

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I INTRODUCTION

Non est factum is a defence which may be available to someone who has been misled into signing a document which is fundamentally different from what he or she intended to execute or sign. Accordingly, where the defence is established, the signing party may be able to escape the effect of the signature by arguing that the agreement was void for mistake.¹ This article is concerned with evaluating the limits and breadth of the defence as it is applied to contracts of guarantees, which are perhaps the most common form of security used in the business world today.

It is usually thought that the guarantor or surety knows that the guarantee secures the repayment of the borrower's loan and that dissatisfaction with the borrower's financial position is probably the reason for the creditor's stipulation that a contract of guarantee be entered into. The use of guarantees can be one of a number of ways of

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¹ See, eg, *Petelin v Cullen* (1975) 132 CLR 355; *PT Ltd v Maradona Pty Ltd* (1991) 25 NSWLR 643.

dealing with the sub-prime mortgage crisis, which has created a credit crunch that has a devastating effect on banks and financial markets and has pushed the major economies into a recession.² The fact that the Australian Government (like those of other developed countries) has decided to guarantee bank customers' deposits (as part of a stimulus package) to raise public confidence in the financial system following the world economic downturn means that it can no longer afford to rely on the usual claim that the banks are always secure, well regulated and capitalised. In this way, the Government has battled to prop up the banks, committing billions of dollars in the process. Yet action on the current scale has never been tried before and nobody knows when it will have an effect-let alone how much difference it will make.³

In a specific situation, where one party has signed a contract of guarantee, believing it to be something different from what it actually is, that party may be able, as alluded to earlier, to rely on the doctrine of non est factum to have the document set aside for mistake. Without such a defence, the mistaken party may be liable under a document appearing to be valid and binding. The rationale for the defence of non est factum is that in truth, the document has not been executed at all.

The article also questions the significance of the plea as a doctrine and its application. It is important to know, for example, that the extensive disclosure by the creditor as required by the *Banking Code of Practice* and the *Consumer Credit Code* may have the indirect effect of reducing the application of non est as a defence at law, since guarantors will now have less opportunity for claiming that they were under a misapprehension as to the terms of the guarantee. It is possible, under some circumstances, that a mistaken party who is unable to obtain relief by reason of non est factum may be able to set aside the guarantee for other reasons such as a breach of the creditor's duty of disclosure, misrepresentation, or unconscionable conduct which are wider in scope and are more likely to give a remedy.⁴

² Mathew Drummond and Katja Buhner, 'Bank Guarantee Delivers Revenue Windfall', *Australian Financial Review*, 20 January 2009, 1; J C Coffee Jr, 'Turmoil in the US Credit Markets: The Role of the Credit Rating Agencies', *Testimony before the United States Senate Committee on Banking, Housing and Urban Affairs*, 22 April 2008.

³ Danny John, 'Banks Raising Billions from New Guarantee', *Sydney Morning Herald*, 13 December 2008, 10; Siobhan Ryan and Scott Murdoch, 'Funds Call for Guarantee', *The Australian*, 27 December 2008, 1.

⁴ Thomson Reuters, *Modern Contract of Guarantee*, Part 4, 'Factors Affecting Validity', [4.500] at 22 January 2009.

II THE NATURE OF THE DOCTRINE OF NON EST FACTUM

The modern boundaries of the doctrine of non est factum can be found in *Saunders v Anglia Building Society*⁵ where the House of Lords restated the principles governing the availability of the defence. Stated in general terms, the criteria for a successful plea are the following:

- The person relying on the defence usually must belong to a class of persons who, through no fault of their own, are unable to have any understanding of the purport of a particular document, because of blindness, illiteracy or some other disability.⁶
- The signatory must have made a fundamental mistake as to the nature of the contents of the document being signed, having regard to the intended practical effect of the document; and the document must be radically different from the one the signatory intended to sign.⁷

The principles of *Saunders* were followed in *Petelin v Cullen*⁸ where the High Court stated that the person seeking relief 'must know that he signed the document in the belief that it was radically different from what it was in fact'.⁹ The court considered the scope of the defence of non est factum but indicated the narrow class of persons who are entitled to rely on the defence — namely, those who are unable to read owing to blindness or illiteracy or some disability and who through no fault of their own are unable to have any understanding of the purport of a particular document and who must rely on others for advice as to what they are signing.¹⁰

The defendant in *Petelin* has to show that he signed the document in the belief that it was radically different from what it was in fact and that his failure to read and understand it was not due to carelessness on his part. The court pointed out that there is a heavy onus on a defendant who wishes to establish the defence of non est factum as this

⁵ *Saunders v Anglia Building Society* [1971] AC 1004, in the Court of Appeal *sub nom Gallie v Lee* [1969] 2 Ch 17; [1969] 1 All ER 1062. See also *Muskham Finance Ltd v Howard* [1963] 1 All ER 81, 83.

⁶ *Barclays Bank plc v Schwartz* (unreported, English Court of Appeal, 21 June 1995). See J O'Donovan, J Phillips, *The Modern Contract of Guarantee* (2003), 181.

⁷ *Saunders v Anglia Building Society* [1971] AC 1004, 1020, 1034. See J O'Donovan and J Phillips, *The Modern Contract of Guarantee* (2003), 181.

⁸ (1975) 132 CLR 355 ('*Petelin*').

⁹ *Ibid* 360.

¹⁰ *Ibid* 359.

plea is an exceptional defence.¹¹

It appears from the circumstances of this case that where the respondent's conduct was not innocent, the question of carelessness on the part of the appellant in terms of not taking reasonable precautions did not become a relevant issue. This being the case, the appellant's defence of non est factum was able to succeed and the respondent's suit for specific performance had to fail.

The plea will remain to be limited in its application.¹² In fact there has been an increasing tendency, particularly in Australia, to disallow the plea where the person signing had some idea about the nature of the document and what it was dealing with, even though he or she may have been unclear, or even mistaken, as to the nature of some of the obligations created by the instrument, or as to the particular class to which it belonged.¹³ It is even possible that if guarantors become mistaken about the terms of the guarantee, they may be aware of the general nature of the transaction in which case they will probably be unable to show that the document was fundamentally different from what they thought it to be. It is conceivable that many of the cases which have been previously decided on the basis of a successful plea of non est factum would now be decided according to the traditional rules of misrepresentation, mistake and unconscionability.¹⁴

III NON EST FACTUM IN THE CONTEXT OF GUARANTEES — A CRITICAL ANALYSIS

There is a heavy onus on a person seeking to rely upon the plea of non est factum due no doubt to the very strict requirements which have to be fulfilled. It is not surprising, therefore, to know that the plea failed where the defendant was not included in the limited class and had been careless in failing to read a power of attorney signed by him.¹⁵ The plea also failed where the evidence showed that a mortgagor (guarantor) was aware of the nature of the guarantee signed and that

¹¹ Ibid 359-360.

¹² *Muskham Finance Ltd v Howard* [1963] 1 QB 904, 912; *Lloyds Bank v Waterhouse* (1991) 2 Family Law 23. See also N C Seddon and M P Ellinghaus, *Cheshire & Fifoot's Law of Contract* (8th ed, 2002) 649-650.

¹³ See *Yerkey v Jones* (1939) 63 CLR 649, 689; *Australian Express Pty Ltd v Pejovic* [1963] 80 WN (NSW) 427.

¹⁴ See, eg, *Child v Commonwealth Development Bank of Australia* [2000] NSWCA 256.

¹⁵ *Turner v Jenolan Investments Pty Ltd* (1985) ATPR 40-571, 46.631.

the mortgage provided security for a loan to the mortgagor's son.¹⁶

In *Avon Finance Co Ltd v Bridger*¹⁷ the majority of the English Court of Appeal rejected the guarantors' defence of non est factum commenting that it was not possible on the facts of the case to find that the guarantors had 'exercised such reasonable care as was appropriate in the circumstances in entering into the transaction'. There, a chartered accountant in a good practice had on his coaxing made his elderly parents unwittingly execute a second mortgage over their home in order to secure his debt. When the son's payments fell into arrears, the plaintiffs sought to recover the loan by bringing an action for possession against the defendants who relied on the defence of non est factum. The Court of Appeal was not willing to enforce a transaction entered into without independent advice where the terms of such a transaction were unfair and where there had been an inequality of bargaining power together with undue pressure exerted on one party or for the benefit of the other. In the circumstances, the son had brought undue pressure to bear on the defendants by misleading them as to the nature of the documents both for his own benefit and that of the plaintiffs, and accordingly, the defendants' bargaining power was impaired by their ignorance of the true situation. For these arguments, the court would not uphold the transaction and the appeal was accordingly dismissed.¹⁸

In *PT Ltd v Maradona Pty Ltd*¹⁹ we have a case that deals with the effect of a successful defence of non est factum on a guarantee and mortgage. The decision indicates an important difference between this defence and defences based on mental incapacity. Lack of mental capacity does not itself invalidate the transaction unless the other party had actual or constructive notice of the incapacity. An important difference between that defence and non est factum is that in the latter the actual execution of the document is impugned.

In September 1985 Maradona borrowed \$500,000 from Equity Mortgage Fund, secured by various guarantees, and by a mortgage over a property and a guarantee by a Mrs Thompson. The borrower defaulted in payment and the lender sought to enforce the security and

¹⁶ *Brown v Ford Credit Australia Ltd* (unreported, Supreme Court of Tasmania, Slicer J, 30 June 1992).

¹⁷ [1985] 2 All ER 281.

¹⁸ *Ibid* 286-7 per Denning MR. The court here applied the dicta of Vaughan Williams LJ in *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, 237.

¹⁹ (1992) 127 ANZ Conv R 513.

the guarantees. The plaintiff PT Ltd was an assignee of the mortgage from the original lender.

The guarantors used several defences all of which failed except the defence of non est factum raised by Mrs Thompson which succeeded. Mrs Thompson suffered a stroke the effect of which was confusion, a speech disorder, an inability to hold a train of thought, problems with memory, and a considerable degree of intellectual impairment. This guarantor was not being in a state to understand the implications of what she was doing when she signed the guarantee and mortgage without proper discussion or explanation. The medical evidence was able to show that the effect of the stroke on the guarantor was permanent.

In *Muskham Finance Ltd v Howard and Anor*²⁰ a finance company let a car on hire-purchase to the guarantor but when he fell into arrears under the hire-purchase agreement it gave him permission to sell the car. He entrusted the sale to a dealer who arranged for the reletting of the car on hire-purchase by the same finance company to the hirer. The hirer was offered a proposal form which he signed to take the car on hire-purchase. There was attached to the bottom of the proposal form a detachable indemnity form containing, inter alia, a guarantee for the payment of all moneys payable under the hire-purchase agreement which the hirer had not paid, and an indemnity against all loss or damage arising out of or consequent on the agreement. After the hirer had signed the proposal form, the dealer told the guarantor that he had sold the car and asked the guarantor to sign the indemnity form, which he said was the release note. He then told the guarantor that, by signing the supposed release note, the guarantor would be clear with the vehicle. The bottom part of the document was visible, including a clause providing that no relaxation or indulgence granted by the company was to operate as a waiver of its rights. The guarantor signed it without looking at its contents, but thinking that it transferred his interests in the car to the dealer, who would be able to sell the car.

On receiving the proposal and indemnity forms, the finance company accepted the hirer's offer and re-let the car to the hirer under the new hire-purchase agreement. The hirer defaulted on the instalments due under the agreement. When the finance company made a claim against the hirer under the agreement and against the guarantor on the indemnity, the hirer admitted liability and submitted to judgment, but the guarantor denied liability, relying on the plea of non est factum.

²⁰ [1963] 1 QB 904.

It was held that the doctrine of non est factum applied only where there was a mistake as to the class and character of a document, but not where the mistake was simply as to its contents; that in the present case the indemnity was wholly different in its class and character from the supposed release note and, accordingly, the guarantor was not bound by his signature and not liable on the indemnity, albeit that both the actual and the supposed document related to the same car. The court made the following concluding statement on the matter in the following terms:

We think that this is a document wholly different in its class and character from that which the guarantor intended to sign, and that the case would not truly be described as a case of misrepresentation as to the contents of a document alone. It is true that the supposed and actual document referred to the same motor-car, but this by itself is not enough to defeat the plea of non est factum.²¹

In *Lloyds Bank plc v Waterhouse*²² the pivotal issue was that an important requirement in establishing the defence of non est factum is that guarantors can demonstrate that they have taken all reasonable precautions to ascertain the nature of the document. In this case, the father, who was illiterate, signed the contract of guarantee under the belief that it related only to a particular loan which the bank advanced to his son, but which, in fact, contained the usual all moneys clause (relating to all the debts accumulated by the son).

The court contended that the father as guarantor should succeed on the basis that (a) he was under a disability, in this case illiteracy. There was no challenge to this as an existing fact, and it was irrelevant that the bank was not aware of this disability; (b) that the document which the father in fact signed was 'fundamentally different' or 'radically different' from the document which he thought he was signing; and (c) that he was not careless or that he did not fail to take precautions which he ought to have taken in the circumstances to ascertain the contents or significance of the document he was signing. Before the defence could succeed, the defendant had to establish strictly each component, particularly the third one.

In the Canadian decision of *Royal Bank of Canada v Interior Sign Service Ltd and Walker*²³ the defendant Walker was sued in respect of a personal guarantee given to secure a loan of money to a company of

²¹ Ibid at 913 (Donovan LJ).

²² *Lloyds Bank PLC v Waterhouse* [1993] 2 FLR 97, 101 (Purchas LJ).

²³ [1973] 2 WWR 272 (BC).

which she was a shareholder and the secretary. She claimed that she was under the impression that she was signing the document (in the presence of the bank manager and her husband, since deceased) for the company in her capacity as its secretary, and that, if she had known that she was giving a personal guarantee, she would not have executed the document and pleaded non est factum as her defence.

Judgment was given to the plaintiffs for the reason that the plea of non est factum had been defined in the authorities which had established that when a person of ordinary understanding signed a document careless of what it contained he or she was bound by it. Reinforcing this principle, the court argued additionally that it was not necessary that the guarantor knew the contents or meaning of the document, provided that the guarantor was not misled by the profferor. There was no duty on the bank manager to explain the meaning of the document, his duty being not to misrepresent or mislead. The court said:

There is no evidence to suggest that the plaintiff bank, through its employee, in any way misrepresented the document to her, nor is there any evidence that any other person misrepresented the document to her in any way. She knew that the document had to be signed before the plaintiff bank would advance further funds to the company of which she was a shareholder and officer. She was given the opportunity of reading the document but declined to do so. She admitted being told that, in signing the document, she was guaranteeing a loan by the plaintiff to the company.²⁴

The court here is attempting to keep the plea of non est factum closely confined within its proper narrow limits and in this way put the onus on a party who is intending to disown the signature.²⁵ It, for example, disagreed with the wider duty of the bank, as explained by the trial judge, that having come to the conclusion that the defendant guarantor could not read English sufficiently to understand the guarantee (which is known by the bank manager), there was a duty cast on the bank manager to give a full and complete explanation of the guarantee to the defendant.²⁶ Thus, it pointed out that 'if she did not know what a

²⁴ Ibid 274 (McKay J). See also *Canadian Bank of Commerce v Dembeck* [1929] 24 Sask LR 186, [1929] 2 WWR 586, [1929] 4 DLR 220 (CA).

²⁵ See *Saunders v Anglia Building Society* [1971] AC 1004, 1016 (Lord Reid) where it was said that non est factum could only be pleaded by 'those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity'.

²⁶ *Royal Bank of Canada v Interior Sign Service Ltd and Walker*, [1973] 2 WWR 272, 275

guarantee was and wanted to know, she should have asked the bank officials or her husband'.²⁷

In *Bradley West Solicitors Co Ltd v Keeman*²⁸ the court stressed that the doctrine of non est factum rides between the law increasing focus on consensus and the reliability which has to be placed on signed documents. In applying the doctrine to a contract of guarantee, the court indicated that the signatory must have believed the document to have a particular character and effect which in reality the document did not have; the mistaken belief must have resulted from an erroneous explanation by someone else; the signatory must have acted with all reasonable care, and if acting in reliance on a trusted adviser must have taken all steps to read and understand the document. In this case, the defence could not be made out, as the defendants had been advised by a solicitor.

The court analysed the plea of non est factum generally, and found that it was not available to a signatory who had not taken all reasonable care in the circumstances. In the case of a person of full age and capacity that would include steps to read and understand the document. If such a person elected not to do so, and instead decided to rely upon his or her adviser, the plea of non est factum will not be available.

In the situation where a person who signs the document does so with a definite objective in mind which could be attained by signing a document of that kind, the defence of non est factum will fail.²⁹ At the same time, if the signatory would have signed the document even if he or she had been told the truth about its character and the nature of the transaction, the defence will not succeed.

It is only in rare cases that those who can read, but who fail to read a document before signing it, would be able to establish the lack of negligence necessary to make good a defence of non est factum, even if they act in reliance on persons whom they trust. In *Saunders*, it was said that a director who, for example, signs a bundle of documents handed to him with only the spaces for his signature exposed may not be negligent in the ordinary sense of the word.³⁰ However, he may be

(McKay J).

²⁷ Ibid.

²⁸ [1994] 2 NZLR 111.

²⁹ *Mercantile Credit v Hamblin* [1965] 2 QB 242; *Saunders v Anglia Building Society* [1971] AC 1004, 1031.

³⁰ *Saunders v Anglia Building Society* [1971] AC 1004, 1031.

taken to have intended to sign those documents whatever they might be, and therefore to have assumed the risk of a fraudulent substitution or insertion in the bundle.

The final point to be made here is that in *Petelin v Cullen*³¹ which was discussed earlier, the High Court had taken a new approach to the doctrine of non est factum when no innocent party's rights are at risk. Here attention should be given not only to the signer and his or her state of mind, but also to the other party to the transaction. The emphasis is on whether that other party ought to have known that the signer was, or might have been, in difficulties. If that were so, the signer's claim that no consent is given by him or her is accorded credence and the other party may not benefit from the transaction. Such a test is similar to the tests applied by the High Court in *Taylor v Johnson*³² and in cases on unconscionable transactions.³³ What the High Court did not argue in *Petelin v Cullen* was that the application of this test as between the two parties should render the contract voidable, not void. If this is the correct approach, the doctrine of non est factum could wither away or be absorbed into the rubric of unconscionability which allows a contract to be set aside. What this means in the long-run is that the principle of non est factum may no longer be available to defeat the rights of innocent third parties.

IV APPLICATION OF NON EST FACTUM IN GUARANTEE CASES: RESTRICTIONS AND LIMITATIONS

The defence of non est factum has been drastically circumscribed and is available to a signer who could prove, for example, that the guarantee was entered into as a result of misrepresentation, that it was fundamentally different from what the signer thought he or she was signing and that there was no negligence involved in making the mistake.³⁴ This increased protection accorded to third parties can be seen to have a useful social purpose, namely, that it is essential that there should be reliance on documents that are relied upon.

³¹ (1975) 132 CLR 355.

³² (1983) 151 CLR 422.

³³ For example, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Blomley v Ryan* (1956) 99 CLR 362.

³⁴ See, for example, *Dorsch v Freeholders Oil Co Ltd* (1965), 52 DLR (2d) 658 where it was held that a plea of non est factum cannot be sustained where there was no misrepresentation as to the nature of the document which the challenging party was asked to sign, and it is immaterial that he did not read the document before signing it, although he was given every opportunity to do so.

Where the guarantor fails to prove an absence of negligence, it must then be shown that he or she took all reasonable precautions in the circumstances to ascertain the nature of the document. This could happen in situations where the guarantor entered into the contract of guarantee without reading it and showing no interest or indifference as to what he or she was signing.³⁵

In *Beneficial Finance Co of Canada v Telkes and Telkes*³⁶ the defendants executed a guarantee on a promissory note and a conditional sales contract for a couple Mr and Mrs Topa who wished to borrow money from the plaintiff finance company. The defendants were familiar with the necessary procedures, as they had done this on other occasions. They admitted liability on the conditional sales contract but pleaded non est factum on the promissory note guarantee, claiming that they had not intended to execute and did not know they had executed the guarantee. When the Topas became bankrupted, the plaintiff now claimed against the defendants on their guarantee of the promissory note.

The court here followed the broad arguments of *Saunders* and would not hesitate to apply the principles of the House of Lords decision in declaring 'that the document signed was 'fundamentally' or 'radically' or 'totally' different from what the defendants believed that they were signing'.³⁷ However, the court said that the issue here was the complete indifference of the defendants to what they were signing making it difficult to support a defence of non est factum.³⁸

The guarantor may have difficulty in satisfying the criterion that the mistake has to be sufficiently fundamental. Such a mistake does not have to be related to the legal character of the transaction but may also be related to its contents. *Saunders v Anglia Building Society*³⁹ endorsed this principle and disagreed with earlier decisions such as *Australian Express Pty Ltd v Pejovic*⁴⁰ which espoused the view that the plea was only successful if the mistake was one as to the legal character of the transaction.

It is not clear as yet if the guarantor is discharged where the guarantor mistakenly believes his or her liability is limited to a specific amount,

³⁵ See, for example, *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281.

³⁶ [1977] 6 WWR 22.

³⁷ *Ibid* 22 (Dewar CJ).

³⁸ *Ibid* 22-23 (Dewar CJ).

³⁹ [1971] AC 1004.

⁴⁰ [1963] 80 WN (NSW) 427.

or extends only to particular transactions, where it is in fact more extensive. One line of authority seems to be suggesting that such mistakes are not fundamental or substantial. An example is *Bank of Australia v Reynell*.⁴¹ There a solicitor arranged with the appellant bank for advances to be made to him to the extent of £5,000 on a guarantee by the respondent. He took the printed guarantee form from the bank and filled it in as a guarantee up to £5,000, but asked the guarantor to guarantee his account with the bank up to £500. The guarantor signed the guarantee but did not read the guarantee himself. The solicitor handed the document to the bank, which took it in good faith as a guarantee for £5,000, and made advances against it to the solicitor to the amount. Eventually, the guarantor discovered the fraud and repudiated the guarantee which was admitted to by the solicitor who then died insolvent. The bank sued the guarantor for the £5,000 on the guarantee and the court held that the bank was entitled to recover the amount. It appears from this case that a difference between £500 and £5,000 was considered not to be fundamental or substantial, although it must be conceded that the case was decided before it was settled that the rule that a mistake as to the contents of the document was not sufficient to a successful defence of non est factum.

Similarly, in *Canadian Imperial Bank of Commerce v Dura Wood Preservers Ltd et al*⁴² it was held that a guarantor who signs a guarantee form thinking that his liability is limited to a secured obligation of \$15,000, when in fact the form made him liable to a much larger and less secured obligation, cannot rely on a plea of non est factum. The implication here is that liability in respect of the greater obligation is not essentially different in substance or in kind from the lesser liability.⁴³

Another line of authority supports the view that mistakes as discussed are fundamental or substantial. In *Lloyd's Bank plc v Waterhouse*⁴⁴ which was cited earlier, it was noted that the liability of the guarantor in respect of an all-moneys guarantee was fundamentally different from the liability under a loan account for the purchase of a farm. This was so even though the all-moneys guarantee imposed an upper limit on the guarantor's liability to the extent of the amount of the loan. The reasoning given here was that the all-moneys guarantee had the effect

⁴¹ (1891) 10 NZLR 257.

⁴² (1979) 102 DLR (3d) 78.

⁴³ See also *Stearns v Ratel et al* (1961) 29 DLR (2d) 718; *Prudential Trust Co Ltd v Cugnet* (1956) 5 DLR (2d) 1.

⁴⁴ [1993] 2 FLR 97.

of making the guarantor liable for debts incurred in activities other than farming.⁴⁵

There are situations where an incorrect understanding that the principal transaction is secured is not fundamental. *Chiswick Investments v Pevats*⁴⁶ is a case where the mistake was as to capacity. There, Pevats, a chartered accountant and secretary of a company, was required to execute a deed of covenant, which contained provision for a personal guarantee by the 'undersigned shareholders'. Pevats became aware of the personal guarantee and said that he was not prepared to personally guarantee the loan, and signed the deed in the place reserved for attestation to the placing of the company seal, and in his capacity as company secretary, but not in the place reserved for the signatures of individual shareholders. The company defaulted on the loan and the appellant sued on the guarantee. It was contended that Pevats never intended to sign a guarantee and, in signing where he did, believed he was doing no more than attesting to the affixing of the company seal. He did not sign in that part of the document which was appropriate for a person signing as guarantor, and he could not be said to have been negligent in failing to ascertain the character of the document before signing it, and his plea of non est factum was successful.⁴⁷

Closely related to the abovementioned criterion that the mistake has to be sufficiently fundamental is the requirement that the guarantee must be 'radically different' from what the guarantor believed it to be – a difficult requirement to be satisfied. First of all, guarantors must show that they did in fact hold a mistaken belief as to the nature of the contract. Where, for example, a mother signs a guarantee without giving any thought at all to the subject matter of the document 'because she trusted her son',⁴⁸ she will not have formed any belief as

⁴⁵ A guarantor will refer to the obligations guaranteed, and an 'all moneys' guarantee will not be limited to the obligations of the debtor as borrower of money, but will also extend, for example, to the principal debtor's liability as a guarantor under a cross guarantee: *Coghlan v SH Locke (Australia) Ltd* (1987) 8 NSWLR 88. It should be noted that the conduct of the creditor may influence the court in the construction of an all moneys guarantee. This may end up in a guarantee of this kind being read down: *Bank of New Zealand v Hault* (unreported, Supreme Court of Queensland, 14 February 1991).

⁴⁶ [1990] 1 NZLR 169.

⁴⁷ See *Canadian Imperial Bank of Commerce v Dura Wood Preservers Ltd* (1979) 102 DLR (3d) 78.

⁴⁸ *Park Avenue Nominees Pty Ltd v McMullen & Anor* (unreported, NSW Supreme Court, Howie AJ, 13 March 1998): [1998] NSWSC 57.

to the nature of the document and cannot avail herself of the defence. In this way, the absolute trust which some guarantors may have in the debtor or creditor will disentitle them from relief. This greatly limits the operation of the doctrine since it is well recognised that

many people do frequently sign documents put before them for signature by ... trusted advisers without making any inquiry as to their purpose or effect.⁴⁹

Secondly, even where guarantors are able to show that they formed a mistaken belief as to the nature of the contract, they will be required to show that, on viewing the document as a whole, there was a radical or substantial difference between the document as it was and the document as the guarantors believed it to be.⁵⁰ It has been established that a radical or substantial difference will exist where, for example, the guarantors believed that they were guaranteeing a loan solely in their capacity as company secretary whereas they were actually guaranteeing the loan in a dual capacity so as to bind them both as an individual and as the company secretary.⁵¹ On the other hand the difference will not be sufficiently radical if the guarantors believed that they were merely guaranteeing a loan to a company they themselves were forming where, in fact, they were being bound as principal debtors.⁵²

From what has been said, it can be seen that to make use of the plea of non est factum, guarantors will have great difficulty in establishing that the mistake is sufficiently fundamental, and the document concerned is radically different from what they believed it to be. It should be pointed out that the disclosure requirements of the *Code of Banking Practice*⁵³ and the *Consumer Credit Code*⁵⁴ will have the potential effect of making it even more difficult for guarantors to establish the two mentioned requirements.

The Codes require creditors to provide extensive information in respect of their position as guarantors. The effect of this is to reduce the scope for guarantors to claim mistake and non est factum to negate any liability under the contract of guarantee. Guarantors who have received a warning in writing that they will be liable to pay if the

⁴⁹ *Saunders v Anglia Building Society* [1971] AC 1004, 1016 (Lord Reid).

⁵⁰ *Ibid* 1017, 1019, 1021, 1034.

⁵¹ *Chiswick Investments v Pevats* (1990) 1 NZLR 169.

⁵² *ICF Securities Ltd Sewell* (1990) 1 NZLR 17.

⁵³ See eg, Clause 24.

⁵⁴ See eg, s 51(1).

debtor defaults and a summary or copy of the obligations to be guaranteed can hardly, in the absence of a relevant disability, complain that they made a mistake. Similarly, the provision recommending the prospective guarantor to obtain independent advice would make the plea of non est factum a lot more difficult to succeed.

V THE PLEA OF NON EST FACTUM IN GUARANTEE CASES: DIMINISHED AND CIRCUMSCRIBED

Judging from the aforesaid, if there is any justification for retaining the plea of non est factum in guarantee cases where third party rights would be defeated, it must be in very unusual situations.

It is hard to envisage any circumstances in which a person of full capacity would be able to rely on the defence, because if someone has taken reasonable care to ascertain what she was signing, it would be most unusual if she does not realise what the document actually is. Nevertheless, it is possible that the defence may still succeed, although in rare cases. The kind of case in which it is most likely to succeed is one of misplaced trust, where the nature and contents of the document would not be readily apparent to the person reading it. As an illustration, if the contract of guarantee is written in a foreign language which the signatory does not understand, and the signatory requests a translation before he signs it, but someone gives him a fraudulent translation which relates to a document of a radically different nature, the defence might be available to him.⁵⁵

It is worth being reminded that the plea was originally available to people whose signatures had been forged where to assert that 'it is not my deed' was perfectly true.⁵⁶ However, it became available to illiterates and others who had to have documents explained to them before they signed.⁵⁷

The plea thus served a useful purpose at a time when there was widespread illiteracy, although with the advent of universal education and general adult literacy, the continued existence of the rule was put in doubt. So it was ironic that when the justification for the use of the plea was diminishing, it was reaffirmed and applied in *Saunders* where, as alluded to earlier, the House of Lords declined to abolish the defence, and took pains in fact to revive it and apply it to cases where

⁵⁵ *Lewis v Clay* (1897) LJ QB 224; *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97.

⁵⁶ See judgment of Salmon LJ in *Gallie v Lee* [1969] 2 Ch 17, 42.

⁵⁷ *Thoroughgood v Cole* (1584) 2 Co Rep 9a; 76 ER 408.

the defendant was not illiterate.⁵⁸ In this way the plea became fictitious because the truth of the matter was not that the person had not signed but had merely misunderstood.

Thus the plea as applied to guarantees will not be successful if a prospective guarantor understands the nature of the document, but is mistaken about its contents or legal effect, or if it is brought about by the person's carelessness or negligence as when he or she is not taking reasonable precautions to determine the nature of the document.

This is confirmed by the peremptory dismissal of the rule by the Court of Appeal in *Avon Finance Co Ltd Bridger*.⁵⁹ Yet the defence had not quite been laid to rest. It was relied upon, for example, by the English Court of Appeal in *Lloyd's Bank plc v Waterhouse*,⁶⁰ a decision which stressed the close links between non est factum, misrepresentation, undue influence and unilateral mistake.

What has been discussed in respect of the plea of non est factum has understandably wide implications for the law of guarantees where it affords a defence to a guarantor against whom action is brought in reliance upon a signed written agreement, and where that guarantor is able to show that he or she was unaware of the true meaning of the document when signing it.

In contracts of guarantee non est factum can be pleaded in innocent third party cases where the person who signed the document is to be relieved of contractual obligations. One class of case is where the defences of say fraud or unconscionability are not available as against the other party to the contract because that party was in no way responsible for or had knowledge of the circumstances which caused the mistake. In this set of circumstances, the signature has usually been procured by the fraud of an intermediary or someone who stands to benefit from the transaction such as a debtor whose overdraft at the bank is guaranteed by the person who signs.⁶¹ Another class of case is where a third party has acquired an interest in the subject matter of the alleged contract without notice of any defect in title.⁶²

⁵⁸ *Foster v MacKinnon* (1869) LR 4 CP 704; [1861-73] All ER Rep 1913. See also, *Lewis v Clay* (1897) 67 LJQB 224.

⁵⁹ [1985] 2 All ER 281.

⁶⁰ [1993] 2 FLR 97.

⁶¹ *Bank of Australasia v Reynell* (1892) 10 NZLR 257; *Newman v Ivermee* (1989) NSW Conv R 55-493.

⁶² *Carlton and United Breweries Ltd v Elliot* [1960] VR 320; *Cansdell v O'Donnell* (1924) 24 SR (NSW) 596.

VI CONCLUSION

This article has explored in some detail the grounds on which a guarantee can be set aside by the defence of non est factum. However, the nature of the guarantee is such that the plea will only void the guarantee in limited circumstances. As a result, stringent tests of various layers for the defence have been developed to ensure that such a situation is brought about. The rationale and policy considerations leading to this pattern are founded on the balancing of the rights of innocent third parties against the injustice of holding guarantors to contracts to which they did not bring a consenting mind.

The law here is being applied narrowly and thus effectively restricts the application of the defence. This is evident from the dearth of case law on the subject and the infrequency of the application of the defence to guarantees generally as the courts have proven to be unwilling to extend the doctrines so as to benefit guarantors at the expense of innocent creditors. And despite the limited duty of disclosure which the creditor owes to the guarantors, the latter are generally expected to look after themselves.

The suggestion of extensive disclosure by the creditor as required by the *Banking Code of Practice* and the *Consumer Credit Code*, as mentioned earlier, may have the indirect effect of reducing the availability of non est factum being used as a defence at law, since sureties will now have less opportunity of claiming that they were under a misapprehension as to the terms of the guarantee. In the case of the *Consumer Credit Code*, this may have limited the impact on the common law as it only applies to certain types of guarantees. The fact that guarantees must be clearly expressed in 'plain English'⁶³ suggests that the *Consumer Credit Code* essentially requires very short documents in the language that an average person would understand.⁶⁴ Presumably, documents expressed in such language would make it harder to prove that guarantors fall within the class of persons who are mistaken about a contract of guarantee or who are unable to understand the document, believing it to be radically different from the one they have in mind, and thus making it difficult to raise the plea of non est factum.

The *Consumer Credit Code* and the *Banking Code of Practice* do not allow for unlimited guarantees, but in fact limit the guarantor's liability to

⁶³ J Pascoe, 'Guarantees and Law Reform - New Directions for Consumers?' (1996) 4(1) *Current Commercial Law* 33, 36.

⁶⁴ D Turner, 'New Consumer Credit Code: A Banking Lawyer's Perspective' (1996) 12(6) *Australian Banking Law Bulletin* 89, 95.

that of the debtor under the credit contract.⁶⁵ The guarantor's liability cannot be increased without consent.⁶⁶ In this way, if the debtor's credit is increased, the guarantor's liability is not automatically increased.⁶⁷ A large number of cases where non est factum would have been pleaded may be rendered unnecessary in cases where the guarantor is mistaken about the liability under the guarantee. However, the Codes are not that helpful to people who are most likely to fall into the class of persons (eg, migrants) who may be mistaken as a result of language deficiencies. This is because they do not require that the transactions be provided in any language other than English.⁶⁸

In some cases, a mistaken party who is unable to obtain relief on the grounds of non est factum may be able to set aside the guarantee on other grounds such as a breach of the creditor's duty of disclosure, misrepresentation, or unconscionable conduct (which are wider and more likely to give relief) under the principles as espoused in *Commercial Bank of Australia v Amadio*⁶⁹ or *Garcia v National Australia Bank*.⁷⁰ In this sense, the assertion that it is rare in practice to find cases of non est factum 'which are not obviously and easily disposed of on some other ground is of some significance in the case of contracts of guarantee'.⁷¹ In the case of unconscionable conduct, for example, its rise as a predominant force, together with the recourse to a range of appropriate legislative provisions have reduced the need for the doctrine of non est factum further, especially in an era where there is a decline in the supremacy of the signed document.⁷²

⁶⁵ *Consumer Credit Code* s 5 (1); *Code of Banking Practice* (2004), Clause 28.2 (a) (b).

⁶⁶ *Consumer Credit Code* ss 54, 56.

⁶⁷ See A Smith, 'The New Consumer Credit Code' (1996) 6(3) *Australian Corporate Lawyer* 20, 21.

⁶⁸ See Pascoe, above n 63, 36.

⁶⁹ (1983) 151 CLR 447.

⁷⁰ (1998) 155 ALR 614.

⁷¹ P S Atiyah, *An Introduction to the Law of Contract* (4th ed, 1984) 94.

⁷² This is evident in the importance of 'ticket' cases in contractual dealings and the erosion of the parol evidence rule as shown by *Codelfa Construction Pty Ltd v State Real Authority of NSW* (1982) 149 CLR 337, 352; *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* [1985] 2 NSWLR 309.

MORE THAN HOT AIR: REFLECTIONS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS

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I INTRODUCTION

The two areas of human rights and climate change are inextricably linked. They are both dependent upon the international cooperation of states and are part of the domain of the common concern of humankind.¹ As such, the protection of human rights and of the climate depends upon multilateral action on the part of the international community, particularly in circumstances where human rights are violated due to the adverse impacts of climate change. A key argument in this article is that there should be a focus on addressing the causes of climate change by developing international environmental law, because climate change forms a fundamental threat to the welfare of both humankind and the environment. This form of protection is likely to lead to more effective prevention of human rights

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¹ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107, preamble para 1 (entered into force 21 March 1994) ('UNFCCC'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 183rd plen mtg, [preamble paras 1, 2], UN Doc A/810 (1948) ('UDHR').

violations that occur as a consequence of climate change, rather than relying solely upon the present legal framework for international human rights law.

This article commences with a brief summary of the relationship between climate change and human rights and then examines whether there currently exists any adequate legal means of protection against violation of the human rights occurring as a result of the adverse impacts of climate change. The second part of this article considers whether there are effective mechanisms available to deal with these violations of human rights at international law and the third part examines the predicament of people who are, and might in the future be displaced by climate change.

This article is timely not only because of the importance attached to the fundamental human rights of individuals, but also due to the fact that the principal existing international legal regime regulating climate change – established under the *Kyoto Protocol* to the *United Nations Framework Convention on Climate Change* ('UNFCCC')² – is due to be renegotiated at the Conference of Parties of the UNFCCC (COP15) in Copenhagen late this year. Indeed, a series of meetings leading up to the COP15 Meeting have already begun, and recent sessions in Bonn in June and August 2009 have highlighted how complex and difficult this process will be. It is certainly too early to have the confidence to predict how the international legal regime will develop at Copenhagen, and in the period thereafter.

Many state governments have been focusing on the economic and security aspects of climate change, without paying sufficient attention to the social and human rights implications.³ However, a report issued by the Office of the United Nations Commissioner for Human Rights ('UNHCHR') in early 2009 has raised this relationship at the highest levels, by focusing on 'The Relationship between Climate Change and Human Rights' (the '*UNHCHR Report*'). The *UNHCHR Report* set out to establish some of the key issues that characterise the relationship between human rights and climate change. It is apparent from the

² *Kyoto Protocol to the Framework Convention on Climate Change* opened for signature 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005) ('*Kyoto Protocol*').

³ John Von Doussa, 'Human Rights and Climate Change: A Tragedy in the Making' (2008) 31(3) *UNSW Law Journal Forum* 953, 953: 'although climate change will clearly have direct and indirect human rights impacts, the focus of governments seems to have been largely on economic, trade and security impacts of climate change, with the social and human rights implications receiving little consideration in policy debates.'

conclusions of the *UNHCHR Report* that the implications of this relationship are very serious. Many fundamental human rights will be affected by changes in the earth's climate – some of the main impacts on human rights are listed in the *UNHCHR Report*. They are highlighted in summary form below.

A *The Right to Life*⁴

Predictions by the United Nations Intergovernmental Panel on Climate Change ('IPCC') indicate that an increase in weather threats, such as heatwaves, floods, storms fires and droughts, will inevitably lead to an increase in human deaths.⁵ These weather-related disasters are more likely to have an effect on the right to life of those in the developing countries, but will also have an impact upon other related human rights, such as the right to adequate food, due to the increase of people suffering from hunger.⁶

B *The Right to Adequate Food*⁷

It is likely that, in those locations in the mid to high latitudes of the world, food production will increase; however, it is predicted that food production will, conversely, decrease at lower latitudes, so that in many poorer regions, additional people will suffer from hunger due to the effects of climate change. This is likely to be particularly the case in

⁴ *UDHR*, GA Res 217A (III), UN GAOR, 183rd plen mtg, [art 2], UN Doc A/810 (1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 6 (entered into force 2 September 1990).

⁵ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, [9], General Assembly A/HRC/10/61 (2009) ('*UNHCHR Report*').

⁶ *Ibid* 9.

⁷ *UDHR*, GA Res 217A (III), UN GAOR, 183rd plen mtg, [art 2], UN Doc A/810 (1948); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 11 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 24(c) (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, [art 25(f), art 28 para 1], UN Doc A/Res/61/106 (2006); *Convention on Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, 1249 UNTS 13, art 14 para 2 (h) (entered into force 3 September 1981); *International Convention on Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195, art 5(e) (entered into force 4 January 1969).

areas such as sub-Saharan Africa.⁸

In addition to the problems of ensuring adequate food production, mitigation actions that seek to reduce the emissions of greenhouse gases might also have other impacts on the right to food. For example, agro-fuel production carried out to mitigate the impacts of climate change could affect the right to food in areas where arable land is scarce, because these fuels may be produced in priority to food, thus leading to an increase in the price of food due to a shortage in production.⁹

C *The Right to Water*¹⁰

There will be a loss of safe drinking water due to less snow cover and reductions in glaciers. The shortages resulting from these losses from the water supplies of mountain ranges are predicted to affect more than one sixth of the world's population.¹¹

D *The Right to Health*¹²

There are likely to be serious adverse affects on the health of people

⁸ *UNHCHR Report*, above n 5, 10.

⁹ Ibid 22. 'Agro-fuels' or biofuels are used to replace fossil fuels for transport and contain ethanol derived from suitable plants.

¹⁰ *General Comments no. 15 the Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, Comm on Economic, Social and Cultural Rights, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (2002); *Convention on the Elimination of all forms of Discrimination against Women* adopted 18 December 1979, 1249 UNTS 13, art 14 para 2(h) (entered into force 3 September 1981); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, [art 28 para 2(a)], UN Doc A/Res/61/106 (2006); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 24 para 2 (c) (entered into force 2 September 1990).

¹¹ *UNHCHR Report*, above n 5, 11.

¹² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12 (entered into force 3 January 1976); *Convention on Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, 1249 UNTS 13, arts 12, 14 (entered into force 3 September 1981); *International Convention on Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195, art 59(e)(iv) (entered into force 4 January 1969); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 24 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, [arts 16 para 4, 22 para 2, 25], UN Doc A/Res/61/106 (2006); *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, adopted 18 December 1990, 30 ILM 1517 (1991), arts 43 para 1(e) para 1 (c), 70 (entered into force 1 July 2003).

throughout the world as a result of climate change. For example, there will be increases in malnutrition, in the spread of diseases and also increased injury, due to the consequences of more frequent severe weather events.¹³ It is likely that these increases in adverse health effects will be more serious in the regions of sub-Saharan Africa, South Asia and the Middle East.¹⁴

E *The Right to Adequate Housing*¹⁵

Global warming will impact on the right to adequate housing, since in some areas such as the Arctic region, low-lying islands and mega-deltas, many people will lose their homes and may need to be relocated. Storm events and sea-level rise will directly lead to a loss of housing and the potential for the loss of livelihoods will result in an increase in those populations in urban areas and in slums, some of which are particularly vulnerable to severe climate events.¹⁶

Indeed, whole countries may eventually become uninhabitable. There have already been various discussions between the Governments of Tuvalu and Australia/New Zealand canvassing options to address the 'disappearance' of that country as a result of rising sea levels. We have now entered a phase of 'environmental refugees', a concept for which existing international law regulation is not well-equipped to deal with.

F *The Right to Self-Determination*¹⁷

The adverse effects of sea-level rise and serious weather events could lead to indigenous peoples being forced to leave their traditional homelands or being placed in a situation where they are no longer able to rely upon their traditional and essential sources of livelihood.¹⁸

¹³ *UNHCHR Report*, above n 5, 12.

¹⁴ *Ibid.*

¹⁵ *UDHR*, GA Res 217A (III), UN GAOR, 183rd plen mtg, [art 25], UN Doc A/810 (1948); *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, art 11, (entered into force 3 January 1976).

¹⁶ *UNHCHR Report*, above n 5, 13.

¹⁷ *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, art 1 para 1, (entered into force 3 January 1976).

¹⁸ *UNHCHR Report*, above n 5, 14.

II ACTION TO PREVENT FUTURE VIOLATIONS OF THESE HUMAN RIGHTS

The aim of the international community should be to prevent these impacts on human rights as far as is possible. In order to achieve this aim, there will need to be greater cooperation amongst states to take more drastic action to reduce greenhouse gas emissions. As noted, the levels required to be reduced are in the process of negotiation, but the signs are not positive. Clearly the levels agreed to under the *Kyoto Protocol* are inadequate:

Whilst there is much debate surrounding the level at which greenhouse gases can be considered dangerous the 2007 IPCC Fourth Assessment Report indicates that global emissions need to be reduced by somewhere in the order of 80 to 90 per cent by 2050 in order to stabilise atmospheric concentrations at 450ppm CO₂-e. Since that report was released there have been many 'system wide' changes that have accelerated beyond IPCC expectations (including the worst ever loss of arctic sea ice in the northern summer of 2007). This suggests that the earth system is moving towards a "tipping point" for the occurrence of irreversible catastrophic impacts such as the total disappearance of the arctic sea ice, and the destabilisation of the Greenland and Antarctica ice sheets.¹⁹

There are reporting obligations under provisions of the *UNFCCC* and the *Kyoto Protocol*, including of matters such as inventories of greenhouse gases and of methodologies for the verification of this information. However, these international agreements provide for preliminary reductions of greenhouse gases by the international community and, in fact, in some cases as for Australia, an increase in emissions was ultimately permitted at the conclusion of the negotiations in Kyoto.²⁰ Clearly, the international negotiations leading to COP15 and beyond need to ensure that there are much greater reductions of greenhouse gas emissions in the future in order to contain climate change.

Compliance institutions have been established to support the environmental protection provisions of the *Kyoto Protocol*,²¹ to monitor

¹⁹ Wayne Gumley, 'Beyond Bali: The Future of Climate Change Law' in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) 295, 296.

²⁰ *Kyoto Protocol*, above n 2, Annex B. Australia's target is to limit its greenhouse gas emissions to 8 per cent above its 1990 emissions during the first commitment period 2008-2012.

²¹ *Ibid* arts 16, 18.

the carbon market and also to check the transparency of the accounting methods used by the parties to the treaty.²² These compliance mechanisms should also be applied to future international agreements on emission reductions, particularly to the next international agreement currently in the process of negotiation, which is likely to account for greenhouse gas emission reductions after the first commitment period that concludes in 2012.²³

However, the utility of these mechanisms is limited by the fact that they are established to assist states to meet their agreed levels of greenhouse gas emissions and obligations under the current regime – the *Kyoto Protocol* – rather than providing any means of redress for states or individuals who are adversely impacted by the effects of climate change. Moreover, many states are already having considerable difficulty in meeting their existing emission reduction requirements and it is as yet unclear how (and whether) they will agree (or be persuaded in some way) to commit to even greater reduction targets and any other more onerous obligations.

Other options for the international community to consider are to ensure financial and technological support for mitigation and adaptation programs, particularly in developing countries where large populations and their environment are threatened by the impact of sea-level rise and increased weather threats.

III LEGAL PROTECTION OF HUMAN RIGHTS

The legal protection and enforcement of human rights becomes a key question when considering the impacts of climate change on these human rights – to what extent are they likely to be protected?

According to *UNHCHR Report*:

The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change – related harm often cannot clearly be attributed to acts or omissions of specific States. Yet, addressing that harm remains a critical human rights concern and obligation under international law. Hence, legal

²² UNFCCC, *An Introduction to the Kyoto Protocol Compliance Mechanism* (2008) 1 <http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024txt.php> at 21 February 2008.

²³ See Bali Action Plan, UNFCCC, *Report of the Conference of the Parties on its Thirteenth Session, held in Bali from 3 to 15 December 2007* (2007) [3] <<http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>> at 30 September 2009.

protection remains relevant as a safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.²⁴

The concern is that, in spite of the development of a more extensive legal regime and treaty system covering human rights issues, numerous violations of human rights continue to occur on a daily basis in many respects.²⁵ For example, one need only refer to the genocide in Darfur as a clear and current situation where fundamental human rights are being ignored and blatantly abused. One of the key problems is that the human rights legal system generally has a very limited capability to enforce the human rights obligations.²⁶ Donoho defines 'enforcement' in this context as,

[to] describe *authoritative* mechanisms that are designed and expected to *compel* direct consequences, such as changes in governmental policy, payment of civil compensation, or imposition of criminal penalties, *under threat of meaningful sanction*.²⁷

It is often difficult to effectively enforce these human rights at international law and even in circumstances where human rights organisations may be able to intervene to assist in relieving the human rights concerns of the Darfur people, the underlying causes of the human rights violations would not be resolved, because these organisations are not equipped to remedy the causes of climate change. There may still be a failure to address the threat of climate change if the international environmental legal obligations of states to reduce greenhouse gas emissions are not substantially strengthened.

Another problem is that the effects of action to mitigate climate change are not always focused on environmentally sustainable outcomes. One of the dilemmas is that a hasty decision to take action to mitigate the effects of climate change may lead to other adverse consequences, as occurred in the case of the movement by governments and industry towards increasing the production of agro-fuels. Some of the adverse consequences of the rapid production of these fuels include impacts on 'land use, deforestation, water consumption, eviction and displacement of small farmers, and effects on food prices and food security.'²⁸

²⁴ UNHCHR Report, above n 5, 30.

²⁵ Douglas Donoho, 'Human Rights Enforcement in the Twenty-First Century' (2006) 35(1) *Georgia Journal of International and Comparative Law* 1, 3.

²⁶ Ibid 5.

²⁷ Ibid 11.

²⁸ Mairon G Bastos Lima, 'Biofuel Governance and International Legal Principles: Is it

Also, the use of these fuels may not always contribute to a lessening of greenhouse gas emissions, as is illustrated in circumstances where agro-fuels are developed in areas that are naturally rich in carbon (as, for example, in forested areas), the release of greenhouse gases into the atmosphere may not justify the emissions saved by use in transport of these fuels.²⁹ The effects of the production of agro-fuels have thus resulted in adverse consequences for the human rights of individuals, due to the impacts of rising food prices, evictions of people from land, displacement of indigenous people and insecure working conditions. This problem is not easily resolved, because of the inter-state issues involved as countries may rely upon bilateral agreements on the production of agro-fuel. Without further development of environmental law in this area, there is little to prevent abuses of human rights as a potential outcome of the production of these fuels.

Lima points out that if environmental governance principles are correctly followed the problems associated with increased agro-fuel production could be alleviated.³⁰ In order to resolve these issues, Lima argues that biofuels should be regulated by an agreed legal framework on biofuels that is in compliance with the sustainability principles in the *Declaration of the United Nations Conference on Environment and Development* ('Rio Declaration'),³¹ as well as the general principles on good governance.³² A possible solution to this problem would be to develop a protocol to the UNFCCC on the production of agro-fuels that would take into account environmental sustainability and governance standards.

A further impediment to the development of international environmental principles is the continued reliance by many states upon the doctrine of sovereignty to protect their own interests. Moreover, whilst there is undoubtedly a substantial body of existing human rights instruments, there is also the danger of 'treaty fatigue', as the development of new conventions may, perversely, dilute the perceived importance of others that have been concluded previously. The reliance by states upon the doctrine of sovereignty is discussed in the next section. This will be followed by a consideration of action that may be taken by appropriate UN institutions.

Equitable and Sustainable?' (2009) 10 *Melbourne Journal of International Law* 470, 471.

²⁹ Ibid 473.

³⁰ Ibid 470.

³¹ *Rio Declaration on Environment and Development*, 31 ILM 874, UN GAOR, UN Doc A/CONF.151/26 (Volume 1) (1992).

³² Bastos Lima, above n 28, 490.

IV SOVEREIGNTY

The traditional international legal concept of 'sovereignty', which stems from the development of the 'nation state' that arose from the 1648 Treaty of Westphalia, impedes the development of binding legal human rights obligations and the development of an institutional authority capable of enforcing these rights. The early concept of sovereignty empowered a state to have exclusive jurisdiction and independence over the people and the environment within its boundaries to the exclusion of other states. In an oft-cited decision in the *Island of Palmas Case*, the eminent Austrian jurist, Judge Huber, expressed it so:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure settling most questions that concern international relations.³³

States often assert that they rely upon the principle of sovereignty to have the freedom of action to organise their internal affairs as far as human rights are concerned. Article 2(7) of the *Charter of the United Nations*³⁴ reinforces this fundamental international law principle of 'non-interference' when it states:

Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.³⁵

The development of minimum (global) human rights standards naturally challenges the exclusive powers of states to impose a system of legal regulation within their own territory. The agreement to undertake international legal human rights obligations under a binding treaty depends upon state consent to be bound, although where these rights are also found within the customary principles of international law, then *all* states are bound.³⁶ Even though there is increasing

³³ *Island of Palmas Case (Netherlands v. United States)* Permanent Court of Arbitration, 1928 2 RIAA 829.

³⁴ *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS 16; 59 Stat 1031 (entered into force 24 October 1945) ('*UN Charter*').

³⁵ *Ibid* art 2(7).

³⁶ *Statute of the International Court of Justice*, opened for signature 26 June 1945, 59 Stat

international cooperation to try to resolve the problems of climate change, individual states generally retain a discretion as to whether they will agree to be bound by environmental and human rights obligations under international agreements.

Moreover, the implementation of these international agreements depends upon the willingness of the states who are parties to comply with their international obligations and with the effectiveness of the supervisory authorities established under these treaty regimes.³⁷

The concept of the common concern of humankind may be perceived as operating in conflict with the unilateral discretion that states assert is a characteristic of the traditional concept of sovereignty. The common concern draws the attention of the international community to the source of the concern, in this particular case, the threat of climate change, and this concept focuses on the need for international cooperative action to address it.³⁸

According to the *UNHCHR Report*, states do have obligations to protect human rights, particularly in circumstances where submergence of low lying islands will lead to an impact on a number of human rights of these peoples. The *UNHCHR Report* indicates that:

States have a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples.³⁹

However, the problem for the adversely affected states is that there may not be adequate procedures to enforce claims of human rights violations that are likely to occur as a consequence of the impacts of climate change. It may be possible for a state to seek action to be taken by the United Nations Security Council, the Human Rights Council, or to consider seeking other legal avenues such as an action in the courts or an appropriate method of dispute resolution. These avenues will briefly be considered in the following sections. This will be followed by a consideration of the potential extent of State responsibility for

1031, (entered into force 24 October 1945) art 38(1)(b); *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Federal Republic of Germany v The Netherlands)* (Judgment) [1969] ICJ Rep 3.

³⁷ Donoho, above n 25, 17.

³⁸ Laura Horn, 'The Implications of the Concept of Common Concern of Humankind on a Human Right to a Healthy Environment' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 233, 249.

³⁹ *UNHCHR Report*, above n 5, 15.

persons displaced by the effects of climate change.

V UNITED NATIONS SECURITY COUNCIL

There have been several significant studies that have shown that the impacts of climate change could threaten world peace.⁴⁰ For example, one estimate is that the combined effects of climate change and other economic, social and political problems, could lead to a heightened risk of conflict in 46 countries, particularly in the areas prone to the adverse impacts of climate change in sub-Saharan Africa, Asia and Latin America.⁴¹ Internal conflicts may also be caused by climate change and lead to violations of human rights. As an example, it is widely regarded that:

Increased incidence of drought in Sudan has been said to be one of the factors that brought pastoralists and nomads into conflict in Dafur.⁴²

The relationship between human security and a safe and habitable environment is vital, particularly in relation to access to natural resources. If this intricate inter-relationship is significantly affected by climate change, the lives and/or livelihoods of those reliant on the natural environment may be jeopardized, or even destroyed.

Moreover, there is another equally significant, but perhaps not yet fully understood, link to be drawn between climate change and its effects on the environment and human conflict. Access to natural resources – or the lack of access – can itself be the trigger for conflict. For example, one of the underlying tensions between Israel and Syria is the issue of access to water. In both the Democratic Republic of Congo and Haiti, the United Nations Environment Programme ('UNEP') has reported that environmental damage has been a major cause of political unrest and conflict.⁴³ It has been estimated that approximately five million people were killed in armed conflicts during the 1990s relating to the

⁴⁰ Ibid 21.

⁴¹ Ibid 21.

⁴² Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007) 1456 cited in an extract from Margaret Beckett, 'Climate Change: the Gathering Storm' (Speech delivered at the Annual Winston Churchill Memorial Lecture, New York, 16 April 2007).

⁴³ Alister Doyle, *UN Aims to Study Link Between Environment, Wars* (2004) Planet Ark World Environment News, 14 January 2004
<http://www.planetark.com/avantgo/dailynewsstory.cfm?_newsid=23429> at 27 March 2007.

exploitation of natural resources,⁴⁴ and that one quarter of the 50 active armed conflicts in 2001 were largely 'motivated' by resources.⁴⁵

In 1990, a research team at the University of Toronto concluded that, in countries as diverse as Haiti, Pakistan, the Philippines and South Africa, 'severe environmental stress multiplied the pain caused by such problems as ethnic strife and poverty'.⁴⁶ In terms of quantifying the effects of environmental degradation, a water expert has recently predicted that, in regions initially experiencing low-level conflict, the risk of escalation to full-scale civil war approximately *doubled* immediately following a year of abnormally low rainfall.⁴⁷

In 2004, the United Nations High-Level Panel on Threats, Challenges, and Change concluded that:

[p]overty, infectious diseases, environmental degradation and war feed one another in a deadly cycle ... Environmental stress, caused by large populations and shortages of land and other natural resources, can contribute to civil violence.⁴⁸

In addition, environmental degradation leads to increasing numbers of refugees. In a report issued in 2008, the United Nations High Commission for Refugees found that the number of civilians who were either refugees outside their country or internally displaced, as a result of conflict or persecution, was 37.4 million, an increase of approximately 3 million on the previous year.⁴⁹ In an interview following the release of that report, the United Nations High Commissioner for Refugees, António Guterres, concluded that climate change led to the dislocation of people 'by provoking conflicts over

⁴⁴ Rudy S Salo, 'When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade' (2003) 16 *Georgetown International Environmental Law Review* 127, 142.

⁴⁵ David R Francis, 'Fueling the Fire: "Resource Wars" Spurred by Assets of Developing Nations' (2002) *Christian Science Monitor* A3.

⁴⁶ Thomas Homer-Dixon, 'Terror in the Weather Forecast', *The New York Times* (New York), 24 April 2007, <<http://www.nytimes.com/2007/04/24/opinion/24homer-dixon.html>> at 24 April 2007. The author led the research team.

⁴⁷ Professor Charles Vörösmarty, 'Drought as a Contributor to Civil War: Results from a Global Spatial Analysis' (speech delivered at seminar titled 'Climate-Security Connections: An Empirical Approach to Risk Assessment', Washington DC, USA, 6 March 2007).

⁴⁸ High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, [22], UN Doc A/59/565 (2004).

⁴⁹ United Nations High Commission for Refugees, *2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (2008) <<http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>> at 20 June 2008.

increasingly scarce resources, such as water' and, due to its impact on the environment, 'was a trigger of extreme poverty and conflict'.⁵⁰

In these senses, environmental degradation caused by climate change can be both a cause and a consequence of armed conflict. In addition, the problems associated with environmental damage are magnified since, inevitably, during the course of conflict there are additional 'knock-on' effects as further environmental destruction, with resultant human casualties, will take place as a result of the actions of the combatants.⁵¹

Moreover, the very nature of armed conflict and its adverse effects on the livelihood of communities and destruction of the natural environment fuels a spiralling vicious cycle of poverty and further violence, thus leaving desperate individuals, who are often children, with no choice but to themselves become active participants in the conflict. It is usually the case that extreme circumstances – hunger, poverty, abandonment, the death of parents and family, disease and the lack of even basic medical services or the threat of violence or property confiscation – will, for example, leave a child (or his/her parents) little choice but to offer his/her services to a 'cause'.⁵² This contributes to the tragically high number of 'child soldiers' now engaged in armed conflict, particularly those of a non-international nature.⁵³

While there is, of course, much more work to be done to accurately

⁵⁰ Julian Borger, 'Conflicts fuelled by climate change causing new refugee crisis, warns UN', *The Guardian* (London), 17 June 2008, 15.

⁵¹ See Stephanie Nebehay, *Dirty Water Provokes Hepatitis Outbreak in Darfur* (2004) Planet Ark World Environment News 11 August 2004 <<http://www.planetark.com/dailynewsstory.cfm/newsid/26523/newsDate/11-Aug-2004/story.htm>> at 27 March 2007, who describes how the refugee camps that have been set up in Darfur as a result of the conflict in that region are struggling with additional problems from the lack of safe drinking water.

⁵² Steven Freeland, 'Mere Children or Weapons of War – Child Soldiers and International Law' (2008) 29 *University of La Verne Law Review* 19, 27-8.

⁵³ In a report released in November 2004, the Non Governmental Organisation Coalition to Stop the Use of Child Soldiers found that children were 'fighting in almost every major conflict, in both government and opposition forces'. In addition to an estimated 300,000 children who engage in actual military conflict, another 500,000 are 'conscripted' into paramilitary organisations, guerilla groups and civil militias in over 85 countries. As well as serving as fighting troops on the front line, they serve in other "indirect" roles, such as 'sex slaves, porters, cooks, spies, and perform[ing] life-threatening tasks such as planting land mines': Steven Freeland, 'Child Soldiers and International Crimes – How Should International Law be Applied?' (2005) 3 *New Zealand Journal of Public and International Law* 303, 304.

determine the nature and extent of the link between climate change, environmental degradation, poverty and political and social conflict – research that would involve the integration and comparison of environmental data with conflict data – the logic of some form of connection appears to be undeniable. This was recognized by the United Nations Security Council, which in January 1992 concluded that:

[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and *ecological* fields have become threats to international peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters.⁵⁴

This highlights yet another important feature of the relationship between deliberate environmental destruction and human security. Environmental degradation can give rise to social upheaval and tensions, thus representing a threat to national security.⁵⁵ Indeed, this is one of the reasons why combatants in a conflict may seek to ‘target’ the environment. Many states now view environmental concerns, including resource conservation and sustainable development ‘in strategic terms’.⁵⁶ One commentator has suggested that the world is ‘only one international environmental disaster that implicates environmental security away from’⁵⁷ the development of customary rules that may permit the legal use of ‘environmental armed force’⁵⁸, as a legitimate exercise of the right of self-defence, in order to avert environmental destruction.

It is possible that the United Nations Security Council may be requested to take some action in the event that these conflicts pose a

⁵⁴ United Nations Security Council, ‘Note by the President of the Security Council’ (31 January 1992) Presidential Statement S/23500 in Catherine Tinker ‘Environmental Security’ in *The United Nations: Not a Matter for the Security Council* (1992) 59 *Tennessee Law Review* 787, 787 (emphasis added).

⁵⁵ Jutta Brunneé, ‘Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law’ (1995) 18 *Fordham International Law Journal* 1742, 1742.

⁵⁶ Rymn James Parsons, ‘The Fight to Save the Planet: U.S. Armed Forces, “Greenkeeping”, and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict’ (1998) 10 *Georgetown International Environmental Law Review* 441, 444.

⁵⁷ Michael K. Murphy, ‘Note: Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation’ (1999) 39 *Virginia Journal of International Law Association* 1181, 1219.

⁵⁸ *Ibid* 1214,

threat to world peace.⁵⁹ The Members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of peace and security'.⁶⁰ The United Nations Security Council may take action to seek a peaceful settlement of the dispute,⁶¹ or if it determines 'the existence of any threat to the peace, breach of the peace or act of aggression'⁶² it may seek the implementation of sanctions⁶³ or take necessary military action.⁶⁴

These powers are broad and, perhaps may raise the possibility of the Security Council acting *ultra vires*. However, it seems that, for all practical purposes, once it has been determined by the United Nations Security Council that there does, indeed, exist a threat to international peace and security, there is no tangible form of 'judicial review'.⁶⁵ Thus, if the United Nations Security Council were to deem it appropriate to authorise some form of action under its Chapter VII powers in relation to environmental concerns (whether related to the effects of climate change or otherwise), this would be binding on *all* states.⁶⁶ Of course, the mere fact that the United Nations Security Council might decide to act in this way does not guarantee that such actions, even if fully implemented, may be effective in relation to the environmental impact that is being addressed.

It may also be possible for the United Nations Security Council to intervene in the affairs of a sovereign state where there is an international responsibility to protect people in the face of serious harm. It is quite conceivable that these circumstances could arise in the advent of negative impacts of climate change. This possibility is heightened by the evolution of a 'Responsibility to Protect' ('R2P')

⁵⁹ Luke T Lee, 'Opinion: The Refugee Convention and Internally Displaced Persons (2001) 13 *International Journal of Refugee Law* 363, 365.

⁶⁰ *UN Charter*, above n 34, art 24.

⁶¹ *Ibid* arts 33-38.

⁶² *Ibid* art 39.

⁶³ *Ibid* art 41.

⁶⁴ *Ibid* art 42.

⁶⁵ Compare the decision of the International Court of Justice in *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, (Preliminary Objections, Judgment), [1998] ICJ Rep 9 with that of the International Criminal Tribunal for the Former Yugoslavia Decision in Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Duško Tadić*, Case No. IT-94-1, Appeals Chamber, 2 October 1995.

⁶⁶ See *Charter of the United Nations* article 25, which, although expressly referring to the 'Members of the United Nations', is generally regarded as applying to all states.

concept, which originated from a 2001 *Report by the International Commission on Intervention and State Sovereignty*⁶⁷ and was later formalised in the 2005 World Summit Outcome General Assembly Resolution as follows:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶⁸

However, there is much debate as to the precise scope of the R2P concept, and how it might be translated into 'action'. Read at its broadest, it could give rise to real tension between traditional notions of sovereignty and the right to intervene. The terms of R2P even contemplate the use of military action in certain circumstances. Whilst this may only be as a last resort, this highlights the difficulties associated with its implementation in practice. There is much discussion still to be had regarding what R2P does – and does not – involve and those who believe that this is truly a new beginning in the conduct of international relations may very well be disappointed – however, only time will tell.

VI HUMAN RIGHTS COUNCIL

It may be possible for states that are adversely affected by the impacts of climate change to approach the relatively new Human Rights Council, which is a subsidiary of the United Nations General

⁶⁷ International Commission on Intervention and State Sovereignty (ICISS), *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (December 2001). The Commission members were Gareth Evans (Australia), Mohamed Sahnoun (Algeria) Gisele Cote-Harper (Canada), Lee Hamilton (United States), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel V Ramos (Philippines), Cornelio Summaruga (Switzerland) Eduardo Stein Barillus (Guatemala) and Ramesh Thakur (India).

⁶⁸ Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007) 841 referring to GA Res 60/1.

Assembly,⁶⁹ about the violations of human rights that have/will occur as a result of the failure of those states that are high greenhouse gas emitters to take action to ensure that their reductions are at a level that 'would prevent dangerous anthropogenic interference with the climate system.'⁷⁰ In theory it might be possible that a recommendation of the Human Rights Council could presage a resolution by the United Nations General Assembly to request states to take action to prevent climate change, in order to comply with their obligations to avoid abuses of human rights.

The Human Rights Council was established in 2006⁷¹ to replace the Commission on Human Rights, which had been criticised because of its failure to perform its functions and its increasing lack of credibility as a protector of human rights.⁷² Membership of the Human Rights Council is based upon a geographical distribution and the contribution of the candidates to the promotion of human rights should be taken into account when they are elected. The total membership for the Council currently comprises 47 states and the functions of the Council include that it shall

- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- (d) Promote the full implementation of human rights obligations undertaken by States and follow-up the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
- (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.⁷³

This range of functions would provide sufficient flexibility for the Human Rights Council to take a range of actions to attempt to prevent serious human rights violations occurring as a result of the adverse impacts of climate change. It could, for example, call upon countries to act in a way so as to address the specific human rights violations that are being threatened (such calls would not be binding but may have

⁶⁹ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 58.

⁷⁰ UNFCCC, above n 1, art 2.

⁷¹ *Resolution on the Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006).

⁷² Smith, above n 68, 58; See also Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007) 791-799.

⁷³ *Resolution on the Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006).

considerable political weight).

Yet, at least thus far, the Human Rights Council has not focused on climate change related issues, although it has passed resolutions (which have been largely ineffective) in relation to some fundamental human rights that are impacted upon by the effects of climate change.⁷⁴ Instead, it has concentrated much of its efforts reacting to conflicts, particularly the Israeli–Palestinian conflict.

Arguably, the recent reforms to the Human Rights Council have not overcome all of the past problems that were experienced by the ineffective operation of the Commission on Human Rights. Indeed, despite some positive initial indications, it appears that the new body continues to operate with many of the destructive political characteristics that plagued its predecessor, so it is possible that political self-interest will prevent the Human Rights Council from supporting those countries that suffer severe impacts of climate change affecting the human rights of their people.⁷⁵

VII. AVENUES FOR POSSIBLE INTERNATIONAL LEGAL ACTION

States may resolve a dispute concerning the breach of an obligation in the *UNFCCC* or the *Kyoto Protocol* by conciliation or mediation, or, if these processes are unsuccessful, they may consider an action before the International Court of Justice ('ICJ'). A state may have standing before the ICJ⁷⁶ where the legal rights of a state have been infringed by another state that has accepted the jurisdiction of that Court. Indeed, the ICJ had previously established an Environmental Chamber (although it now no longer is operative) and has also heard a number of important cases that involved environmental issues and regulation.⁷⁷

⁷⁴ See, eg, Human Rights Council Resolution 6/8 on human rights and equitable Access to safe drinking water and sanitation (28 September 2007); Human Rights Council Resolution 6/8 on adequate housing as a component of the right to an adequate standard of living (14 December 2007); Human Rights Council Resolution 7/14 on the right to food (27 March 2008).

⁷⁵ Claire Callejon, 'Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence' (2008) 8 *Human Rights Law Review* 323, 342: 'Compared to the former Commission, institutions of the Council do not appear to have been reinforced in a way that would allow this body to protect and promote human rights in a more effective way.'

⁷⁶ *Statute of the International Court of Justice*, art 34(1) (1945).

⁷⁷ A Chamber for Environmental Matters, comprising of seven judges elected for three year periods, had been established within the International Court of Justice, pursuant

However, there are a number of difficulties that would be encountered by states choosing to bring a climate change action before the ICJ, particularly as the responsibility for emission reductions falls upon a large number of states and it would be difficult to establish which state or states are responsible for the damage. In addition, the obligations under the *UNFCCC* are worded in broad and general language, so that it would be difficult to determine a breach of specific duties to an individual state.⁷⁸

Another problem is whether damages would be an adequate remedy in circumstances where, for example, there have been serious human rights problems, such as a lack of fresh water, or where people are unable to remain in their homeland due to the severe impacts of climate change.

The cost of litigation before the ICJ is also very high, particularly for a small island state that may not have the resources to fund an action against a high emitting state (such as the United States of America), even though the consequences are very serious, with some of these island nations facing inundation as a result of sea-level rise. A small island nation may lack standing and may not be able to show that its legal rights have been directly infringed, because the climate change damage occurs as a result of a collective failure by a large number of

to article 26(1) of the Statute of that Court, which provides that '[t]he Court may ... form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of case ...'. The Chamber for Environmental Matters is the only chamber to have been established under that provision and its establishment reflected the Court's 'desire to demonstrate the particular interest that it attaches to environmental issues': International Court of Justice, 'The judges of the International Court of Justice elect the members to the Court's Chambers and Committees', (Press Release, 10 February 2000) <http://www.icj-cij.org/icjwww/ipresscom/IPress2000/ipresscom200003_Committees_20000109.htm> at 15 September 2009. However, despite the fact that the Court has had before it a number of cases dealing with environmental issues since the establishment of the Chamber for Environmental Matters in 1993 - in particular *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* and the ongoing *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* - the parties to those cases have not requested that the Chamber itself hear the case (article 26(3)), but instead have brought the dispute before the full Court. One reason offered for this is that the disputing States might not necessarily agree among themselves that their dispute is an environmental one: Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (2008), 315. As a result, the President of the International Court of Justice announced in October 2006 that, during that year, 'the Court decided not to hold elections for a Bench for the Chamber for Environmental Matters': H E Judge Rosalyn Higgins, President of the International Court of Justice, (Speech to the General Assembly of the United Nations, 26 October 2006) <<http://www.icj-cij.org/presscom/index.php>> at 16 April 2007.

⁷⁸ *UNFCCC*, above n 1, arts 3, 4.

states to reduce their greenhouse gas emissions. The lack of standing for NGOs and other interested parties before the ICJ also presents a barrier for those organisations that may be willing to bring an action in the public interest to deter further increases in greenhouse gas emissions from those states with significant amounts of emissions.

A further difficulty is that many of these high emitting states are reluctant to accept the jurisdiction of the ICJ on climate change issues. This reluctance may, in part, be due to the lack of certainty about the development of international environmental law on climate change. Further action should be taken to progress the development of international environmental law and to improve access to climate justice, particularly for states that are severely impacted by climate change (as is the case for many small island states). It may be possible to establish a climate change tribunal that permits more open standing to states, NGOs and interested parties and that could make enforceable determinations on disputes involving climate change, including issues concerning displaced people.⁷⁹

Another possibility is for states to choose to attempt to resolve their disputes through arbitration before the Permanent Court of Arbitration ('PCA'). This Court has developed 'Optional Rules of Arbitration of Disputes Relating to the Environment and/or Natural Resources',⁸⁰ where the parties may decide to bring their dispute before a panel of arbitrators who are experts in the area. Rest argues that the PCA can play a significant role to remind states about their responsibilities to protect the environment and assist with the implementation of international environmental law.⁸¹ Another key area that will need to be addressed is how to protect the human rights of people displaced by climate change.

VIII PEOPLE DISPLACED BY CLIMATE CHANGE

One of the predictions in the future is that many people will become displaced due to the consequences of the adverse impacts of climate

⁷⁹ Laura Horn, 'Is Litigation an Effective Weapon for Pacific Island Nations in the War Against Climate Change?' (2009) 12 *Asia Pacific Journal of Environmental Law* 169, 197.

⁸⁰ Permanent Court of Arbitration, *Optional Rules of Arbitration of Disputes Relating to the Environment and/or Natural Resources* <<http://www.pca-cpa.org/upload/files/ENVIRONMENTAL.pdf>> at 26 June 2009.

⁸¹ Alfred Rest, 'Enhanced Implementation of International Environmental Treaties by Judiciary - Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 1, 27.

change. The estimated numbers being suggested are significant — they may range between 50 million⁸² and up to about 250 million during the next 50 years.⁸³ These displaced people have been referred to as ‘climate change refugees’ or as ‘environmental refugees’; however the use of this terminology is criticised,⁸⁴ and, in fact, they are more correctly recognised as ‘climate change displaced persons’.⁸⁵ One of the principal legal challenges associated with this phenomenon is that people fleeing from climate threats are currently not recognised as refugees, particularly as many are internally displaced persons who remain within the borders of their own home state. As a consequence, they do not fall within the definition of refugees in the *Convention relating to the Status of Refugees*.⁸⁶ This Convention indicates in article 1 as follows:

The term ‘refugee’ shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The reasons why these displaced people generally appear to fall outside of this definition are because they are not being persecuted for reasons based upon race, religion, nationality or membership of a particular racial or political group. However, several commentators argue that these people could, in some circumstances, fall within the definition, as in the case of persecution through environmental harm.⁸⁷

⁸² Ilona Millar, ‘There’s No Place Like Home: Human Displacement and Climate Change’ (2007) 14 *Australian International Law Journal* 71, 72.

⁸³ John Von Doussa, Allison Corkery and Renée Chartres ‘Human Rights and Climate Change’ (2007) 14 *Australian International Law Journal* 161,180; Jane McAdam ‘Climate Change ‘refugees’ and international law’ *Bar News: The Journal of the NSW Bar Association* (Winter 2008) 27, 27; see also Von Doussa, above n 3.

⁸⁴ David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2003-2004) *The Georgetown International Environmental Law Review* 209, 217; Aurelie Lopez ‘The Protection of Environmentally-Displaced Persons in International Law’ (2007) 37 *Environmental Law* 365, 388.

⁸⁵ Millar, above n 81, 76.

⁸⁶ *Convention Relating to the Status of Refugees* 189 UNTS 137, art 1 (entered into force 22 April 1954) amended by *Protocol Relating to the Status of Refugees* 606 UNTS 267, art 1 (entered into force 4 October 1967).

⁸⁷ Lopez, above n 83, 378; Millar, above n 81, 83.

The *Convention Relating to the Status of Refugees* also indicates that the term 'refugee' applies to those people who are located outside of their country of nationality and, therefore, the definition cannot apply to people who are internally displaced due to climate change threats.⁸⁸

Thus, there is, at present, no internationally binding legal instrument that specifically protects climate change displaced people, nor is there an institution with powers to assist these people. The United Nations Environment Programme alerted the world to this problem, but no institution has been established to deal with it.⁸⁹ Obviously, the human rights instruments can help to protect the rights of these people because, to the extent that their fundamental human rights are violated, they are entitled to assistance, whether at home or overseas.⁹⁰ However, whether the protection of these rights can be enforced is questionable, given the problems noted earlier in this article.

The concern is whether there is sufficient protection for the human rights of people who are fleeing the consequences of climate change and that these circumstances should be distinguished from those where there has been a deliberate abuse of their human rights by a state government. It is arguable that the negotiations at Copenhagen in December should include the development of international legal protection for these people and that states have the responsibility to consider these issues in the light of the environmental principles included in the *UNFCCC*.⁹¹ The United Nations *Guiding Principles on Internal Displacement*⁹² provide for the protection of people displaced within the borders of their own country in the event of natural or human-made disasters; however these principles are not legally binding and generally offer guidance to governments dealing with these issues within their own borders.⁹³ It is suggested therefore that a new international agreement should be developed to cover both international and national displacement of people due to the adverse effects of climate change.

⁸⁸ Lopez, above n 83, 386.

⁸⁹ McAdam, above n 82, 29.

⁹⁰ Lee, above n 58, 364.

⁹¹ *UNFCCC*, above n 1, art 3.

⁹² United Nations Office for the Coordination of Human Affairs, *Guiding Principles on Internal Displacement* (2007)
<http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html> at 29 September 09.

⁹³ David Hodgkinson and Tess Burton, 'Towards a Convention For Persons Displaced by Climate Change' (Seminar presented at the Grantham Research Institute on Climate Change, the London School of Economics, 6 March 2009).

The actual cause of these movements of displaced people is a global reluctance on the part of states to make adequate reductions of greenhouse gas emissions. These human rights violations are the consequences of a failure by states to adequately develop international environmental law and the law of sustainable development. According to Lopez:

Working on projects of sustainable use of the environment may prevent the multiplication of further, and in some cases irremediable, mass displacement.⁹⁴

Clearly, environmental legal principles should be further developed to address the threat of climate change and to promote sustainable development, in order to prevent the exodus of large numbers of people and further violations of their human rights. The following section examines whether the concept of the common concern of humankind plays a role in linking the areas of climate change and human rights. This is followed by a discussion of whether there should be an international agreement to protect the interests of climate change displaced people.

IX THE COMMON CONCERN OF HUMANKIND

The concept of the 'common concern of humankind' applies to both the protection from the adverse effects of climate change⁹⁵ and to the protection of human rights.⁹⁶ It requires that there be a bridge between human rights law and environmental law on these two fundamental concerns. The significance of the concept of common concern of humankind is that the international community collectively has an interest in the global atmosphere and a common responsibility to seek to achieve sustainable development.⁹⁷ This common responsibility for States indicates that they should take action to reduce greenhouse gas emissions, in order to ensure that the climate is protected for both present and future generations and to reduce the threat of these predicted human rights violations.⁹⁸

In fact, the whole of the global environment has been considered to be

⁹⁴ Lopez, above n 83, 408.

⁹⁵ *UNFCCC*, above n 1, preamble para 1.

⁹⁶ Dinah Shelton, 'Common Concern of Humanity' (2009) 39(2) *Environmental Policy and Law* 83, 83.

⁹⁷ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed, 2009) 130.

⁹⁸ Horn, above n 38, 244.

the 'common concern of humanity'⁹⁹ and the connection between human rights and environmental conservation has been recognised as follows:

Peace, development, environmental conservation and respect for human rights and fundamental freedoms are interdependent.¹⁰⁰

The *Stockholm Declaration* links respect for human rights to the protection of the environment as follows:

Man [humankind] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he [she] bears a solemn responsibility to protect and improve the environment for present and future generations.¹⁰¹

The *Draft International Covenant on Environment and Development* ('*Draft Covenant*') discusses the implications of common concern of humanity as a concept and regards the global environment as a common concern of humanity, providing as follows:

The global environment is a common concern of humanity. Accordingly, all its elements and processes are governed by the principles of international law, the dictates of public conscience and the fundamental values of humanity.¹⁰²

In this way, the *Draft Covenant* indicates that the common concern of humanity concept avoids the problems that arise from reliance upon traditional notions of state sovereignty, because the environment extends beyond the jurisdiction of individual states, as does the atmosphere. This concept also takes into account the long term future interests of humanity and is thus not restricted by short term considerations. It also provides as follows:

The conclusions that the global environment is a matter of 'common concern' implies that it can no longer be considered as solely within the domestic jurisdiction of States due to its global importance and consequences for all. It also expresses a shift from classical treaty-making notions of reciprocity and material advantage, to action in the

⁹⁹ See IUCN Commission on Environmental Law and International Council of Environmental Law, *Draft International Covenant on Environment and Development* (3rd ed 2004) ('*Draft Covenant*') art 3. Note that this is only a draft document and there is no present prospect of it becoming a treaty.

¹⁰⁰ *Ibid* art 4.

¹⁰¹ *Declaration of the United Nations Conference on the Human Environment (Stockholm)*, [Principle 1], UN Doc A/CONF/48/14/REV.1 (1972).

¹⁰² *Draft Covenant*, above n 98, art 3.

long-term interests of humanity.¹⁰³

The situation where the human rights perspective is viewed as superior to the environmental viewpoint causes some difficulties, particularly as a result of the anthropocentric approach of human rights law. It is preferable to view respect for human rights as coupled together with responsibility for protection of the atmosphere, so that a less human-centred view is adopted. Bosselmann suggested the following guideline as one of a number of guiding principles based upon ecological ethics:

The fundamental norms for social life, in particular human rights, are to be understood in the context of humans' ecological dependence. Individual human rights are not only determined by the interests of others but also by the interests of the natural environment.¹⁰⁴

This approach would place greater significance upon the protection of the climate and the actions that are necessary to ensure the Earth's climate is maintained for future generations, and could therefore lead to more effective emission reductions by states. The focus should be on the cause of the migration movements of displaced people and emphasise environmental protection, in order to prevent the consequences of large scale migrations of people,¹⁰⁵ even if the environmental damage is considered to be only one of a number of causes in the particular circumstances. The primary goal should be to prevent accelerated sea level rise and to emphasise the necessity for immediate action to be taken by the international community of states, in an attempt to protect the environment from damage.¹⁰⁶ This would, in turn, lead to a lessening of the adverse impacts of climate change and to reductions in the numbers of climate change displaced people.

Clearly, in the area of climate change, environmental protection should be the primary focus rather than human rights law. International environmental legal principles could help to provide an overall foundation for the obligations of states when dealing with the global crisis of climate change, in order to prevent or reduce the likelihood that violations of human rights may occur. Many of these core principles are referred to in the *UNFCCC* Article 3, which indicates that state parties should be guided by these principles in their actions to achieve the objective of the Convention, which is stated as:

¹⁰³ *Draft Covenant*, above n 98, 37.

¹⁰⁴ Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995) 286.

¹⁰⁵ See Keane, above n 83, 223.

¹⁰⁶ See Horn, above n 38, 254.

.... to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.¹⁰⁷

The guiding principles that are listed in Article 3 that are relevant to the human rights position of effected populations are intergenerational equity and intragenerational equity,¹⁰⁸ common but differentiated responsibilities,¹⁰⁹ the precautionary principle,¹¹⁰ sustainable development.¹¹¹ It is also necessary to take into account:

The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.¹¹²

Many of the states that will be severely affected are not the chief greenhouse gas emitters. There is therefore a responsibility for larger industrialised countries that have been large emitters of greenhouse gases both/either in the past and/or in the present to assist the victims of climate change.¹¹³ On the other hand, many of the displaced people will be driven from their homes in island states or low lying coastal areas in developing countries; yet these states would be very low emitters of greenhouse gases and not chiefly responsible for the effects of climate change.

The application of these principles by states when taking action on climate change would also lead to a likely reduction of the violations of human rights that would otherwise arise as a result of climate change. Even though Article 3 sets out these principles as only of a guiding

¹⁰⁷ UNFCCC, above n 1, art 2.

¹⁰⁸ Ibid art 3(1).

¹⁰⁹ Ibid art 3(1).

¹¹⁰ Ibid art 3(3).

¹¹¹ Ibid art 3(4).

¹¹² Ibid art 3(2).

¹¹³ Frank Biermann and Ingrid Boas, *Protecting Climate refugees: The Case for a Global Protocol* (2008) *Environment Magazine*
<<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>> 1, 3.

nature, such that the wording of this article indicates that the provisions may not be considered binding and may instead be of a 'soft law' status, they evince an expectation that they should be taken into account when states are negotiating future instruments and protocols to the *UNFCCC*.¹¹⁴ It is therefore self-evident that, specifically, the negotiations in Copenhagen later this year should be guided by these key principles.

If the precautionary principle¹¹⁵ is adhered to by the international community, this should lead to states adopting serious targets for reductions of greenhouse gas emissions, because the international community would then be taking into account the aim of preventing the significant impact of climate change on small island states¹¹⁶ and other vulnerable developing states. In addition, as a result of applying this principle, the international community should consider how to manage those areas that do suffer from adverse impacts, including the displacement of large numbers of people.

However, the application of this principle does not determine the actual amount of reductions required. States should be aiming to achieve sustainable outcomes for the atmosphere, so the climate can be conserved for future use by future generations. Birnie, Boyle and Regwell indicate the following concerning the application of the precautionary principle:

Endorsing this principle does not answer the question what measures are to be taken, or by whom, and it is clear that substantial problems of global and regional economic equity have to be addressed if the necessary action is to be undertaken by a sufficiently large number of relevant states.¹¹⁷

These principles guide states parties to the *UNFCCC*, with some arguing that the precautionary principle may possibly be international customary law. However, there is some controversy about whether and to what degree this principle is part of international customary law, because of uncertainty about the meaning and application of this

¹¹⁴ Birnie, Boyle and Redgwell, above n 96, 359.

¹¹⁵ *UNFCCC*, above n 1, art 3(3). The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.

¹¹⁶ Millar, above n 81, 88.

¹¹⁷ Birnie, Boyle and Redgwell, above n 96, 377.

principle.¹¹⁸ The precautionary principle is based on a premise that the lack of scientific certainty as to the negative environmental consequences of a particular action should not be used as a justification to carry out that action. This has the effect of reversing the burden of proof as to the consequences of an action, placing it on those who claim that an activity is *not* damaging.¹¹⁹ Principle 15 of the *Rio Declaration* sets out the principle as follows:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹²⁰

The application of the principle is designed to enable the international community to address a global environmental problem before its effects are felt or its existence scientifically proven.¹²¹

The *UNFCCC* also indicates that sustainable development should be considered when measures are adopted to deal with climate change.¹²²

¹¹⁸ *Ibid* 160.

¹¹⁹ Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (2006), 50.

¹²⁰ *Rio Declaration on Environment and Development*, 31 ILM 874, UN GAOR, UN Doc A/CONF.151/26 (Volume 1) (1992).

¹²¹ United Nations Environment Programme, Ozone Secretariat, *The Vienna Convention for the Protection of the Ozone Layer* (2001) 30

<<http://www.unep.org/Ozone/pdfs/viennaconvention2002.pdf>> at 18 June 2008. The obligation to apply the precautionary principle has been defined in article 2(2)(a) of the *Convention for the Protection of the Marine Environment of the North East Atlantic*, opened for signature 22 September 1992, 32 ILM 1069 (entered into force 25 March 1998) in the following terms: '... preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects'.

For a detailed discussion of the precautionary principle see, eg, Birnie, Boyle and Redgwell, above n 96; Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003), 266-79; James Cameroon and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14(1) *Boston College International and Comparative Law Review* 1; Lothar Gündling, 'The Status in International Law of the Principle of Precautionary Action' (1990) 5 *International Journal of Estuarine and Coastal Law* 23.

¹²² *UNFCCC*, above n 1, art 3(4) provides as follows: 'The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.'

There is also some question about the ambit of the *UNFCCC* and whether it extends to the human rights consequences of climate change. It is possible that addressing these issues may not yet have a great deal of support among developed and developing countries.¹²³ However, it is clear that the guiding principles in Article 3 of the *UNFCCC*, as well as the recognition of sustainable development in this instrument, indicate that human rights are a concern and the crisis facing climate change displaced people should be addressed.

Consequently, these guiding principles and the political necessity of ensuring that agreement is reached on the placement of these peoples could lead to negotiations at Copenhagen either in relation to a separate treaty,¹²⁴ a new international agreement,¹²⁵ or a protocol to the *UNFCCC* on this issue, as has been suggested by some commentators.¹²⁶ These negotiations should take place coincidentally with other discussions regarding climate change issues, as they are a fundamental consideration that need to be dealt with by the international community as it addresses climate change. This should happen before these migrations take place, so that there are systems in place to aid these people. It is therefore submitted that the focus at COP15 should be on a precautionary approach, to try to prevent these events from occurring and to encourage the implementation of more realistic and effective targets to reduce greenhouse gas emissions.

X A NEW INTERNATIONAL AGREEMENT

A number of commentators have suggested that negotiations should commence on a convention to cover the interests of climate change displaced people. Some consider that this should be effected through a separate convention addressing this issue of climate change refugees,¹²⁷ while others argue for an amendment to the 1951 *Geneva Convention Relating to the Status of Refugees*,¹²⁸ and still others suggest regulation or based upon the *Convention against Torture*.¹²⁹ However, it

¹²³ Millar, above n 81, 91.

¹²⁴ Hodgkinson and Burton, above n 92, 3; see Millar, above n 81, 84.

¹²⁵ Von Doussa, Corkery and Chartres, above n 82, 182.

¹²⁶ Biermann and Boas, above n 112, 2.

¹²⁷ Hodgkinson and Burton, above n 92.

¹²⁸ Marei Pelzer 'Environmentally Displaced Persons not Protected: Further Agreement' (2009) *Environmental Policy and Law* 90, 90; see Lee, above n 58, 366; see Lopez, above n 83, 402.

¹²⁹ *Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment*, opened for signature 4 February 1985, 1465 U.N.T.S. 85 (entry into force 26 June

is probable that these negotiations would be unsuccessful, because this may only give protection to climate change displaced persons who cross a state border and would not give relief to those displaced within the territory of their home state.¹³⁰ It may also be the case that governments would not agree to extend similar protection for much larger numbers of refugees.¹³¹

Another commentator has suggested the development of a broader convention to assist both internally displaced people, as well as those who cross borders as a result of environmental destruction, and that this convention should be based upon international environmental law principles.¹³² The advantage of a convention that addresses both of these types of displaced people is that developing countries could receive more assistance. In addition, if developed countries assist these people while they are within the jurisdiction of their home states, this is less likely to lead to cross border migration and possible conflict with other states that could threaten international security. Other proposals that only deal with cross border migrants leave many internally displaced people without protection.¹³³

A preferable approach is that of Biermann and Boas, who argue that negotiations should commence to develop a 'Protocol on the Recognition, Protection and Resettlement of Climate Refugees' to the UNFCCC.¹³⁴ As many displaced people will be located within the jurisdiction of their home state, it is possible for an agreement to cover displacement of people in need of assistance within their home state, as well as to those people who, in the circumstances, have no choice but to leave their home state.

The five reasons given by Biermann and Boas for the development of this Protocol are outlined (in summary) as follows:

1. It would be more consistent with the goal of planned voluntary resettlement of people over many decades, rather than emergency relief.

1987); see Dana Falstrom 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 1, 18.

¹³⁰ Lopez, above n 83, 408.

¹³¹ Biermann and Boas, above n 112, 2.

¹³² Gregory McCue, 'Environmental Refugees: Applying International Law to Involuntary Migration' (1993-1994) 6 *Georgetown International Environmental Law Review* 151, 177.

¹³³ Lopez, above n 83, 408.

¹³⁴ Biermann and Boas, above n 112, 2.

2. The recognition of climate change displaced people as permanent immigrants to their new countries that accept them.
3. The regime is aimed towards groups of people, who may be whole populations of affected regions or states.
4. The aim is to support governments and local authorities to protect people within their home territory as well as to assist domestic help and resettlement programs in affected states.
5. This is a global problem and a global responsibility, particularly on the part of those industrialised countries that have contributed to a large degree to past and present emissions of greenhouse gases. In this way, industrialised countries would contribute to the financing and support for resettlement of displaced people.¹³⁵

Biermann and Boas refer to the climate change displaced people as 'climate refugees' and they also make suggestions about the content of the proposed protocol. States parties to this Protocol could propose areas under their jurisdiction with populations in need of relocation because of climate change. An executive committee, composed of both affected countries and donor countries, could determine both whether the specified territory should be included on the list of affected areas and also the type of assistance that should be provided, after a formal proposal has been submitted from the government of the affected state. This assistance would be supported by a funding mechanism and could include financial, voluntary resettlement, purchase of new land and migration plans.¹³⁶ An equal number of donor and affected states would make up the executive committee, which would be make decisions requiring a majority of donor countries and a majority of affected developing states.

These arguments in favour of a protocol were, however, rejected by Hulme, who points out that the concept of 'climate refugee' is open to the argument that it has a neo-colonial ideology and would therefore be rejected by some governments.¹³⁷ It would be necessary to define who falls into the category of 'climate refugee' – this may be difficult given that there is often more than one cause of the decision to migrate,

¹³⁵ Ibid 2.

¹³⁶ Ibid 3.

¹³⁷ Mike Hulme, *Commentary – Climate Refugees: Cause for a New Agreement?* (2008) Environment Magazine
<<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/hulme-full.html>> 1, 2.

including related economic, political and social factors. In addition, areas that may become uninhabitable might not necessarily remain in that condition, and may later be able to become habitable. The approach could also be viewed as a colonisation of environmental problems.¹³⁸

Biermann and Boas respond to these suggestions by stating that they remain in favour of a protocol to resolve this issue,¹³⁹ particularly as it is likely that the adverse effects of climate change will lead to human tragedy in the future. The idea of 'climate refugees' may be difficult to define, as would also be the reasons for the migration. However, this question could be subject to determination through political compromise in negotiations between industrialised countries and developing nations.¹⁴⁰ There would be no danger of paternalism under this protocol, because it requires the assertion by developing countries of the specific affected areas and the procedures and action taken would have to be approved by the majority of developing countries that have ratified the protocol, as well as the majority of donor countries.¹⁴¹

In addition, the protocol is aimed at those affected areas where temporary migration is no longer an option and the migrants will need to resettle in a permanent home. These commentators also reject the criticism of green neo-colonialism, because this protocol is directed at supporting millions of people in those developing countries that have not been major greenhouse gas emitters, but yet they may have to give up their homes as a result of a global crisis stemming from large amounts of greenhouse gas emissions from industrialized and wealthier countries.¹⁴²

Clearly, there is an urgent need for negotiations to commence on an international agreement to deal with assistance and support for climate change displaced people. The suggestions raised by Biermann and Boas are pointing the international community in the right direction as it seeks to find solutions to protect the human rights of these people before the predicted violations occur.

¹³⁸ Ibid 2.

¹³⁹ Biermann and Boas, above n 112.

¹⁴⁰ Ibid.

¹⁴¹ Ibid 3.

¹⁴² Ibid.

XI CONCLUSION

It is clear that the effects of climate change are impacting, and will continue to do so upon the lives of many people. Even though there may still be areas of disagreement among states and the scientific community as to these precise effects, and the extent to which action is to be taken to mitigate them, all agree that some form of legal regulation is necessary. This is even more important given the impact that climate change has on human security, human habitation and, ultimately, on the fundamental human rights of all individuals.

It is therefore necessary to incorporate human rights considerations into the forefront of current negotiations that are directed towards a 'post-Kyoto' world. The lack of specific attention to this issue thus far, coupled with the inadequacies of the existing legal framework of human rights instruments and mechanisms of enforcement make this an imperative. The consequences of not acting in a comprehensive and appropriate way are too dire to contemplate.

By highlighting the dire consequences for many human beings, increased attention to the overwhelming necessity to protect the global climate will result. This will indicate that appropriate remedial measures themselves depend upon the global cooperation of all states, acting together as part of the common concern of humankind.

POSTSCRIPT

As this article was being finalised, the diplomatic discussions at COP15 had just concluded. It was clear from the discussions that very significant divides had emerged between the various vested interests (of which there were many) who were in Copenhagen. Those developing and small island states who were most vulnerable to the effects of climate change argued in vain that strong action, founded upon a legally binding agreement, should be undertaken. Instead, a non-binding agreement of only two and a half pages and 12 paragraphs – the '*Copenhagen Accord*' – was concluded, largely at the instigation of the United States, China, India, Brazil and South Africa, and subsequently 'noted' by the conference in plenary session.

The *Copenhagen Accord* is important in certain respects – it is the product of 'agreement' between both developed and the major polluting developing countries. As such, it does set some form of framework upon which more concrete requirements can be built. It provides for significant funding commitments – although the amounts may still fall far short of what is required – and makes some

progress on the issue of deforestation and forest degradation.

However, overall, it is an abject disappointment to many who looked upon COP15 to set a more rigid, legally binding and committed path to meeting what the Accord itself recognises as 'one of the greatest challenges of our time'.¹⁴³ It does not prescribe any binding obligations – indeed the Accord is a non-binding instrument – and is couched in some vagaries that will be difficult to clarify in the months ahead. Significantly, while it does prioritize adaptation funding to the 'most vulnerable developing countries',¹⁴⁴ the commitments are vaguely expressed and there is no reference whatsoever to the real impacts on the human rights of those affected.

The coming months will see further diplomatic wrangling leading up to the clarification of emissions targets by 31 January 2010.¹⁴⁵ However, if the negotiations that culminated in the events in Copenhagen are anything to go by, those who had hoped that the fundamental human rights issues that are inexorably connected to climate change would be properly addressed should not set their expectations very high at all.

¹⁴³ *Copenhagen Accord*, 15th sess, Agenda Item 9, para 1, UN Doc FCCC/CP/2009/L.7 (2009).

¹⁴⁴ *Ibid* para 8.

¹⁴⁵ *Ibid* paras 4-5.

EVIL REGIMES OF LAW: CHALLENGES FOR LEGAL THEORY AND FOR INTERNATIONAL LAW

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I INTRODUCTION

This paper is concerned with the ethical dimension of the concept of legal system, both at a national and at an international level. The notion of an 'evil system of law' is an important yet troubling one. From the point of view of jurisprudence, evil regimes of law are either a contradiction in terms, or are deeply troubling. If an evil (or even merely bad) system of law is by definition not a system of law at all, as broadly claimed by theorists of the natural law orientation,¹ then evil regimes masquerading as legal systems need to be unmasked in that respect, as well presumably as resisted or challenged in other ways. They must be shown not to be legal systems at all. This would still raise difficult questions about the identification of 'goodness' and 'badness,' but would avoid the particularly tricky jurisprudential questions of how to describe and to 'interrogate' systems that are at the same time legal systems and systems that are to be reviled. That is to say, if there is anything at all in the legal positivist² claim that legality

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¹ See John Finnis, 'Grounds of Law and Legal Theory: A response' (2007) 13 *Legal Theory* 315.

² John R Morss, 'Part of the Problem or Part of the Solution? Legal positivism and legal

is not absolutely incompatible with malevolence, then a whole series of theoretical challenges arise. These challenges include questions about the differentiation between good and bad legal systems, about boundary cases between those types, and about historical transition from one type to another – for example a good legal system going bad or a bad legal system going ‘good.’³ But the challenges concern international as well as municipal (national) legal arrangements, and therefore contribute to an understanding of what might be called the nexus between ethics and world order.

One example of this ‘nexus’ is provided by the situation of the ‘failed state.’ The civilian populations of so-called ‘failed states’ might well be at the mercy of ‘war-lords’ or other extended quasi-criminal organisations, and if ‘law’ is not co-terminous with ‘good laws’ then the rule of such gangs might exhibit some elements of a legal system. Powerful criminal organisations operating within states that can hardly yet be called ‘failed’ – the case of Italy springing to mind here – might also demonstrate some legal characteristics. Again, ‘rogue states’ might well exhibit characteristics of legality both within their own borders and beyond despite conduct that is deplored by the international community. Afghanistan prior to the US-led invasion of late 2001 might be said to have exhibited the characteristics of a rogue state.⁴ That is to say, early 2001 Afghanistan might be thought of as exhibiting a legal system as such, and as constituting an international legal actor. With respect to the latter, treating the 2001 invasion of Afghanistan as a matter of self-defence between sovereign states, that is to say as an armed response by one state (the USA) to the armed attack on it of the other, would seem to presuppose international legal subjecthood in both. In other words the formal character of Afghanistan was as a legally constituted and legally competent entity even though it was ruled by terrorists.

Something more should be said at this point on the question of international legal personality since this raises important points concerning the role of ethics at the global level. The recognition of legal personality at the international level is an extremely catholic

education’ (2008) 18 *Legal Education Review* 55.

³ These terms are not employed disingenuously, but more precise terminology is elusive. An evil or bad system of law can be provisionally defined as one that benefits a few rather than the many or oppresses the many to the advantage of the few.

⁴ Richard Falk, ‘Appraising the War Against Afghanistan’, Social Science Research Council <<http://essays.ssrc.org/sept11/essays/falk.htm>>.

procedure, at least when the sovereignty of a territorial state has already been established and a regime is recognised as effectively occupying that territory. The procedure is inclusive of diverse political regimes including military dictatorships.⁵ Even if governments may from time to time decide not to recognise particular other governments as such, for example on the basis of unacceptable social arrangements such as *apartheid*, this political sanction leaves unaffected the international recognition of the state of which the impugned government is currently the steward. Ongoing international agreements are not voided. To this extent at least, international law thus finds no conceptual difficulty in the notion of evil legal system. Indeed finding ways of cohabiting with foreign regimes thought of as deplorable if not downright despicable is the bread and butter of the diplomatic tradition out of which much international law is derived.

It may thus be observed that the threshold for legal status in the international domain is extremely low. Perhaps it is to be anticipated that legality of a national system as such (of a system considered in respect of its own jurisdiction, rather than in terms of its international dealings) must be assessed against higher standards. But it may well be that these dual aspects of legitimacy – the internal and the external – while differing in many respects, are not entirely distinct.

Significantly, the problematic role of force is of relevance to questions of legality in both domains. An early approach to these matters would have suggested that internal legality would depend on force (as represented by the commands of the sovereign), and that the absence of enforcement on the international stage would, correspondingly, precisely negate the pretensions to legality of international arrangements. This ‘classical’ dualist account of the comparison between municipal and international law is unsatisfactory for a number of reasons. It is a notable trend of theoretical work and perhaps more significantly of practical realities in international law in recent decades that the sharp distinction between the domains of inter-state legal relationships and of internal legal systems is becoming increasingly blurred.⁶ Individual citizens have recourse to international human rights instruments and to tribunals that are empowered with jurisdiction over the citizen’s own national government. Non-state

⁵ James Crawford, *The Creation of States in International Law* (2nd ed, 2006). States are also undefined as to upper or lower limits of population or of geographical size, that is to say there are no minima or maxima for these dimensions.

⁶ See Franck’s ‘piercing the statist veil’ in Thomas Franck, *Fairness in International Law and Institutions* (1995) 6.

actors are of increasing importance at the international law level. States are coming to be thought of as one among many kinds of collective legal entity on the international stage.⁷

Of course, non-state actors come in many shapes, sizes and orientations. Another example that demonstrates affiliations between the criteria for international and for municipal legality is terrorism. Terrorism may often be associated with failed or 'rogue' states, as well as with organised 'polities' within and across the borders of states that are not or not yet either failed or rogue. If a terrorist organisation closely identifies with a religious movement then obedience to devotional obligations may in itself constitute a salient form of legality. That is to say, commitment to a systematic spiritual agenda may well give rise to organized collective coordination of action that amounts to compliance with the requirements of a legal system. (Both sides in the historical invasions known as the 'Crusades', as well as in similar conflicts such as the ejection of the Moors from Spain, might be said to have exhibited compliance with legal systems). Any form of legitimacy for a terrorist organisation is likely to be resisted by the state forces for counter-terrorism, for which a characterisation of terrorism in terms of criminality (or irrationality) is usually preferable. A similar attitude might also be taken by non-state organisations, whether national or international.⁸ The recognition that legality is not the sole preserve of the virtuous, or that (which come to the same thing) the recognition that systems of obligation may be considered virtuous by those governed by them irrespective of the opinions of those governed by other regimes, gives rise to the same set of 'evil regime' questions.

These considerations suggest that evil systems of law merit scrutiny and conceptual analysis. If evil in the world remains a major issue facing humankind and if some of that evil is constituted by evil systems of law, then some hints about ways of changing such systems for the better would not go amiss.⁹ These issues call for an enquiry into available theoretical resources, including relevant versions of 'the philosophy of international law'¹⁰ as well as jurisprudential accounts of

⁷ John R Morss, 'The Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22(2) *Leiden Journal of International Law* 289.

⁸ Religious organizations and civil peace movements might be thought of as opposed to terrorism in general or in particular.

⁹ Philip Allott, *The Health of Nations: Society and Law beyond the State* (2002) 399; 37; also see Philip Allott, 'The Globalisation of Philosophy and the Philosophy of Globalisation' in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

¹⁰ The question of a 'Rule of International Law' as discussed by Jeremy Waldron, is

the criteria for legality and legal obligation. Both sets of ideas, which may not be easy to reconcile with each other nor to synthesise, must be examined if progress is to be made in the ethics of the systems under which people live. In relation to the former, the philosophy of international law, the focus of discussion will be the proposal of Criddle and Fox-Decent that a set of precise 'peremptory' norms (*jus cogens* norms) can be identified, non-negotiably governing the conduct of states, and derived from the fiduciary responsibilities of the state towards its citizens and indeed to the citizens of other states.¹¹ In relation to the latter, one place to begin is with Hart.

II. HART'S GUNMAN AND THE NATURE OF LEGAL OBLIGATION

Analytic jurisprudence takes Hart's *The Concept of Law* as its touchstone for the conceptualisation of legality in societal systems of control. For Hart, in the legal positivist tradition, the virtue or otherwise of a legal enactment is strictly irrelevant to its legal status as such. But Hart is equally wary of substituting force for virtue as the criterion for legality, instead seeking a middle way of a somewhat more sociological variety, so to speak in between the poles of legal realism and legal idealism. In this vein, Hart's account of the gunman situation¹² is intended to illuminate the distinction between obedience to a mere command, in particular a command backed up by the threat of violence, and obedience to the authoritative commands of law (obedience to a legal system).

According to Hart, Austin's much earlier (nineteenth century) account of legal obligation had made the mistake of treating law as fundamentally arising from the peremptory commands of a powerful sovereign. Such commands were assumed by Austin to be backed up by force or by the threat of force. According to Hart the command backed by force is merely gun-law, not real law. When a gunman robbing a bank orders the clerk to hand over the money, this 'order' is

relevant to this debate: John R Morss, 'Facts, Threats and Reds: Common Law Constitutionalism and the Rule of Law' (2009) 14 *Deakin Law Review* 79, 93; also see Philip Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (2005).

¹¹ Evan Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331.

¹² H L A Hart, *The Concept of Law* (2nd ed, 1994) 19. Priel has suggested that the distinction of gunman versus legal system is misrepresented by Hart and by those who have followed him: Danny Priel, 'Sanction and Obligation in Hart's Theory of Law' (2008) 21 *Ratio Juris* 404.

no more than a peremptory instruction: 'Do it! (or else).'

It would not even be correct to say that the gunman is 'giving an order' to the clerk, in the sense that he might 'give an order' to his associate (henchman) guarding the door. Hart's point with this apparently pedantic observation is that 'giving an order' implies some kind of authority structure, that is to say some element of perceived or actual legitimacy, whereas mere 'ordering' does not. By 'authority structure' is meant a hierarchical arrangement, even with the bare minimum of stability, as a consequence of which an instruction rises above the merely arbitrary or gratuitous. 'Giving an order' partakes if only minimally of true command, that is to say 'an appeal not to fear but to respect for authority.'¹³ If the clerk has any reason to treat the gunman's instructions as authoritative – if the gunman is wearing police uniform, for example, or if he is a respected member of the clerk's community – then something beyond mere coercion is taking place, loyalty for instance. There is instead something systemic at work – something so to speak sociological.

There is no doubt that this is the thin end of an important wedge. Structured legitimacy of authority runs all the way from such modest and admixed situations all the way to parliamentary enactments, and perhaps customary law,¹⁴ not to speak of Common Law. In another direction perhaps it runs to the decisions of the UN Security Council, and of the International Court of Justice, and to the United Nations Charter itself.¹⁵ Hart's argument is that lawful obligation involves authoritative regulation extended over time, over subjects or over concrete situations. In other words, rules rather than utterances. According to Kevin Toh,

Hart's signal contribution to the twentieth century legal philosophy

¹³ Hart, above n 12, 19, 20. Some support for this distinction may also be found in Hobbes, writing in the seventeenth century and influential on Austin. For Hobbes the relationship is one of covenant, not naked fear. Hobbes' sovereign is an actor, acting in the name of those 'natural persons who have covenanted to treat the words and actions of the sovereign as their own.' Thus the sovereign 'puts on the mask of the natural person to whom he speaks, compelling that person to treat his words as commands and his actions as binding.' David Runciman, *Pluralism and the Personality of the State* (1997) 254. Hobbes' account is complex in other ways as well: the sovereign may be an assembly not a natural person.

¹⁴ John R Morss, 'Can Custom be Incorporated in Law? On the Place of the Empirical in the Identification of Norms' (2008) 53 *The American Journal of Jurisprudence* 85.

¹⁵ 'Another direction' in the sense that for Hart, international law has to be thought of as 'primitive' in comparison with the democratic municipality with its parliamentary enactments: John R Morss, 'Sources of Doubt, Sources of Duty: H L A Hart on International Law' (2005) 10 *Deakin Law Review* 41.

consisted of his arguments to show that if laws prevail among a community of people, then at least some members of that community treat existence of laws as furnishing reasons and even obligations to act according to such laws ... a departure from the older legal positivist positions of Bentham and Austin.¹⁶

Thus Hart shows that Austin's gunman scenario misses the point and that compliance with law is different from a response under duress.¹⁷ For Hart unreflective obedience is the only kind of obedience applicable to the gunman scenario. There is no legal system to obey, only the ad hoc instructions of the criminal. To be sure, some of the subjects of a fully-fledged municipal legal system may obey the law or parts of it for reasons which differ little from the reasons of a gunman's victim – but this does not undermine the legality of the system by which they are governed. The upshot of Hart's analysis of the gunman scenario is that legal obligation is not constituted by physical force. But nor for Hart is it constituted by a recognition of the virtuous. A legal regime is a regime characterised by general rules of obligation – a matrix of social facts.

Among other consequences, Hart's analysis has the effect of 'dethroning' the sovereign and thereby undermining the international anarchism implied by Austin. Following Austin strictly, legal obligation only arises within the territorial jurisdiction of a sovereign; law can only be local (national), not international. Unless and until a sovereign of the whole world emerges – in which case there would be one global system of law – the world's legal systems are inevitably plural and there is no international law worthy of the name. Sovereigns are in a state of nature with each other on the world stage. With Hart's account, however, the sovereign is replaced by rule systems as the source of legal obligation, and the possibility of international law is no longer denied. At the same time any presumption that authoritative legal decrees, as of a sovereign, are benevolent either by definition or by empirical tendency is cancelled. In defining lawfulness on the basis of rules, Hart is expressly (for municipal law) or implicitly (for international law) affirming the possibility of bad or even evil legal

¹⁶ Kevin Toh, 'An Argument Against the Social Fact Thesis (And Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)' (2008) 27 *Law and Philosophy* 445, 457.

¹⁷ Duress as a criminal defence, to murder for example, itself raises important issues, some of which arise in the international criminal justice setting: John R Morss and Mirko Bagaric, 'The Banality of Justice: Reflections on Sierra Leone's Special Court' (2006) 8 *Oregon Review of International Law* 1.

systems as well as benign ones.¹⁸ This insight must be kept in mind while more recent contributions are examined.

III. APOLOGY, UTOPIA, AND PHILOSOPHY OF INTERNATIONAL LAW

Contemporary philosophy of international law is best contextualized by reference to debates over international law as a whole system. In this respect conceptual debate in international law in the first decade of the present century has been dominated by two closely related concerns which together have defined what might be called international law's current problematic. These two concerns or agendas are 'fragmentation' and 'constitutionalisation.'

'Fragmentation'¹⁹ bemoans the apparent breakdown of coherent, unified, principles-based legal regulation at the international level into myriad regimes. Public international law, it is suggested, is disintegrating into a confused agglomeration of specialised jurisdictions such as regional jurisdictions (Europe, Africa, the Americas), topic-based jurisdictions (law of the sea, of whales, of international arbitration), and mischief-based jurisdictions (such as the proliferating international criminal tribunals, themselves of various types and hybrids thereof). The simple series of sources for international law as laid out in Article 38 of the Charter of the International Court of Justice, and derived from the very similar instrument governing the earlier Permanent Court, are being overwhelmed by 'soft law' sources such as General Assembly Resolutions and by regional sources having de facto international effect such as EU law.

As well as contributing substantially to the 'fragmentation' debate, Koskenniemi²⁰ has analysed international law's discourse over several centuries as vacillating between the two poles of 'apology' (a realist,

¹⁸ The role of legal officials in international settings is discussed by Patrick Capps, *Human Dignity and the Foundations of International Law* (2009) 98.

¹⁹ Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 2.

²⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001); Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113; Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, Erik Castrén Institute Research Reports 21/2007.

descriptive approach close to politics or 'international relations') and 'utopia.' If the concern with 'fragmentation' is an apologetic stance then 'constitutionalisation' is unashamedly optimistic if not quite utopian. The constitutionalisation movement within international law expresses the view that international law is becoming articulated in ways that converge with the typical features of public law in democratic municipal settings.²¹ It therefore looks favourably on municipal techniques for exerting judicial constraint on executive power,²² including the typical provisions of Bills of Rights, and seeks to model regulation at the international level on such exemplars. One notable version of international constitutionalisation would involve the proposal that the Charter of the United Nations in itself represents a World Constitution.²³ Similar claims have sometimes been made with respect to the *Universal Declaration of Human Rights*.²⁴

It could be argued that such claims represent the position that international law as a whole system is benign – not just well-intentioned but also well articulated to deliver beneficial outcomes to people and to peoples around the globe. This is not to suggest any lack of sophistication or lack of awareness of shortcomings of the system in these contributions, but rather to point out that such proposals urge that at least the basics of a good international system are in place. This orientation is definitely optimistic, if not utopian. On the other hand the concern for fragmentation would seem to represent a pessimistic or somewhat dystopian view. The fragmentation argument would seem to suggest that international law as a whole is dysfunctional, and

²¹ Benedict Kingsbury, Nico Krisch, and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247.

²² See similarly, the 'ongoing institutionalization of the international legal order' referred to by Georg Nolte and Helmut Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 *International and Comparative Law Quarterly* 1, 28.

²³ Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1997) 36 *Columbia Journal of Transnational Law* 529, 567; S. Breaux, 'The Constitutionalization of the International Legal Order,' (2008) 21 *Leiden Journal of International Law* 545; for an approach derived from critical theory, Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000).

²⁴ Simon Chesterman, 'I'll Take Manhattan: The International Rule of Law and the United Nations Security Council' 1 *Hague Journal of The Rule of Law* (2009) 67, 67; 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (16 September 2005), <<http://www.un.org/summit2005>, para 134>; also see André Nollkaemper, 'The Internationalized Rule of Law' (2009) 1 *Hague Journal of The Rule of Law* 74, 74.

therefore a 'bad' (if hardly 'evil') system. That international law has a 'dark side' is hardly to be denied.²⁵

Conceptual work in international law thus opens up a debate over whether the global legal system as a whole is 'good' or 'bad,' in ways that connect up with the conceptual questions of evil systems of law. If as suggested above an evil or bad system of law can be provisionally defined as one that benefits a few rather than the many or oppresses the many to the advantage of the few, then there are several grounds on which international law might be vulnerable to characterization as a bad system. Extreme inequalities in terms of poverty and access to health services, escalating degradation of the environment and tolerance of the development of weapons of mass destruction by chosen elite states, are all examples of 'black marks' against the regime of international law as we know it — at least to the extent that international law plays a part in these crises. Less dramatically, and more technically, the same point could be made about international law's conservative axioms defending the territorial integrity of existing states against self-determination claims and defending colonial administrative boundaries in post-colonial times under the doctrine of *uti possidetis*.²⁶ Counter-arguments could be made, asserting the beneficial effects of international law, but the possibility of doing so conforms to the more general theoretical point as made by Hart: (international) law is not good by definition, or simply by virtue of its lawfulness to the extent it has any.

Against this background, some representative contributions to contemporary philosophy of international law may be sketched. Current debate in the philosophy of international law includes a range of proposals concerning the relationship between the discipline of international relations, the sphere of the ethical or moral, and international law. Allen Buchanan has made substantial contributions to debate in international law especially in relation to human rights, secession and self-determination, and the legitimacy of international legal systems. Thus Buchanan²⁷ proposes that if international law were

²⁵ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004); Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (2007); Anne Orford, 'International Law and the Making of the Modern State: Reflections on a Protestant Project' (2008) 3 *In-Spire: Journal of Law, Politics and Societies* 5.

²⁶ Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The role of Uti Possidetis* (2002).

²⁷ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004).

to be properly established on the basis of a systematic and coherent principled framework, its connections with the moral would be revealed and its contribution to a justice-based international relations would become possible. Buchanan's approach to international law (and indeed to international relations) might thus be termed reductionist with respect to the primacy of a domain of moral principles. On the other hand Ratner²⁸ has proposed that international law should, without losing its identity or complexity as a discipline and more or less in the form we know it, become the bridge between international relations and the ethical so that all three would be treated as autonomous yet contiguous disciplines. Ratner's proposal sees international law as the answer to a problem – the problem of establishing a meaningful nexus between ethics and world order, between the moral and the political. If politics is the art of the possible, and if ethics may be referred to as the art of the obligatory, then international law for Ratner presents itself as the missing link between those arts.²⁹

Buchanan and Ratner share an approach that is cautious and pragmatic in comparison with Philip Allott for whom the necessary changes to international law are wholesale and rather revolutionary ones rather than piecemeal and evolutionary.³⁰ All three however agree on the significance of ethics for international law. This theme is developed in greater detail by two contemporary appropriations of Kantian theory in the context of international law: the 'state as fiduciary' argument of Criddle and Fox-Decent and the practical rationality approach of Patrick Capps.³¹ Both contributions are concerned with systemic aspects of international law. Capps' contribution is much more technical in its appropriation of Kantian philosophy than is that of Criddle and Fox-Decent, for whom the appeal to Kant is of a somewhat general nature as indicated below. Partly for this reason, only the first of these contributions (Criddle and Fox-Decent) will be discussed in detail here, but the larger project of bringing to bear the resources of European moral philosophy on questions of international law should be thought of as an important aspect of the larger context for their work. In other words, the *evaluation* of international law is a matter of

²⁸ Steven Ratner, 'Is International Law Impartial?' (2005) 11 *Legal Theory* 39.

²⁹ Also see Hilary Charlesworth and David Kennedy, 'Afterword: - and Forward: There remains so much we do not know' in Anne Orford (ed), *International Law and its Others* (2006) 401, 401-2.

³⁰ Philip Allott, *Eunomia: New Order for a New World* (2001).

³¹ Capps, above n 18.

lively debate.

IV PEREMPTORY NORMS AND THE FIDUCIARY STATE

Peremptory norms (*jus cogens* norms) are defined as non-derogable rules of law at the international level, proscribing the most egregious violations of human rights and prescribing various aspects of the conduct of states in their dealings with each other and with individual persons. The project of Criddle and Fox-Decent involves the scrutiny of a number of 'candidates' for peremptory norm status with a view to identifying those norms that truly deserve that special status, that is to say as norms that should *compel* the conduct of states. In effect Criddle and Fox-Decent are developing an ethics of international relations, a principled set of norms that states should treat as obligatory. This project has direct relevance to any discussion of the capacity of legal systems to embody virtue or benevolence. Indirectly, it also has relevance to the debate over evil systems of law.

It should be remarked that a narrow reading of the jurisprudence of the International Court of Justice finds only one such norm unambiguously and authoritatively identified (in 2006) – the prohibition of genocide.³² However there are many international norms that are routinely categorized by influential commentators under this heading. These include such diverse norms as a (conditional) prohibition on the use of armed force; the principle of self-determination (of peoples); the prohibition of piracy; and the procedural requirement that international undertakings should be honoured, otherwise referred to as the principle of *pacta sunt servanda*.

In contrast with customary international law, to which the peremptory norm bears some resemblance, there is no requirement for the actual practice of states to provide evidence for such norms; their status is in some sense based on principle rather than observance, effect or consent. However it is important to stress that these norms are, in common with treaties or with customary international law, thought of as defining or constraining the conduct of states, not the conduct of other forms of collective or of individuals as such. Peremptory norms would appear to constitute constraints on the autonomy or sovereignty

³² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda) (Jurisdiction and admissibility)* [2006] (International Court of Justice, General List No 12, 3 February 2006) at <<http://www.icj-cij.org/docket/files/126/10435.pdf>>; a possible second being the prohibition on the use of force; on both see Criddle and Fox-Decent, above n 11, 339 fn 36.

of states but would also appear to rely on that sovereignty for their application. Peremptory norms constitute a set of rules as to what 'Princes' should and should not do, so to speak, in the light of reason.

Criddle and Fox-Decent examine the grounds for identifying peremptory norms. Consistent with the principled or deontological nature of these norms, Criddle and Fox-Decent enquire into the ethical basis or what might be called the 'inner morality'³³ of the identification criteria applicable to particular candidates for *jus cogens* status. Criddle and Fox-Decent may thus be said to be employing the machinery of the peremptory norm in order to define the good in a national legal system.³⁴ When is a state benevolent, and a good world citizen among the community of global states? Against what benchmarks may this be tested? Expressed in this blunt manner the questions may look unsophisticated but hardly trivial.³⁵

The specific proposal by Criddle and Fox-Decent is that reconceptualising *jus cogens* or peremptory norms in terms of 'fiduciary' relationships helps to establish a normative basis for *jus cogens* that is not inappropriately reliant on state sovereignty. If anything the explanatory position is to be reversed: state sovereignty is to be redefined as reliant on the set of properly identified *jus cogens* norms. States are entitled to the prerogatives of sovereignty, such as the territorial prerogatives, only if their conduct, evaluated against their obligations towards natural persons, justifies that status. In effect Criddle and Fox-Decent define a good legal system as one that acts in accordance with the fiduciary *desiderata*. Their analysis relies on the important claim that understood in a normative manner (as against a merely procedural manner) legal relationships between states must be consistent with the responsibilities that states undertake for the welfare of their citizen. Indeed any state's legitimate power/authority is to be thought of as constituted (directly or indirectly) by its delivery of those responsibilities — by its caring for persons.³⁶

³³ Consistent with this terminology, Fuller's articulation of the Rule of Law is incorporated into the Criddle and Fox-Decent analysis: *ibid* 361.

³⁴ For an argument that international law should itself display high (fiduciary) standards also see Evan Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' (2008) 27 *Law and Philosophy* 533.

³⁵ A related set of questions is addressed in the work of John Rawls and the question of the good state versus the bad state is implicit if not explicit in much political philosophy; see Buchanan, above n 27, 45.

³⁶ Also see the international 'responsibility to protect:' Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445.

For Criddle and Fox-Decent the 'fiduciary' relationship is thought of in a manner derived from certain writings of Kant. Independently of his important writings on international law and the cosmopolitan as such, Kant had argued that the paradigm case of parental care to children (or more broadly of the present generation to the next generation) reflects a general kind of obligatory welfare attitude.³⁷ Children having not volunteered or agreed to be born in the first place, those responsible for procreation by those acts of procreation accept correlative obligations. For Criddle and Fox-Decent, this *desideratum* enables a principled categorisation of a number of putative candidates for the status of preemptory norm or *jus cogens*. Criddle and Fox-Decent thus attempt a novel definition of the *jus cogens* norm with the interesting outcome that some norms routinely included as preemptory are now to be excluded, and some unfamiliar norms are now included.

For Criddle and Fox-Decent, the rights of citizens that are to be protected are predominantly (but not entirely) their rights as individuals. States have duties to take care of their citizens' (and in some circumstances, others') individual rights, and the set of these duties may indeed exhaust the terms of Statehood – so States may exist solely in order to protect those (at least generally speaking) individual rights. Thus 'States exercise sovereign authority as fiduciaries of the people subject to state power'³⁸ and correspondingly, preemptory norms 'express constitutive elements of sovereignty's normative dimension.'³⁹ The 'chessboard' of named states, each with its own defined geographical terrain, is to be thought of more as a political arrangement than a legal one.⁴⁰ This approach is broadly consistent with a tradition in international law particularly associated with Hersch Lauterpacht,⁴¹ according to which (first), the ('municipal') legal systems of sovereign states are held to be in principle of a piece with and convergent with inter-State law – the so-called 'monist'

³⁷ Somewhat closer to these better-known contributions of Kant is the authors' search for a 'fiduciary conception of cosmopolitan citizenship': Criddle and Fox-Decent, above n 11, 380; thus 'jus cogens norms constitute a universal bill of cosmopolitan human rights', *ibid* 359. On Kant's approach to social welfare and equality rights see Otfried Hoffe, *Categorical Principles of Law* (2002) 216; for a more contemporary viewpoint, T Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007).

³⁸ Criddle and Fox-Decent, above n 11, 333.

³⁹ *Ibid* 332.

⁴⁰ It might be said that Criddle and Fox-Decent converge with the position of Buchanan (see text above) in eliding international law as such by focusing on the role of the ethical.

⁴¹ Capps, above n 18, 211.

position – and (second), this monism is understood on the basis that all legal regulation is ultimately concerned with the rights of individual people.

In contrast to orthodox accounts, the Criddle and Fox-Decent state-as-fiduciary analysis excludes from the domain of the peremptory *pacta sunt servanda*. This exclusion is made on the grounds that change of circumstances, affecting human survival and other rights, might properly override an inter-state agreement (for example, a trade treaty relating to foodstuffs).⁴² It also excludes the prohibition of piracy (on the grounds that piracy is predominantly a private or quasi-criminal matter). On the other hand Criddle and Fox-Decent include as peremptory norms the observance of due process (for example in matters of arrest, detention and trial) even in emergency circumstances; and the prohibition of public corruption ('kleptocracy').⁴³

The second of these – perhaps the most innovatory of their proposals – directly addresses matters of the bad, if not evil, regime of law. Thus Criddle and Fox-Decent locate a series of fundamental and non-negotiable obligations in those governmental bodies into whose care citizens entrust themselves. In effect good governance receives an operational level of description.⁴⁴ Correspondingly, their fiduciary approach, with its list of specific fiduciary duties, provides for some fine-grained analysis of 'bad governance:' for some gradation of those regimes in which one or more of these duties is neglected. It might be supposed that a regime neglecting sufficient of these duties would deserve the name 'evil' (or perhaps 'failed'). One could speculate that humanitarian intervention might be predicated on such a calculus. Certainly the Criddle and Fox-Decent model envisages that national legal regimes (states) may from time to time fall short of the ideal represented by the list of duties. Their analysis therefore contributes to our operationalised understanding of 'goodness' and 'badness' in legal systems.

⁴² Criddle and Fox-Decent, above n 11, 377.

⁴³ Ibid 371-3. There are also communalities between the fiduciary and the orthodox lists, as with the principle of self-determination of peoples. It is not clear however who the fiduciary is for whom in this case and self-determination (that is to say autonomy) might even be said to be conceptually inconsistent with any fiduciary relationship.

⁴⁴ John R Morss (2007) 'Good Global Governance: Custom, the Cosmopolitan and International Law' (2007) 3 (1) *International Journal of Law in Context* 59.

V CONCLUSIONS

While the Criddle and Fox-Decent approach is very different from Hart's in its commitment to an explicit set of values, it is alike to Hart's rule-based approach in that it can be used descriptively.⁴⁵ Bad or evil systems of law can be comprehended. Virtue is not presupposed. An intriguing question is whether international law as a whole could be evaluated on the basis of this model of fiduciary obligations. The interrelated topics of fragmentation and of constitutionalisation in global international law, outlined above, both embody values-based presuppositions about the purpose of international law. If legal systems may be hijacked for evil purposes, without thereby necessarily losing their status as legal systems, then it would seem that a global legal system, such as international law aspires to be, cannot be immune from such a fate.

It may be that a minimal level of such factors as efficiency and effectiveness must be reached before the question of 'hijacking' arises for any legal system – local, regional or global.⁴⁶ If so, international law as we know it may be considered safe from hijacking by virtue of its inadequacy in these respects. Even if that is the case the possibility would remain an unsettling if 'academic' one. One might compare that somewhat hypothetical concern with the concern explored by Kant in relation to a centralized world government. Just as Kant warned against the tyrannical possibilities in that scenario, so might one explore totalitarian possibilities in a unified scheme of international law. However despite 'fragmentation' both the efficiency and the effectiveness of international law 'as a whole' may be greater than its detractors sometimes suggest so that the concerns may be more than merely hypothetical. A whole world perspective on law, and one that suspends belief in the virtue of international law as such, would seem worth exploring. One contemporary approach to this is through the notion of systems.⁴⁷

⁴⁵ A Hartian reading of the Criddle and Fox-Decent account could be made: with the set of fiduciary criteria playing the part of 'rule of recognition.'

⁴⁶ Strictly speaking of course, the term 'hijacking' must be thought to include benevolent as well as 'evil' purposes.

⁴⁷ Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,' (2004) 25 *Michigan Journal of International Law* 999; Richard Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past' (2009) 22(2) *Leiden Journal of International Law* 251. In this connection one might ask whether the world as a whole may be treated as a legal subject (I owe this idea to William Twining).

A common thread in the above issues is the use of force. Hart's analysis replaced the Austinian notion of obedience to law as duress with an account based on the implementation and following of rules. The force of law is for Hart not vulgar coercion by a 'gunman' but the more gentle persuasion of social practice. The Criddle and Fox-Decent proposals also centre on norms that compel, but which are not physically coercive. It seems that it is of the nature of legal systems, whether jurisdictionally circumscribed or international, that they comprise persuasive norms. Being persuaded 'to the dark side' is at least as salient as being persuaded in the other direction. It is important that the ethical malleability of law is not overlooked in times of emergency, for example at a time when international polities, as fiduciaries, are being challenged to cooperate over the regulation of environmentally catastrophic industrialization. Law's flaws must be acknowledged if law is to contribute to the saving of the world.

THE FAIR WORK ACT 2009 (CTH): A NEW MODEL?

GEOFF WARBURTON*

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I INTRODUCTION

The *Fair Work Act 2009* (Cth) (*FWA*), most of the provisions of which commence on 1 July 2009¹, needs to be understood in the wake of three waves of neo-liberal labour market reforms. The last fundamental change to the law of employment in Australia occurred of course on 27 March 2006 when amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*Work Choices*) to the *Workplace Relations Act 1996* (Cth) (*WR Act*) commenced. The changes made by *Work Choices* constituted some of the most significant changes to individual and collective employment relations law in Australia since the enactment over one hundred years ago of the *Conciliation and Arbitration Act 1904* (Cth). However, *Work Choices* constituted the third wave of labour market reforms in Australia aimed at reducing external inflexible forms of regulation and increasing greater flexibility in the labour market.²

The first wave was the legislation introduced by the Keating Labor government which increased the incidence of agreement making with much less reliance on arbitration and a centralised system but which retained an arbitration system primarily concerned with making

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¹ National Employment Standards ('NES') and Modern Awards however will commence on 1 January 2010. See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (*The First Transition Act*).

² H C Colvin, G Watson and N Ogilvie, *An Introduction To the Industrial Relations Reforms* (2006) 3.

awards as a safety net of minimum wages and conditions.³ Included in the new bargaining regime established by the *Industrial Relations Reform Act 1993* (Cth) was provision for enterprise flexibility agreements whose significance lay in the fact that they might be negotiated directly between employers and employees at a workplace without union involvement. These agreements were intended to be the means by which enterprise bargaining would spread to non-unionised workplaces. The second wave was the legislation introduced by the Howard Liberal/National Party coalition government in 1996 which aimed to further facilitate agreement making including non-union agreements made directly by employers with employees.⁴ This wave expanded the alternative forms of agreement making under federal legislation available to employers and employees by introducing a form of enterprise agreement made between the employer and individual employees: Australian Workplace Agreements ('AWAs'). Employers that now wished to could negotiate directly with each of their individual employees. The second wave also reduced the coverage afforded to employees by awards by limiting award making to a reduced set of subject matters or allowable award matters.

Further reform was introduced by *Work Choices* following the 2004 election. These reforms included:

- Further promoting the option of direct bargaining between employers and individual employees by providing that AWAs can 'trump' any other type of workplace agreement in the sense that *Work Choices* placed AWAs at the apex of a hierarchy of statutory instruments which placed collective workplace agreements next and awards at the bottom. An instrument higher in the hierarchy operated to the exclusion of those instruments below it.
- Further reducing the scope for award making under federal arbitration.
- Fundamentally changing the approval process for federal workplace agreements by removing the no disadvantage test, which related agreement outcomes for employees to existing outcomes for employees under awards.
- Removing the remedy of unfair dismissal from small

³ *Industrial Relations Reform Act 1993* (Cth). See B Moore, 'The Industrial Relations Reform Act 1993: A New Era for Industrial Relations in Australia' (1994) 7(1) *Australian Journal of Labour Law* 69.

⁴ *Workplace Relations and Other legislation Amendment Act 1996* (Cth).

businesses.

- Restricting further the scope for unions to take protected industrial action when negotiating collective workplace agreements.
- Removing significantly but not entirely the ability of unions and employees to circumvent the federal regime for workplace relations by choosing to access the often more favourable protections and remedies available under state industrial legislation.

Work Choices also had a significant impact on the institutional framework for industrial relations by:

- Expanding the existing federal system with the aim of creating one national system of workplace relations.
- Replacing the peculiar hybrid at federal level of compulsory arbitration co-existing with agreement making by effectively abolishing the award making power of the Australian Industrial Relations Commission ('AIRC') (except for award rationalisation and simplification)⁵ and greatly restricting the AIRC's role generally in industrial dispute resolution.⁶
- Removing the AIRC's role in approving collective workplace agreements by replacing the approval process by a more simple lodgement process involving lodgement with the Employment Advocate and making all agreements subject to a new legislative safety net of minimum wages set by the Australian Fair Pay Commission and four employment conditions entitlements: levels of annual leave, personal leave, parental leave and maximum ordinary hours of work which together constitute the Australian Fair pay and Conditions Standard which prevails over a workplace agreement or a contract of employment.⁷

⁵ *Workplace Relations Act 1996 (Cth)* ss 118-119D

⁶ For example, where the AIRC conducts an alternative dispute resolution process under either Division 3 or Division 4 of Part 13 of the *Workplace Relations Act 1996 (Cth)* relating to a matter arising in the course of bargaining in relation to a proposed collective workplace agreement or pursuant to a power in a workplace agreement, it does not have the power to issue orders.

⁷ *Workplace Relations Act 1996 (Cth)* Part 7, s 172(2).

II A NEW NATIONAL SYSTEM OF WORKPLACE RELATIONS?

Part of the legacy of *Work Choices* is its attempt to create a single national workplace relations system for Australia based on an expanded federal industrial relations system. *Work Choices* was the first attempt 'to simplify the complexity inherent in the existence of six workplace relations jurisdictions in Australia by creating a national workplace relations system based on the corporations power that would apply to a majority of Australia's employers and employees.'⁸ The *Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005* explained the legislative strategy and the scope of the changes to be made by *Work Choices*:

If legislated, the proposed reforms would expressly state an intention to 'cover the field' thereby ousting any conflicting state law. The states would be limited to regulating only those employers which do not come within the scope of the corporations power, the territories power, the power concerning commonwealth employees, or the Victorian referral of industrial relations powers.⁹

In *New South Wales v Commonwealth*¹⁰ the High Court comprehensively rejected a general constitutional challenge to *Work Choices* holding that the federal parliament had the power to legislate as to the industrial rights and obligations of constitutional corporations and their employees. However it rapidly became apparent after *Work Choices* and State legislative initiatives directed at frustrating federal ambition including expanding the scope of public employment by the Crown in the right of State governments, and conferring new jurisdictions on State industrial tribunals pursuant to private arbitration based referral agreements between constitutional corporations and trade unions, that the corporations power cannot provide an adequate basis for a comprehensive national system of workplace relations.¹¹

FWA and cognate legislation accepts this legacy and makes no attempt to reverse the expanded federal workplace relations system based on the corporations power that *Work Choices* created. Instead it builds on the legislative approach of *Work Choices* in this area by pursuing a

⁸ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) 7.

⁹ *Ibid* 9.

¹⁰ (2006) 229 CLR 1.

¹¹ Neither by itself or in conjunction with the other constitutional heads of power relied upon by the Commonwealth. For a full discussion of the various legislative measures taken by State governments to frustrate federal ambition, see C Sappideen, P O'Grady and G Warburton, *Macken's Law of Employment*, (6th ed, 2009) ch 1.

policy of the federal government negotiating with State governments the terms of their co-operation 'to achieve national industrial relations laws for the private sector'¹² by 'either State governments referring powers for private sector industrial relations or other forms of cooperation and harmonisation'¹³. The fortunate coincidence for this policy of a federal Labor government negotiating with State Labour governments in all States except Western Australia has allowed the federal Labor government to achieve a significant measure of its aim in this area. In December 2009, the Commonwealth Parliament enacted the *Fair Work Amendment (State Referrals and Other Measures) Act 2009* which gives effect to earlier State referral legislation in all Australian States except Western Australia by which referral States referred their private sector industrial powers to the Commonwealth Parliament. In Western Australia the State Liberal government was reported as deciding not to make either a general referral of industrial powers or a text based referral of industrial powers but would consider opportunities for harmonisation with the federal system and has recently set up its own review of state workplace laws.¹⁴

III GOOD FAITH BARGAINING

The provision in *FWA* of a scheme for good faith bargaining was referred to in early 2009 as 'the novel aspect of the proposed changes as the current law makes no real provision for good faith bargaining'.¹⁵ However, Senators Xenophon and Fielding were reported as being concerned that the good faith bargaining provisions 'were tantamount to compulsory arbitration'.¹⁶ A peak employer chief executive was also reported as stating that the effect of the same provisions was that unions were being handed 'a key to the front gate, an automatic seat at the bargaining table and direct access to sensitive commercial records'.¹⁷

Perhaps the first thing to notice here is that good faith bargaining is a

¹² 'Forward with Fairness', Australian Labor Party industrial relations policy, Federal Election 2007, 6 <<http://www.workplace.gov.au>>.

¹³ *Ibid.*

¹⁴ Thomson Reuters, *Workforce News Service*, Issue 1672 (27 March 2009) 2.

¹⁵ Marilyn Pittard, LexisNexis Butterworths, *Workplace Relations Australia Bulletin*, (at 8 February 2009) 5.

¹⁶ Phillip Coorey, 'Senate Set to Pass Work on Laws as Coalition Stews', *Sydney Morning Herald*, 10 March 2009, 6.

¹⁷ Thomson Reuters, *Workforce News Service*, Issue 1673 (27 March 2009) 3.

long established doctrine in both the United States and Canada¹⁸ and is also not a novel development in Australian and New Zealand legislative history. It might even assist our understanding of the good faith bargaining scheme in *FWA* to examine some of the earlier legislative manifestations of a duty to bargain in good faith.

Currently good faith bargaining obligations are found in no fewer than five industrial jurisdictions in Australia and New Zealand: *Industrial Relations Act 1996* (NSW) s 134(4), *Fair Work Act 1994* (SA) s 76A, *Industrial Relations Act 1979* (WA) ss 42B-42D, the *Industrial Relations Act 1999* (Qld) s 146 and the *Employment Relations Act 2000* (NZ) ('*ERA(NZ)*') ss 4 and 32. Of the Australian States, however, only Western Australia has an expansive statutory scheme for good faith bargaining for an enterprise agreement. That statutory scheme incorporates a power in a supervisory tribunal to declare on application from a negotiating party (that has discharged its good faith obligations), that bargaining has failed and there is no reasonable prospect of agreement being reached so that arbitration of the remaining terms of the agreement can take place.

Moreover, the *Industrial Relations Reform Act 1993* (Cth) enacted under the Keating Labor government inserted section 170QK into the *Industrial Relations Act 1988* (Cth) which gave a power to the AIRC to make orders for the purpose of ensuring that the parties negotiating an agreement under that act do so in good faith.¹⁹ A quick comparison of the latter provision with the corresponding provision in the *FWA*, s 229, reveals at first glance some significant apparent differences between the two sets of provisions. However when the main decisions of the AIRC on the scope of the earlier provision are taken into account the degree of difference is reduced.²⁰ Both sets of provisions effectively

¹⁸ Good faith bargaining in the United States was established by the *National Labour Relations Act 1935* ('*Wagner Act*'). In 2007, the Supreme Court of Canada in *Health Services and Support Facilities Sub Sector Bargaining Association v British Columbia* [2007] SCC 27 held that the right to bargain collectively including a duty to bargain in good faith was protected under the Charter of Rights. One of the grounds for the decision was that collective bargaining and the duty to bargain in good faith had become generally recognised as a fundamental right in Canada prior to the enactment of the Charter in 1984.

¹⁹ The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) repealed this provision.

²⁰ *Public Sector, Professional, Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission* (1994) 36 AILR 372 ('*ABC Case*') and *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, metals and Engineering Union* (1995) 59 IR 385 ('*Asahi*') both held that good faith bargaining orders under s170QK were to facilitate an agreement and did not involve requiring

impose obligations mainly of a procedural kind and also prohibit certain kinds of bargaining tactics but are at pains to point out that good faith bargaining does not require a party to make concessions during negotiations. But unlike s170QK, the *FWA* has in adopting tests of 'genuine' and 'unfair' conduct gone further in formulating standards of bargaining conduct.

The provisions dealing with good faith in *FWA* are found in Part 2-4 of that Act. The key object of this Part is 'to provide a simple, flexible and fair framework that enables collective bargaining in good faith particularly at the enterprise level for enterprise agreements that deliver productivity benefits.'²¹ Section 228(1) of *FWA* provides that a bargaining representative for a proposed enterprise agreement must meet the following good faith bargaining requirements:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

Section 228 (2) then provides the important qualification that the above good faith bargaining requirements do not however require

- (a) a bargaining representative to make concessions during bargaining for the agreement; or
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

It was never clear during the brief life of the s 170QK jurisdiction, from its commencement in 1993 to its repeal in 1996, if the facilitative rather

that concessions be made by a negotiating party.

²¹ *Fair Work Act 2009* (Cth) s 171(a).

than interventionist role that the AIRC adopted in relation to bargaining with good faith orders nevertheless co-existed with a power in the AIRC to arbitrate as a last resort where a party persisted in breaching good faith bargaining obligations. *Forward with Fairness*, the ALP's industrial relations policy at the last federal election, made it clear that the proposed good faith bargaining regime did not involve arbitration. Nevertheless, under Division 8 of Part 2-4 of the *FWA*, Fair Work Australia (FWAustralia) is given as a last resort in cases of serious and persistent breaches of good faith bargaining requirements a power to arbitrate the dispute between the negotiating parties.

Under Subdivision 8B of Part 2-4 of the *FWA* a bargaining representative for a proposed enterprise agreement may apply to FWAustralia for a bargaining order where one of the other bargaining representatives have not met the good faith bargaining requirements. Bargaining orders made under s 231 can, inter alia, specify the actions to be taken by the bargaining representative for the purpose of ensuring that they meet the good faith bargaining requirements. Where a bargaining representative has contravened such a bargaining order an application may be made to FWAustralia for a serious breach declaration. FWAustralia may make this declaration under s 235(2) only after being satisfied of the following:

- a bargaining representative has contravened one or more bargaining orders; and
- the contravention or contraventions are serious and sustained; and
- have significantly undermined bargaining for the agreement; and
- the other bargaining representatives for the agreement have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and
- agreement on the terms that should be included in the agreement will not be reached in the foreseeable future ; and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

The result of a serious breach declaration being made in relation to a proposed enterprise agreement is that a Full Bench may then arbitrate, ie, make a bargaining related workplace related determination in

relation to the agreement.²² However, it is clearly apparent here from the nature and number of these pre-requisites that the power to arbitrate that is given to the Full Bench of FWAustralia is a very limited and circumscribed power. It should come as no surprise therefore that in the first six months of *FWA* there were only 38 applications for bargaining orders compared with over 1,000 applications for an agreement to be approved and no arbitrated workplace determination.²³ FWAustralia must make a bargaining related workplace determination as soon as possible after the post- declaration negotiating period ends.²⁴ The post declaration negotiating period (which ends 21 days after the serious breach declaration is made²⁵) appears to be a final opportunity for the bargaining representatives to attempt to resolve their differences and avoid arbitration. It could hardly be said in the light of this extremely long and difficult path to arbitration that good faith bargaining is arbitration in disguise or even that it is easily available where there has been a breach by a bargaining representative of the good faith bargaining requirements.

This conclusion is reinforced by the New Zealand experience relating to last resort arbitration under the bargaining in good faith regime in *ERA(NZ)*. When first introduced in 2000 the *ERA(NZ)* provided that good faith bargaining did not require the making of concessions by a party during bargaining. However after amendments made in 2004 to section 33 of *ERA(NZ)* it now provides to the effect that parties are required to act in a way that will assist in concluding a collective agreement 'unless there is a genuine reason based on reasonable grounds not to'. The New Zealand Employment Relations Authority may arbitrate to determine the terms of a proposed agreement where there is a serious and sustained breach of the duty to bargain in good faith but to date no such determinations have been made.²⁶

It is constructive when considering the bargaining in good faith provisions in *FWA* to compare them with the corresponding provisions in the *ERA(NZ)*. Comparison with the central role given to the duty of good faith in the *ERA(NZ)* also puts the more modest position of good

²² *Fair Work Act 2009 (Cth)* s 269.

²³ J Gillard, *Address to Julian Small Foundation*, Sydney, 12 November 2009.

²⁴ *Fair Work Act 2009 (Cth)* s 269 (1).

²⁵ *Fair Work Act 2009 (Cth)* s 269 (2).

²⁶ *Employment Relations Act 2000 (NZ)* s 50J. See Gordon Anderson, 'The Sky Didn't Fall in: An Emerging Consensus on the Shape of New Zealand Labour Law?' (Paper presented at the Australian Labour Law Association - Fourth Biennial Conference, Melbourne, 14-15 November 2008) 10.

faith bargaining for a collective agreement under the *Fair Work Act 2009* into perspective. Under the *ERA(NZ)* the objects section of the act makes it clear that the statutory obligation of good faith has a central role in the regulation of *all* aspects of the employment relationship and of the employment environment.²⁷ Thus good faith obligations are declared to be as central to an individual employment relationship as to collective employment relationships. Good faith in the *ERA(NZ)* does not merely operate, as in the *FWA*, to import a set of requirements for representatives engaged in collective bargaining. It is expressly provided that it is the duty of parties to an employment relationship 'to deal with each other in good faith' and that this duty is wider in scope than the implied common law duty of mutual trust and confidence and is not limited to bargaining for a collective agreement.²⁸ Pursuant to a 2004 amendment to *ERA(NZ)* this provision is amplified to include a requirement to the parties 'to be active and constructive in establishing and maintaining a productive employment relationship, in which the parties are, among other things, responsive and communicative'.²⁹ The matters to which the good faith obligation in *ERA(NZ)* applies are set out in subsection 4(4) thereof and include most matters that are likely to significantly affect employees either collectively or individually and includes 'consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about employee's collective employment interests, including the effect on employees changes to the employer's business'. There is also a mandatory consultation obligation on an employer when it 'is *proposing* to make a decision' that may have an adverse effect on the continuation of employment of any of its employees'.³⁰ The 2004 amendments to *ERA(NZ)* also made it clear that the obligation of good faith applied to bargaining for an individual employment agreement or for variation thereof and to any matter arising out of an individual employment agreement.³¹ The basic good faith obligations that apply to collective bargaining are contained in Part 5 of *ERA(NZ)* and are supplemented by a Code of Good Faith issued by Minister. The Court may have regard to Code in determining if parties have acted in good faith. Clause 6 of the Code for example provides to the effect that where a party believes that there has been a breach of good faith in relation to collective bargaining the party shall

²⁷ *Employment Relations Act 2000* (NZ) s 3.

²⁸ *Employment Relations Act 2000* (NZ) s 32(5), s4 (1A).

²⁹ *Employment Relations Act 2000* (NZ) s 4(1A).

³⁰ *Employment Relations Act 2000* (NZ) s 4(1A)(c).

³¹ *Employment Relations Act 2000* (NZ) s 4(4)(a).

indicate this at an early stage enable other party to remedy the situation or provide an explanation.

As Anderson notes a major objective of good faith obligation in *ERA(NZ)* was to promote collective bargaining which had dramatically declined during the era of the *Employment Contracts Act 1991* (NZ) which ended in 1999. However, since the *ERA(NZ)* commenced in 2000 collective bargaining density or the number of employees whose terms and conditions are determined by a collective agreement has continued to fall to the point where union density in the private sector in 2008 was only 10% and collective bargaining in New Zealand 'has increasingly become a public sector phenomenon'.³² (A very similar pattern of relentless decline in trade union membership is also apparent in Australia where trade union density in the private sector was only 13.7% in 2007).³³ This pattern of decline in collective bargaining density however also serves to highlight the significance of the statutory obligation of good faith applying to individual employment agreements in New Zealand.

In Australia however under *FWA* there is no statutory good faith obligation on an employer either when negotiating terms of an individual employment agreement with an employee or generally in respect of its relationship with the individual employee. This is a conspicuous absence when some key features of enterprise agreements and modern awards under the *FWA* are considered. All enterprise agreements and modern awards made under *Fair Work Act 2009* must contain a flexibility term which enables 'an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee'.³⁴ In its decision of 20 June 2008, the Full Bench of the AIRC set out its model flexibility clause which enables an individual employer an employee to agree in writing to vary or displace the operation of certain elements in a modern award in relation to that employee. Under s 202 of *FWA* if an employer and an employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement this

³² Gordon Anderson, 'Transplanting and Growing Good Faith in New Zealand Labour Law' (2006) 19 *Australian Journal of Labour Law* 1-20 and above n 26. According to Anderson private sector collective bargaining density was only 9% in 2006 whereas the corresponding public sector figure was 61%. Note however that under *ERA(NZ)* only union members can be bound by a collective agreement in contract to enterprise collective agreements under *Fair Work Act 2009*.

³³ Email correspondence with Australian Bureau of Statistics, 15 April 2008.

³⁴ Industrial Registrar Williams, *Publication of Award Modernisation Request*, (2 April 2008).

has effect in relation to those parties as if the enterprise agreement were varied by the arrangement. There must be genuine agreement between the parties and the employee must be better off overall than the employee would have been if no individual flexibility arrangements were agreed to.³⁵ However, there is no independent body to supervise the making of such flexibility arrangements by the employer and the individual employee or to determine if the better off overall test has been satisfied.

Considerable uncertainty attaches to the issue of what standard is to be adopted when applying the good faith bargaining requirements for collective bargaining under the *FWA*. One threshold issue is whether an objective or subjective approach should be taken in determining if there has been a breach of good faith. However the New Zealand Court of Appeal in a series of decisions cautions against framing the construction issue in this way and regards it as 'unhelpful' for some compelling reasons.³⁶ In *Auckland City Council v Southern Local Government Officers Union Inc*³⁷ the Court of Appeal explained:

[I]t does not follow that because good faith was related to the mutual obligations of trust, confidence and fair dealing, the Court should be taken to have mandated a wholly objective assessment by reference to effect. That would be to exclude consideration of honesty or lack of it which can be an important element in the concept of good faith. To suggest that conduct, undertaken honestly, that has an adverse effect for reasons completely unforeseen, is to be held to have been undertaken other than in good faith would be a significant departure from the natural meaning of those words. To judge conduct solely by reference to effect in this way would be to invoke hindsight and to disregard the influence of the circumstances in which conduct is undertaken. We think a broader and more balanced approach is called for.³⁸

Also in *Carter Holt Harvey Ltd v National Distribution Union*³⁹ the New Zealand Court of Appeal stated that:

Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct

³⁵ *Fair Work Act 2009* (Cth) s 203(4).

³⁶ Most of the decisions are referred to in *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] NZCA 1.

³⁷ (2007) 2 NZLR 10.

³⁸ *Ibid* [22].

³⁹ (2002) ERNZ 239.

is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.⁴⁰

Another threshold issue regarding the construction of good faith bargaining requirements in the *FWA* is the relationship between these requirements and the taking of protected industrial action. It should not be presumed that when a bargaining representative is discharging its good faith bargaining requirements this necessarily precludes it from taking protected industrial action. One significant step taken by *FWA* towards an easing of a generally cumbersome and restrictive set of pre-conditions for protected industrial action inherited from *Work Choices* is the abolition of the requirement of initiating a bargaining period. Instead of this requirement the *FWA* provides that bargaining for an enterprise agreement begins when either:

- an employer agrees to bargain or the employer initiates bargaining for
- an enterprise agreement, or
- FWAustralia makes a majority support determination (MSD), ‘using any method it considers appropriate’⁴¹, to the effect that a majority of the employees who will be covered by the proposed enterprise agreement want to bargain collectively with the employer who will be covered by the agreement⁴², or
- FWAustralia makes a scope order specifying in relation to a proposed single enterprise agreement the employers and employees who will be covered by the agreement⁴³, or
- FWAustralia makes a low paid authorisation in relation to a proposed agreement.⁴⁴

With the exception of this change however the rules governing protected industrial action however under *FWA* remain basically unchanged from that which applied under *Work Choices*.⁴⁵ Protected

⁴⁰ Ibid [55].

⁴¹ *Fair Work Act 2009* (Cth) s 238 (1).

⁴² *Fair Work Act 2009* (Cth) s 237 (2).

⁴³ *Fair Work Act 2009* (Cth) s 238.

⁴⁴ *Fair Work Act 2009* (Cth) s 173(2).

⁴⁵ With the qualification that unlike *Work Choices* protected industrial action by employers under the *Fair Work Act 2009* (Cth) is limited to action taken in response to industrial action by employees, (s 411). See generally Shae McCrystal, ‘A New Consensus: The Coalition, the ALP and the Regulation of Industrial Action’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The new workplace laws and the*

industrial action is only available to bargaining representatives who are pursuing a single enterprise agreement and not a multi-enterprise agreement and not engaging in pattern bargaining.⁴⁶ *FWA* also contains the precondition of a secret ballot introduced by the Howard government in 2005⁴⁷ including the requirement that each applicant for a ballot is genuinely trying to reach agreement.⁴⁸ It is a further requirement that remains from the Howard government era that in order for employee claim action or employer response action in relation to an enterprise agreement be capable of becoming protected industrial action the relevant bargaining representative must be genuinely trying to reach agreement.⁴⁹

Forsyth raises the issue of whether the concept of genuinely trying to reach agreement is intended to have the same meaning as the obligation to bargain in good faith so that the protected industrial action cannot be engaged in until after a party has met its bargaining in good faith obligations.⁵⁰ He argues that there is at the least 'scope for confusion' given the provisions in the *FWA* about the extent to which parties may have to fulfil their good faith obligations before they undertake industrial action.⁵¹ It is submitted that the starting point here is that these provisions by expressly providing that bargaining representatives are not required by their good faith obligations to make concessions or reach agreement allows hard bargaining. McCrystal points out in this connection that a trade union can be genuinely trying to reach agreement but on terms which are presently unacceptable to the employer and that this situation will not deprive the union of any genuineness.⁵² Determining when a refusal to compromise constitutes a lack of genuineness may sometimes be a difficult task but it should be undertaken by considering the conduct of the party as a whole and differentiating between different bargaining starting points. Thus in *Community and Public Sector Union v Australian Broadcasting Corp*⁵³ a Full Bench of the AIRC held that taking protected industrial action was

Work Choices legacy (2009) 141-163.

⁴⁶ *Fair Work Act 2009* (Cth) ss 413, 422.

⁴⁷ See Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots before Employee Industrial Action' (2007) 20(3) *Australian Journal of Labour Law* 1-18.

⁴⁸ *Fair Work Act 2009* (Cth) s 443(1)(b).

⁴⁹ *Fair Work Act 2009* (Cth) s 413.

⁵⁰ Anthony Forsyth, 'Exit Stage Left, now Centre Stage: Collective Bargaining under Work Choices and Fair Work' in Forsyth and Stewart, above n 45, 138.

⁵¹ *Ibid.*

⁵² McCrystal, above n 45, 150.

⁵³ (1995) 36 AILR 419.

not necessarily inconsistent with a duty to bargain in good faith and stated that:

Negotiations in good faith would generally involve negotiations with an open mind and a genuine desire to reach agreement as opposed to simply adopting a rigid predetermined position and not demonstrating a preparedness to shift.⁵⁴

At the same time as the Ontario Labour Relations Board has held ‘the duty to bargain in good faith is not designed to redress an imbalance of bargaining power between the parties’.⁵⁵ Similarly, the National Labor Relations Board in the United States has held that ‘delay and its cause and effect, a lack of cooperation between the parties or of preparation, and the reasonableness and unreasonableness of demands are among the factors considered when determining if the party intended to negotiate in good faith.’⁵⁶ Thus the requirement in effect in s 228(1)(d) of the *FWA* that the bargaining representatives engage in a process of rational discussions during negotiations for an enterprise agreement should not obscure the fact that such bargaining also involves the exercise of bargaining muscles including the ability to make persuasive threats of industrial action and even carry out industrial action in certain circumstances. There is no contradiction here if one accepts as Cox argues that

collective bargaining is not a purely intellectual activity and that conduct or the threat of conduct away from the bargaining table is a normal and legitimate component of negotiations.⁵⁷

In a recent decision of *FWA Australia SDP Richards* recognised that while ‘precipitous recourse to industrial action may well be demonstrative of an unwillingness to genuinely try to bargain, or let alone to bargain in good faith’⁵⁸ much depended on the facts and circumstances of each case and in many cases bargaining in good faith would operate in co-existence with the taking of protected industrial

⁵⁴ *Ibid* 421.

⁵⁵ *Ontario Nurses Association v Board of Health of Haliburton* (1977) OLRB Rep 65, 67.

⁵⁶ *NLRB v WR Hall Distributor*, 341 F 2d 359 (10th Cir, 1965).

⁵⁷ P Cox, ‘The Duty to Bargain in Good Faith’ (1958) 71 *Harvard Law Review* 1401, 1408. The qualification here of course is that under ss 423 and 424 of the *Fair Work Act 2009*, as under *Work Choices*, there is a power in the tribunal to suspend or terminate protected industrial action where it is causing significant economic harm to the employer or where the action is threatening to endanger the life, personal safety or health or the welfare of the population or part of it or threatening to cause significant economic damage to the Australian economy or an important part of it.

⁵⁸ *National Tertiary Education Industry Union v University of Queensland* [2009] FWA 90, 4.

action. Thus, in the circumstances of that case, where bargaining had been extended over a lengthy period of time and the employer was found to have its own reasons for seeking to delay the progress of bargaining, it was found that in the context of the union making an application for a secret ballot under s 437 of *FWA* that the application should not be denied on the basis that the union was not genuinely trying to reach agreement. In another recent decision of *FWA Australia* it has been held that it is not necessary that bargaining representatives bargain to an impasse or standstill or reach a specific stage in their negotiations before making a protected ballot application.⁵⁹

IV NATIONAL EMPLOYMENT STANDARDS AND MODERN AWARDS

As Murray and Owens⁶⁰ recognise, it was in the area of minimum standards that *Work Choices* had arguably its most radical effect by adopting in federal legislation (instead of in accordance with long tradition in awards) a set of minimum standards known as the Australian Fair Pay and Conditions Standard ('AFPCS').⁶¹ These legislative standards were at such an austere level in some key areas that as Murray and Owens put it 'they represented the driving force behind the deregulatory impact of *Work Choices*'.⁶²

AFPCS comprises minimum employee entitlements in five key areas: wages (minimum rates of pay and casual loadings), maximum ordinary hours of work (38 per week plus reasonable additional hours), annual leave, personal leave (consisting of paid personal leave/carer's leave, unpaid carer's leave and unpaid compassionate leave) and parental leave. Many traditional award determined entitlements such as overtime, penalty rates and redundancy payments were missing from these five standards. The overall impact of AFPCS needs to be understood however in the broader context of *Work Choices*. At the same time as it established the AFPCS *Work Choices* removed minimum wage determination including the determination of classification structures and casual loadings from the AIRC and gave it to a new statutory tribunal, the Australian Fair Pay Commission (AFPC). *Work Choices* also provided that once a federal statutory

⁵⁹ *AFMEPKIU v HJ Heinz Company Australia Ltd* [2009] FWA 322, [20] (Whelan C).

⁶⁰ Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Forsyth and Stewart above n 45, 40.

⁶¹ See *Workplace Relations Act 1996* (Cth), Part 7.

⁶² Jill Murray and Rosemary Owens, above n 60, 41.

workplace agreement commenced operation the effect was to oust or exclude the application of any awards to the employees covered by that workplace agreement⁶³but not to exclude the AFPC minima.⁶⁴ *Work Choices* also abolished the no disadvantage test under which no workplace agreement could be approved if it provided in effect that there was a less favourable net outcome for employees under the proposed workplace agreement than under a relevant award. Late in the term of the Howard government however amending legislation was passed which in effect re-introduced a modified version of the no disadvantage test.⁶⁵

The most conspicuous feature that emerges on a comparison of *Work Choices* and the *FWA* in this area is that the latter act has retained the essential *Work Choices* model of a set of legislative minimum standards. Moreover there is a significant degree of similarity between the content of the respective core legislative standards on annual leave, personal/carer's leave and parental leave. Although Labor's National Employment Standards ('NES') contain five more standards than the AFPCS all of the five minima in the latter with the exception of wages are also found in the NES. The critical difference between the AFPCS and the NES however is that the latter must be understood in the context of modern awards under *FWA*. It should also be noted that minimum wage rates under the latter act will be determined by a Minimum Wage Panel of *FWA*Australia. Although modern awards cannot generally exclude the NES they may contain terms ancillary to or incidental to the NES and in the case of redundancy may replace the redundancy standard in the NES by a more favourable industry specific redundancy scheme for employees.⁶⁶

Modern awards do not however revive pre-*Work Choices* modes of arbitration. Pre-*Work Choices* most federal awards operated on the basis of respondentcy. That is they applied only to those employers named in the award as a respondent or person bound by the award. These awards generally set minimum standards and also allowed employers to provide additional 'over award' payments or conditions more favourable to employees. Some awards were made by arbitration by an industrial tribunal and others were made by consent of the parties and then approved by an industrial tribunal. Unions often pursued general improvements in working conditions through award variations in one

⁶³ *Workplace Relations Act 1996 (Cth)* ss 349, 354, 399.

⁶⁴ *Workplace Relations Act 1996 (Cth)* s172 (2).

⁶⁵ See the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth)*.

⁶⁶ *Fair Work Act 2009 (Cth)* ss 55, 141.

sector where they had stronger bargaining power which was then adopted as a 'flow on' to other awards. Also major test cases were regularly mounted before industrial tribunals which were asked to adopt a model clause which set new general standards to be ultimately inserted in all awards. For example in 1984 the *Termination, Change and Redundancy Case*⁶⁷ established new general standards in federal awards in relation to termination of employment and redundancy. *Work Choices* severely restricted the arbitration powers of the AIRC to make or vary awards by for example reducing the subject matter of awards from 20 to 15 matters.

Modern award making (unlike traditional arbitration pre-*Work Choices*) is a top down process driven originally by the AIRC pursuant to an 'award modernisation request' from the Minister under s 576 (4) of the *Workplace Relations Act 1996(Cth)*.⁶⁸ Under the FWA a Full Bench of FWAustralia is given the task of carrying out the process and it may inform itself in any way it thinks appropriate.⁶⁹ However, Minister Gillard varied her original *Request* made on 28 March 2008 on 7 occasions up to the end of December 2009 to incorporate new directions or instructions as to specific aspects of modern award making. For example, the variation of 28 May 2009 deals specifically with the restaurant and catering industry and instructs the AIRC that it should create a modern award covering that industry separate from the Hospitality Industry Award 2010 which modern award the AIRC was at the time in the process of determining under the Ministers original *Request*. The terms of the variation reflected the Minister's response to reports of employer opposition in the restaurant industry to the proposed penalty rate regime in the Hospitality Industry Award 2010. It directed the AIRC to 'establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times'.⁷⁰ Thus the award modernisation process is not a traditional adversarial process where evidence gathering depends on the parties. The outcome of this process is common rule awards which bind employees and employers on the basis of the industry or occupation in which they are located.⁷¹ Modern

⁶⁷ (1984) 8 IR 34.

⁶⁸ The Ministers request was made on 28 March 2008. See Industrial Registrar Williams, *Publication of Award Modernisation Request* (2 April 2008).

⁶⁹ *Fair Work Act 2009* (Cth) s 590.

⁷⁰ [2009] AIRCFB 555 [2].

⁷¹ *Fair Work Act 2009* (Cth) s 143.

wards are to be updated only every 4 years by FWAustralia however it will also have a discretion to exercise its powers in relation to modern awards outside the four year review period but only where this is necessary to achieve the aims of the modern award system.⁷² Although an employer, employee or organisation may make an application to vary, omit or include terms in a modern award⁷³ this opportunity must, if it is submitted, also be understood in the limiting context of the aims of the modern award system to set minimum conditions for employees in particular industries or occupations. In her *Request* Minister Gillard made it clear that part of the modern award process is to reduce the number of awards and to simplify their content starting from first principles and to reach different results in different industries.⁷⁴ Modern awards may also include only terms relating to 10 subject matters: minimum wages and skill based classifications and career structures and incentive based payments, type of employment, arrangements for when work is performed, overtime rates, penalty rates, annualised wage arrangements, allowances, leave, superannuation and procedures for consultation, representation and dispute settlement.

Cooney et al stress the need for responsive standard setting in employment in which the subjects of regulation are engaged and able to respond to local conditions and changing circumstances.⁷⁵ To meet their benchmark employment standards 'need to be created through dynamic participative processes that both engage actors at the local level and provide for continuous evaluation'.⁷⁶ Public regulation of employment is required because private modes of regulation are unable to generate decent work.⁷⁷ This is a useful perspective from which we can evaluate standard setting under the *FWA* and *Work Choices*. The latter failed to create decent work through responsive regulation and instead adopted 'command and control methods' via elaboration of key legislative standards according to Cooney et al.⁷⁸ The legislative standards of *Work Choices* offered no opportunity other

⁷² *Fair Work Act 2009* (Cth) s 157.

⁷³ *Fair Work Act 2009* (Cth) s 158.

⁷⁴ Industrial Registrar Williams, *Publication of Award Modernisation Request* (2 April 2008).

⁷⁵ Sean Cooney, John Howe and Jill Murray, 'Time and Money Under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29 *University of New South Wales Law Journal* 215.

⁷⁶ *Ibid* 241.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

than the cumbersome mechanism of legislative amendment to develop new standards. Without advocating a return to pre-*Work Choices* modes of standard setting, the authors support what they cryptically describe as a model that 'would draw on, rather than marginalise the successful elements' of the award based system that both engaged actors at the local level and provided for continuous evaluation.⁷⁹

How does the *FWA* score on the scale of responsive regulation? Not very well it is submitted since its approach is a hybrid of inherently unresponsive legislative standards and a modern award based system far removed from the award based system discussed by Cooney et al in which regulation provided real opportunities for the actors the subject of regulation to be engaged at the local level and for continuous evaluation. Instead modern award making under the *FWA* is a process that is driven from the top down with no real continuous engagement between the tribunal and the subjects of the standards or any continuous evaluation of the standards themselves

V CONCLUSION

While *FWA* does not really revive pre-*Work Choices* modes of regulation it has not sought fresh inspiration in any basic reformulation of the modes of regulation or in fundamental overarching concepts. Instead a Labor federal government that was out of power since 1996 appears to have been content to move not too far away from *Work Choices* in some major areas and even to retain some of the *Work Choices* model in some key areas such as the regulation of industrial action and the statutory safety net. The analysis earlier in this article of good faith bargaining provisions in *FWA* highlights the very narrow set of circumstances that must exist before a Full Bench of *FWA*ustralia may arbitrate the terms of a proposed enterprise agreement. By any reasonable standard this power to arbitrate that is given to *FWA*ustralia in the context of a persistent and serious breach of the good faith bargaining requirements is a very limited and circumscribed power. Why the Rudd Labor government, which campaigned on a policy of re-introducing fairness into employment relations, chose to adopt inherently unresponsive legislative standards as a key part of its industrial safety net remains inexplicable. Although it removed the hierarchy of statutory instruments under *Work Choices* that encouraged individual arrangements over collective agreements and supports collective bargaining moving to centre stage in

⁷⁹ Ibid 215.

employment regulation it has not come to terms with or adequately addressed the relentless decline in trade union membership in Australia in recent decades that has now reached the point where only 13.7 % of private sector employees were union members in 2007.⁸⁰ The corresponding figure in the public sector was 41.1%.⁸¹ These figures threaten to undermine the legislative strategy of placing collective bargaining at the centre of employment regulation. It appears illusory given the New Zealand experience to expect the good faith bargaining requirements in *FWA* to reverse this continuing decline. Most of all *FWA* suffers as a legislative strategy for a reforming Labor government by comparison with the *Employment Relations Act 2000* (NZ) which has proved to be an enduring reformulation⁸² by a Labor government of the basic framework for regulating employment relations. *ERA*(NZ) does this by articulating a comprehensive code of good faith which has a central role in *all* aspects of the employment relationship and of the employment environment. It thus places statutory good faith at the core not only of collective but also of individual employment relations.

⁸⁰ See above n 34.

⁸¹ *Ibid.*

⁸² See Anderson, above n 26. The *ERA*(NZ) has been substantially retained by the National Party Government that assumed office in November 2008.

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