LAW & CHANGE
Exploring the role of legal research in law reform and social justice

The Australian National Postgraduate Law Conference 2009

Thursday 11 June & Friday 12 June 2009

Sparke Helmore Theatre
ANU College of Law
Fellows Road
Canberra
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## Schedule of Presentations

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| 11.15 | **International law**  
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Ms Dawn Voon - From Non-Interference to Just Intervention: An Association of Southeast Asian Nations Humanitarian Intervention Legal Framework  
Mr Umair Ghori - World Trade Organisation Non-Agricultural Market Access Negotiations and the Global Textiles and Clothing Trade: Reconciling the Irreconcilable amid the Financial Meltdown  
**Refugees**  
Mr Matthew Zagor (Chair)  
Ms Melinda McPherson - Gender Blind Justice – Impediments to claims of gender based persecution by asylum seeking women in Australia  
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| 12.15 | LUNCH                                                                  |
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Ms Alana Thompson - Barriers to Achieving a Holistic Outcome for Parents Involved in Care Proceedings in the Children's Court Context  
Ms Leilani Ujvari - To What Extent Are Legal Standards Vis-A-Vis Children’s Rights and the Rights-based Approach to Development Understood and Incorporated into Post-Conflict Psychosocial Recovery Programs for Children?  
Ms Michelle Fernando - Why Judges Don’t Speak with Children in the Family Court: Fear, Folly or Fairness?  
**Public law**  
Mr Moeen Cheema (Chair)  
Mr Weibing Xiao - Freedom of Information Reform in China  
Ms Chen Zhang - Establishing a Public Interest Litigation System in China |
| 2.15  | **Customary and Indigenous land law**  
Ms Jo-Anne Weinman (Chair)  
Ms Louise Parrott - Constitutionalising Indigenous Self-Government Rights: The Migration and Transplantation of Foundational Ideas from Canada to Australia  
Ms Rebecca Monson - Feminist Participatory Research on Land Issues in the Solomon Islands  
Mr Leon Terrill - The Days of the Failed Collective |
| 3.15  | AFTERNOON TEA                                                          |
| 3.30  | **Law, space and place**  
Mr Brad Jessup (Chair)  
Ms Justine Bell - Sustainability and the Torrens Title System  
Ms Susan Bird - Waste Deep: Australian Recycling Culture, “Skip Dipping” and Nature Strip Scavenging  
Ms Rebecca Goodbourn – Law, the Human "Body" and the Impact of Regulation on the Physical Experience of Melbourne’s Lane Ways |
| 4.30-4.45 | CLOSE                                                                    |
Keynote speaker biographies and abstracts

The Hon Michael Kirby AC CMG

Staying honest but having values in research

Michael Kirby was, until 2 February 2009, one of the seven Justices of Australia’s highest constitutional and appellate court, the High Court of Australia. He served there from his appointment on 6 February 1996. At the end of that service he was Australia’s longest serving judicial officer having been:

- A Deputy President of the Australian Conciliation and Arbitration Commission 1975-1983
- Inaugural Chairman of the Australian Law Reform Commission 1975-1984
- A Judge of the Federal Court of Australia 1983-1984
- President of the New South Wales Court of Appeal 1984-1996
- President of the Court of Appeal of Solomon Islands 1995-1996
- A Justice of the High Court of Australia 1996-2009

In addition to these posts, Michael Kirby has served in many international and United Nations positions including two expert groups of the OECD, Paris, many bodies of the Commonwealth Secretariat, London and positions in the ILO, UNDP, UNESCO, UNODC, WHO Global Commission on AIDS, and UNAIDS. He was President of the International Commission of Jurists 1995-1998 and served as Special Representative of the Secretary General of the United Nations for Human Rights in Cambodia 1993-1996. He has been a member of the governing body of three Australian universities, ultimately being elected as Chancellor of Macquarie University in Sydney 1984-1993. He holds honorary degrees of Doctor of Letters, Doctor of Laws and Doctor of the University from twelve Australian and foreign universities and various other appointments.

Michael Kirby is respected and experienced as a judge and lawyer. He is well known for his insight, warmth, intelligence and courage.

Dr Patricia Easteal

Using research findings to achieve social justice and law reform: sexual assault and domestic violence myths

Patricia has conducted internationally-recognised research projects over the past 20 years in the area of violence against women. She has identified how the reality of sexual assault and domestic violence may collide with community and criminal justice mythology about these crimes. She has also described the effects of this collision on the victims’ access to justice. These research findings have contributed in a number of ways to community attitudinal shifts, law reform, and some improvement in access to justice. Specific examples include broadening community and legal understanding of domestic violence, sexual assault and self-defence. In this informal ‘share’, Patricia will identify some of the avenues she has found most useful for advocacy and effectuating change. These include submissions to law reform bodies, expert evidence, public speaking, book-writing and media work. She will look too at the role of law teaching in fostering awareness among solicitors, barristers and judicial associates. Patricia will be presenting the keynote evening address on Thursday 11 June.

Patricia is an Associate Professor in Law at the University of Canberra. She has a strong commitment to legal education derived from a multi-disciplinary background. Her aim in teaching is for students to acquire the intellectual tools and self-confidence to become independent and lifelong learners through actively questioning conventional wisdom and assumptions about the neutrality of key legal constructs like reasonable and relevant and by reflecting on the complex ties between society and the law. Patricia’s research is multidisciplinary. In her research, Patricia investigates the context of the law and how social structures, language, and values affect the substance and practice of the law, specifically in the areas of criminal law, family law, discrimination law, employment law and immigration law. Important aspects of her research are its applicability to real life issues such as law reform and its nexus with her teaching.

Patricia is also a community representative on the ACT Domestic Violence Prevention Council and has sat on a number of government and community Boards and Committees such as those of several women’s refuges and the Canberra Rape Crisis Centre. Patricia’s achievements in learning and teaching were recognised in 2008 with an Australian Learning and Teaching Council National Teaching Award and in 2007 with a VC Distinction Award and a Carrick Citation for effective research-led learning approaches that engage law students in independent and critical inquiry into the complex ties between law, society and access to justice.
Professor Margaret Thornton  
*Research in the new knowledge economy*

This presentation will consider the impact on university research of the neoliberal turn. Instead of the pursuit of knowledge for its own sake, research is now expected to have use value in the market. What is privileged is its income-generating capacity and value to end users. Drawing on the notion of governmentality, the presentation shows how the market ideology came to be quickly accepted through mechanisms of control that emerged at the supranational, the national, the university and the individual levels. The presentation considers how academic freedom is in danger of being eroded as a result of the commodification imperative and explores the space for resistance.

Margaret is Professor of Law and ARC Australian Professorial Fellow in the ANU College of Law, Australian National University. She has degrees from the Universities of Sydney, NSW and Yale (US), and has been admitted as a Barrister. Her research interests are in the areas of discrimination law and policy, legal education, the legal profession and feminist legal theory. Her current research examines the retreat from EEO and social justice. She is a Fellow of the Academy of Social Sciences in Australia and a Foundation Fellow of the Australian Academy of Law.

Professor Don Rothwell  
*Maintaining a dialogue*: lights, camera, mobile phones, the news cycle and the law

The Australian media have over recent years had an immense interest over legal issues which have gained significant public prominence - the legality of the Iraq war, the treatment of detainees at Guantanamo Bay, refugees and asylum seekers, climate change, the death penalty, a Bill of Rights - and these issues often see the media turn to academics and researchers working in the field to provide their expert comments on these issues. This raises issues as to whether academics and researchers are capable of properly engaging in media commentary, and the consequences that may arise from their statements or observations. What occurs when legal academics and researchers become part of the political process when their comments spark controversy ('Australia’s intervention in Iraq is illegal and contrary to international law'), or when they become advocates for particular causes ('Australia can commence legal action in the International Court of Justice to stop Japanese whaling in the Southern Ocean')? Can only tenured academics speak to the media, or are doctoral candidates able to contribute to this debate? Would the media even be interested in your research? Do journalists actively scan the most recent issue of the Federal Law Review for insightful comment on recent High Court decisions? These are some of the issues which are increasingly being confronted by legal academics and researchers in Australia which as the media continues to expand will create further media opportunities but also challenges.

Don is Professor of International Law at the ANU College of Law. He is currently Acting Director of the ANU College of Law’s Centre for International and Public Law (CIPL); and Deputy Director of the Australian Centre for Military Law and Justice. His major research interest is international law, with a specific focus on international law and the use of armed force, law of the sea, law of the polar regions, and implementation of international law within Australia. In November 2008, he was awarded the Vice-Chancellor’s Award for Community Outreach at the Australian National University.

Dr Kristine Hanscombe  
*Scope and limitations of legal research in achieving legislative substantive or procedural change*

Kristine will lead a discussion with research students drawing on her expertise and experience at the Bar. It is hoped that discussion will be lively and provocative. She will focus on the possibilities for legal research to improve the experience and opportunities for public interest and class action litigants through legislative substantive and procedural change. The limitations of using legal research to agitate for judicial activism will also be a focus.

Kristine has a PhD in pure mathematics and is a Senior Counsel at the Victorian Bar. Kristine has a broad administrative law, commercial and equity practice. Her administrative law practice mainly involves judicial review but includes some cases of merits review. In relation to commercial matters, she has a particular interest and experience in class actions, in the Federal Court and the Victorian Supreme Court. Cases of this type have included the GIO, Aristocrat Leisure and Mediarworld shareholders’ cases, the Concept Sports multi-plaintiff proceeding, and an industrial class action for breach of award and contract. Kristine has the leading brief for the applicant in a current large cartel class action in the Federal Court concerning air cargo freight rates. Recently Kristine has represented a group of business owners and another group of activist lawyers in two administrative law challenges against the Federal Minister’s decisions in relation to the Gunns Pulp Mill in Tasmania, and has been briefed in commercial cases involving complex questions of trust and property law.
Dr Hitoshi Nasu

How to get your PhD published

Dr Hitoshi Nasu is a lecturer in law at the ANU College of Law, The Australian National University. He teaches international law, international security law, international humanitarian law, and military operations law in the military law program. He received his PhD in International Law from the Faculty of Law, The University of Sydney in 2006. He recently turned his PhD thesis into a book publication: *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Martinus Nijhoff Publishers, 2009).
Student Abstracts and Biographies

Naeima Abdulatif (PhD, University of Wollongong)

Working women and their rights in the workplace: international human rights and its impact on Libyan law

Abstract

The thesis explores the relationship between the rights of women at work and their rights of motherhood. It considers how these two sets of rights, as protected under international human rights law, can and should be recognised and promoted within the Libyan legal system. The project will examine the theoretical and practical operation of relevant Libyan laws in the context of the standards set by international human rights law, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the International Labour Organization (ILO) Maternity Protection Convention and other instruments dealing with discrimination against working mothers.

To facilitate the enjoyment by working women, of their rights as both independent workers and mothers, without requiring a choice of one over the other. The project is an attempt to solve the problem of conflict between work and motherhood. The thesis will assess the adequacy of existing Libyan laws and, where warranted, recommend amendments and reforms to ensure the protection of both work and motherhood rights. This project will also examine the Libyan employment Law with regard to the issues of working mothers. Moreover, it will investigate the steps that have been taken within the Libyan legal system to prevent discrimination, and encourage participation and find out ways in which participation continues to be limited.

This research will review primary and secondary materials on relevant international human rights law in order to determine what is expected of state parties in relation to respecting both rights at work and motherhood rights, including maternity leave. The “Qualitative research approach” will be the design used to conduct the study and collecting the research data. It is claimed that the data collected by this method can provide rich and in-depth understanding of the problem under investigation by the research if its purpose is to do so. Qualitative approach collects data by using different methods. Semi-structured interview is one of these methods that will be used by this study. It is defined as a flexible type of interview in which the interviewer "starts with a few defined questions but be ready to pursue any interesting tangents that may develop". It uses mainly open-ended questions.

This study attempts to make radical and practical contributions to the Libyan legal regime. Its findings and recommendations can lead to the improvement of employment laws regarding maternity leave in the Libyan legal system. In this ways, the study will contribute to the literature on the domestic application of human rights norms, and can also offer some specific steps to make the Libyan laws and regulations in this field stronger and more powerful. These changes will be beneficial to Libyan women and provide them with the ways to own their rights both as mothers and as independent working women who can have an effective role in Libyan society.

Biography

Naeima Abdulatif has been in the legal research field since 1990. She obtained a Bachelor in Law (LLB) at the University of Garyounis (UoG), (Benghazi-Libya) in 1988, Postgraduate Diploma in Public Law from UoG in 1990, Master in Administrative Law (UoG) in 1996, English courses at the University of Wollongong (UOW), (Australia). Naeima is currently doing her PhD at the University of Wollongong. Naeima taught History of Law and Legal Systems, Political Science and International Law at UoG from 1997–2000, supervised law students at the UoG 1997–1998, and was a lecturer in the Faculty of Law, Alfateh University 2000–2001.

Philip Adey (PhD, The University of Sydney)

Philip Adey works on matters of subordinate legislation for the Department of Health & Ageing in Canberra. He lives in Canberra and is a PhD student at The University of Sydney Law School (topic: recovery for negligent infliction of psychiatric injury). In a previous life he worked as a translator in Germany. He holds a Master of Health Law (Sydney), a Master of Medical Science (Newcastle) and an MA (Auckland).

Bruce Arnold (PhD, University of Canberra)

Bruce Arnold is undertaking a PhD (Law) at the University of Canberra on the nature of identity in Australian law. He has a particular interest in biometrics, evidence, privacy, human rights, intellectual property and communication law. Bruce was awarded the Thompson Reuters Prize (2008) and Dean's Award for Excellence. He teaches law at the University of Canberra and consults in the telecommunications/new media sector. He has been an invited presenter at financial crime, justice, privacy and other conferences.
Rebecca Bates (PhD, The University of Sydney)

The private flow of public goods: can private water firms meet basic human needs?

Abstract
Water privatisation is both an old and new phenomenon. The private sector was responsible for the first formal provision of water and sanitation services in Europe and North America in the nineteenth century. This responsibility however, was soon taken over by the state as private firms failed to meet the needs of their consumers. The private sector returned to prominence in the 1970’s when Western Democratic governments enthusiastically adopted neo-liberal economic theory and states moved away from government ownership. The current nature and composition of the water and sanitation services market is a consequence of this transition. Today, the private water market currently valued at over US$356 billion and public-private partnerships are responsible for the provision of some degree of service in over ninety countries across the world. The issue of how to regulate this participation is one central issue facing water regulators across the world.

Importantly, as the private sector has expanded its presence within the water and sanitation services sector the international community and national governments have increasingly recognised the human right to water within international instruments and domestic legislation. This recognition has occurred through a number of implicit and explicit statements which affirm the right and the presence of state practice. The existence of the right within international law raises the important question: can private firms be responsible for the provision of a basic human need such as water?

This presentation will consider the interrelationship between the private supply of water and its emerging status as a human right. The study will involve a consideration of forces behind the privatisation movements, its key actors and the practical implications of recognising a right to water in a globalised market place. The presentation will argue that while the private sector has the capacity to improve both services and infrastructure, care must be taken to ensure that the water rights of individual consumers are not infringed. The question for us as lawyers is whether legal mechanisms have the potential to achieve this task.

Biography
Rebecca is a lecturer at The University of Sydney. She is a graduate of The University of Sydney and Macquarie University and is currently completing her doctorate at The University of Sydney Faculty of Law. Her thesis explores the issue of water privatisation in the current era of globalisation and takes into account its relationship with human rights, trade liberalisation and regulation. Rebecca has a particular research interest in the issues associated with privatisation and the physical realisation of human and environmental rights. Rebecca has previously worked at a leading commercial law firm and at the University as a research assistant on an ARC Discovery Project. She has also spent time volunteering at the Environmental Defender’s Office. Rebecca is admitted as a solicitor of the Supreme Court of NSW.

Justine Bell (PhD, Queensland University of Technology)

Incorporating sustainability into land titles registration: the role of law reform

Abstract
Sustainability has been a major driver behind government policy and legislation over the past few decades. There have been numerous statutes enacted at all levels of government in Australia, attempting to promote this objective. However, all land in Australia is registered under a Torrens framework of land registration, whereby only a limited range of restrictions may be registered on the title to land. This has created several difficulties. Many restrictions on land use designed to promote sustainability are not capable of registration on the land title register, and subsequently are not visible through a title search. This creates a barrier to sustainability, as landholders and prospective purchasers cannot easily obtain information on restrictions affecting their land. Furthermore, it undermines the objectives of the Torrens system, including the intention for it to act as a ‘mirror’, accurately reflecting all interests in land.

To promote the notion of sustainability, and restore the objectives of the Torrens system, the author asserts that law reform in this area is necessary. The objective of the author’s postgraduate research is to examine and critique a number of case studies, and formulate recommendations for government to establish a system that promotes both sustainability and the Torrens ideal. This paper presentation will cover the author’s research to date, and canvass a number of different options available to governments to attempt to remedy this problem, with attention given to case examples.

Biography
Justine Bell graduated from the Queensland University of Technology with First Class Honours in Law in 2006, and commenced her PhD in 2007. Justine’s thesis will examine how restrictions on land title and use designed to promote sustainability can be managed within a Torrens framework of land registration. Justine has published several articles in this
area, and has recently presented her research at an international conference. Justine will be commencing an appointment as Associate Lecturer at The University of Queensland in July 2009.

Susan Bird (PhD, Victoria University)
Waste deep: Australian recycling culture, “skip dipping” and nature strip scavenging

Abstract
In this paper I will examine Australian recycler culture – skip dipping and nature strip scavenging. Estimates are that Australians produce over 34 million tonnes of solid waste each year – over 17 million tonnes ending up as landfill. (Australian Bureau of Statistics 2007: http://www.abs.gov.au/ausstats/abs@.nsf/latestproducts/E1E64A4DB813BC8BCA25732C00207FF7?opendocument#WASTEGENERATED20FROMALL20SOURCES).

Skip dipping and nature strip scavenging are seen by many as a protest against this wastage (see, for example: http://www.taste.com.au/news+features/articles/919/bin+diving+for+your+dinner). Skip dipping or dumpster diving involves searching large, commercial bins for useful items, usually food. This often takes place at night outside major supermarkets and bakeries. Nature strip scavengers scour the suburbs for areas which are due for a hard garbage collection. They pick through the items left on the nature strip for discarded “treasures”. Those that engage in these practices do it out of need, as a protest against the wastefulness of capitalist culture, to acquire items for free, or all of the above. Many skip dippers are well educated and in well paid jobs (Rush, 2006:1).

Skip dipping and nature strip scavenging raise some interesting legal issues. Who owns rubbish once it has been discarded? If skips are on private property, then sifting through them could result in charges of theft in criminal law or trespass in tort. However, once bins are located in the public space of a laneway or nature strip, the situation becomes more complex. The legality of these activities varies between local councils who have the authority to make laws regarding waste collection, and often own the bins in question. Under the City of Melbourne's Environment Local Law 1999, residential waste is not to be placed on the street earlier than 6pm on the night before a scheduled pick up.

The City of Yarra’s Environment Local Law s26.3 states that an unauthorised person must not remove items on a nature strip which are put out for hard garbage collection. Both of these council areas have moved toward the resident organising the pickup of hard rubbish, rather than a general date being set by the council for all residents. This ensures that nature strips do not become a supermarket for scavengers during the weeks leading up to collection, thus undermining recycler culture.

In an age where we are taught the benefits of the three Rs – Reduce, Reuse, Recycle – why is local law reform angled toward hampering scavenger cultures?

Biography
Susan Bird is a PhD student at Victoria University in Melbourne. She is a Faculty of Business and Law scholarship holder. Susan has a background in both Arts and Law, having graduated with honours in both disciplines. She has worked as a lecturer and tutor at both Victoria and Swinburne universities in Arts and Law subjects. The title of Susan’s PhD is “Streets and Lanes: Regulation of Melbourne’s Public Space”. The thesis explores the concept of public space, drawing on the works of Lefebvre and legal geographers to examine regulation from a distinctly spatial angle.

Lachlan Blackhall (PhD, The Australian National University)
Lachlan Blackhall received a Bachelor of Engineering (Aerospace) and a Bachelor of Science from The University of Sydney in 2006. He is currently a PhD student in the Systems and Control Group in the Research School of Information Sciences and Engineering at the Australian National University.

Jeremy Boland (PhD, The Australian National University)
Jeremy Boland is a research student in the ANU College of Law working in the field of Corporations Law. Jeremy has taught Corporations Law in the College of Law since 2003. Jeremy has also taught International Relations and International Law at the University of South Australia. Jeremy has worked as a solicitor, youth worker and most recently in an executive management role in an ACT-based not-for-profit organisation where he oversaw the development and implementation of programs and services for vulnerable children, young people and families, older people and people with a disability, women escaping domestic violence and individuals and families living in public housing. He also oversaw community development activities and research into community strengths. He has given a number of presentations on research-based early childhood intervention strategies and social capital among public housing tenants.
Keely Boom (PhD, University of Wollongong)

*Exposure to legal risk for climate change-related damage: a case study of Tuvalu v Australia*

**Abstract**

The postgraduate research topic of this paper is Exposure to Legal Risk for Climate Change-related Damage: A Case Study of Tuvalu v Australia. The research explores the phenomenon of transboundary climate change-related damage within the context of legal responsibility under international law and transnational law. The primary aim of the research is to appraise exposure to legal risk for climate change-related damage in international and transnational legal contexts. The secondary aim of the research is to appraise Australia’s exposure to legal risk for climate change-related damage experienced in Tuvalu in international and transnational legal contexts. The research aims to fill gaps in the analysis of potential legal responsibility for climate change-related damage by adopting a comprehensive approach and through the in-depth use of the case study. The case study will be used to explore the realities of exposure to legal risk for climate change-related damage.

Climate change-related damage is becoming an increasing problem for international and transnational legal systems. It is a problem that threatens to cause a wide range of damage to people and property across the globe. The problem is unprecedented in complexity and scale, but is increasingly being supported by scientific evidence linking greenhouse gas polluters to damage.

The focus upon climate change-related damage in the Pacific will operate within the context of significant concurrent developments in negotiations over international and transnational legal risk for climate change-related damage within the UNFCCC process. The examination of Australia’s legal risk towards Tuvalu also operates within the context of innovative proposals by Tuvalu, including its proposal to operate as a sovereign nation within Australia. The research will help inform all parties as to the legal risk under international law and transnational law. In assessing exposure to legal risk for climate change-related damage the research will provide important information to assess the adequacy of these outcomes. This will highlight the potential of negotiated solutions, which may also provide a promising area of future research.

**Biography**

Keely Boom is a full-time PhD candidate and part-time lecturer at the University of Wollongong. Keely’s research examines exposure to legal risk for climate change-related damage, using the case study of Tuvalu v Australia. Her research will provide the first comprehensive assessment of exposure to legal risk for climate change-related damage under international law and transnational law. This research will provide the first extensive study of Australia’s particular risk situation. Keely is Legal Officer of the Australian Climate Justice Program, an organisation which is based on the premise that the law can be a powerful and effective tool in the campaign for climate protection.

Jennifer Buchan (PhD, Queensland University of Technology)

*The risk of franchisor failure: an assessment of the adequacy of regulatory response*

**Abstract**

While the franchisor is solvent, franchisees are contracting parties with some statutory protection under the *Trade Practices Act* (TPA) and the Franchising Code of Conduct (the Code). If the franchisor entity goes into administration or fails completely the administrator and liquidator are regulated by the Corporations Act. Upon the appointment of the liquidator, all contracts the franchisor has entered into, for example franchise agreements, are then re-categorised as assets or liabilities. This includes franchise agreements, leases and supplier agreements. If contracts are deemed to be liabilities, the liquidator can disclaim them. Despite the unique role it occupies in the franchise network as employer of labour, provider of equity and loan finance and taker of risk, the franchisee is not a recognised creditor under the Corporations Act.

Franchisees encounter significant problems gaining adequate redress within either the consumer protection or the insolvency regulatory framework if their franchisor fails. There are numerous empirical and theoretical research questions arising from the above situation. As a background to my PhD I have systematically examined patterns of ownership of assets and of contract based insolvency risk bearing in franchises.

For my PhD I am evaluating the effectiveness of aspects of the consumer protection parts of the TPA against specific consumer protection benchmarks in the context of protecting franchisees as business consumers whose franchisor fails. I am confining my research to franchise networks where franchisees operate business format franchises under retail leases.

The specific aspects of the TPA I am evaluating are Unconscionable Conduct as regulated under section 51AC, the Unfair Practices provisions in Part V Division 1, Conditions and Warranties in Consumer Transactions in Part V Division...
Family violence and mediation: overcoming the challenges towards effective participation of women in mediation

Abstract

Family violence remains a burning issue with a pervasive prevalence in Bangladesh where society remains less responsive to it, treating family violence as a private matter not to be shared with others, and urges women to endure violence silently. Moreover, persistent wife battering or other forms of psychological abuses may generate fears that suffice to make victim women silent against their husbands. Therefore, feminist scholars oppose the participation of women in mediation when they have a history of family violence. Though family mediation may provide low-cost, timely access to justice to women, as argued by feminist scholars, out of fear, victim women will not be able to negotiate effectively in mediation. Moreover, mediators will not be able to help women as they hide family violence out of social stigma attached on it, and so will end-up with inequitable outcome through mediation. Contrary to this notion, using the post-structural theory of power, this paper will demonstrate that, under appropriate conditions, even female victims of family violence may not remain silent in mediation. Based on the primary data collected through the observation of mediation sessions and interviews with mediators in Bangladesh, it will be affirmed that protective legal provisions against further violence, legal counseling from mediators, and pro-women intervention by the mediators can wipe away the fear of past violence and stimulate victim women to participate effectively in mediation. It will be further demonstrated that, in more than 90% cases victim women in Bangladesh are observed as vocal about past violence and negotiate effectively in mediation. It will be claimed that a practice of long separation of women from their husbands before coming to mediation also help them to overcome the trauma and fear of past family violence. Therefore, despite the history of family violence, all these changes make the women more confident to negotiate effectively during mediation.

Biography

Jamila Ahmed Chowdhury is currently doing her Ph.D. on 'Women's Access to Justice in Bangladesh' at the School of Law, The University of Sydney. She completed her schooling in 1995 at the Mymensingh Girls' Cadet College in Bangladesh. For her excellent result in the H.S.C. examination, she achieved the Prime Minister's award in 1995. She was also awarded a gold medal for her academic excellence, securing 1st class honours and 1st position in the 4-year LL.B (honours) Faculty of Law, University of Dhaka. A Japan Development Scholarship enabled her to study for her 2-year LL.M. at the law school of Niigata University, Japan in 2004. Jamila is serving as a lecturer at the University of Dhaka and is a practicing lawyer at the Dhaka Bar, Bangladesh. Additionally, she had worked as a program lawyer in the United Nations Development Program (UNDP) project. Her current focus is how to enhance women's access in Bangladesh to equitable justice through mediation. In recognition to her diligent research into women's rights in Bangladesh, she was awarded a UNESCO fellowship to conduct research at the Bibliotheca Alexandria, Egypt in 2005. In the following year, she was awarded with Asia Fellows Award, funded by the Ford foundation, USA, to conduct research on the case management system in Malaysia. Late in 2006, Jamila came to Sydney as an international research student. After the completion of her PhD at The University of Sydney, she hopes to use her training and knowledge to aid the disadvantaged women of Bangladesh with more wisdom and vigour.
Owen Cordes-Holland (PhD, The Australian National University)
Owen is a recent graduate of the ANU College of Law (completing with first-class honours and a University Medal in Law). He is currently a full-time PhD scholar, tutor and guest lecturer in the College. Owen has a particular interest in international law especially as it relates to the environment and human rights. Owen's PhD examines Australia's recent performance as an 'international citizen' with respect to the environment. He argues that principles of 'good international citizenship' are necessary to improve states engagement with the international environmental legal system. The thesis examines Australia's recent good international citizenship credentials on issues such as climate change, biodiversity and whaling.

Roger Davis (PhD, The Australian National University)
Roger Davis is a lawyer and a strategic planner who has worked with Indigenous Non Government Organisations and government in Australia and Cambodia. He has specialised in Indigenous land and natural resource management for fifteen years. He has strong interests in Indigenous cultural protection. His proposed PhD research at ANU seeks to examine the application of human rights concepts to develop frameworks for the planning, management and evaluation of development that impacts upon Indigenous people.

Amar Dhall (PhD, University of Canberra)
Neo-Naturalism a New School of Jurisprudence
Biography
Amar holds a Bachelor of Construction Management and Economics, Bachelor of Laws (Hons) and is currently enrolled in a Ph.D. (second year). He is sponsored for 2009 by University of Canberra Faculty of Law and has recently had his first publication (titled: On the Philosophy and Legal Theory of Human Rights in Light of Quantum Holism) accepted by World Futures: The Journal of General Evolution.

Amar’s thesis-in-progress explores, inter alia, the intersection of philosophy of science and philosophy of law and teases out some subsequent jurisprudential implications employing Human Rights and the formulation of 'sovereignty' as case studies.

In 2009 Amar has worked at the University of Canberra as a Sessional Lecturer in Advanced Legal Research and Writing (PG); in the Indigenous Tutorial Assistance Scheme (ITAS): mentoring an Indigenous Student through Architecture; and in the Migrant and Refugee Mentoring Program: mentoring a Burmese refugee through the Juris Doctor program. He is Representative of Post Graduate Law Students: University of Canberra Faculty of Law Faculty Board 2009 and has been (and remains) a Project Manager and Consultant to Total Building Solutions Pty Ltd for the last 8-years.

Amar is an avid adventure traveller, photographer and aficionado of all things fun.

Michelle Fernando (PhD, University of Tasmania)
Why judges don’t speak with children in the Family Court: fear, folly or fairness?
Abstract
‘Children's proceedings are unlike any other civil litigation in this land. Where else do you have the principal party, about whom the action is and the orders will affect, who doesn’t have an audience?’ - Family Court Judge in interview, April 2009.

In hearings about parenting arrangements for children, where the outcome can affect every aspect of their lives, Australian children are not often afforded the opportunity to express their views directly to the decision-maker.

This research looks at the rare but recognised practice of judges speaking with and hearing directly from children (judicial conferencing), and investigates why the vast majority of judges in Australia do not meet with children, despite the well-documented benefits.

There are many good reasons for judicial conferences occurring. Judges must take children’s views into account when making decisions in their best interests. Speaking directly with children allows judges to hear their views without filtering from third parties, ensuring informed decisions are made on the best evidence available. Research has shown that many children want to speak with judges and benefit from being involved in the decision-making process. The handful of judges who do speak with children find it to be helpful and report excellent outcomes.

Despite the benefits, judicial conferencing remains unpopular. The researcher recently conducted in-depth and confidential interviews with four current Family Court judges about their experiences and views on speaking with children and why they think judges remain reluctant to do so. While well-known concerns about evidence and judges’ perceived lack of
skills and training were aired, the interviews also produced some surprising and unexpected opinions, including the marked
difference between the interviewees’ personal and professional views.

The researcher is currently developing a survey to be sent to all family law judiciary to obtain the majority view-points and
investigate whether there are good reasons for judges’ reluctance to speak with children, or whether that reluctance is
driven more by tradition and theoretical concerns. The ultimate question is whether the prevalent culture can be changed.
Judges themselves are divided on whether this will happen.

Biography
Michelle worked as a family lawyer at Dobson, Mitchell & Allport in Hobart, Tasmania for five years, before returning
to full time study. Michelle is in her third year of PhD candidature at the University of Tasmania. Her supervisor is
Prof Margaret Otlowski. Michelle’s thesis explores the theme of interaction between judges and children in contested
family law proceedings, with a particular focus on the changes made by the Family Law Amendment (Shared Parental
Responsibility) Act 2006. Michelle also lectures in Family Law at the University of Tasmania.

Umair Ghori (PhD, The University of New South Wales)
World Trade Organisation non-agricultural market access negotiations and the global textiles and clothing trade:
reconciling the irreconcilable amid the financial meltdown

Abstract
Textiles & Clothing (T&C) is a sector of world trade that is critical to the sustenance of developing economies. This sector
is not only important in terms of export earnings but also in terms of providing employment to millions of people. With
the end of quotas on 1 January 2005, this sector was integrated into the GATT/WTO framework. This entailed a process
of readjustment for many countries that are overwhelmingly dependent on T&C to sustain economic activities especially
those that do not possess comparative advantage in T&C manufacturing and owed the existence of these industries solely
on the basis of the incubated environment created by quotas.

Since the elimination of that environment, many developing countries that had initially supported the end of quotas have
come to a realisation that the luxury of minimum guaranteed market share in the primary target markets of the EU and
the US in the form of quotas would not be available. Hence, the continuing need for treating T&C sector as different a
rationale that formed the very basis of the discriminatory quota system that violated the fundamental GATT principles of
Most Favoured Nation and National Treatment.

These conflicting interests have also seeped into the ongoing WTO NAMA Negotiations, which are being conducted under
the aegis of the Doha Round of Multilateral Trade Negotiations to reduce or eliminate tariff and non-tariff barriers for
all industrial products worldwide (including T&C). The primary sponsors for the NAMA negotiations are the developed
countries. However, the developing countries have a major stake in the outcome of these talks i.e. the reduction of tariff
peaks on products of particular interests to them such as textiles, apparel, footwear etc. The developing countries are
concerned that ambitious tariff cuts will lead to reductions in applied rates and loss of tariff protection. Tariff reductions
under NAMA would also mean that developing countries would cease using tariffs to shield their developing industries
from foreign competition. The Least Developed Countries (LDCs) are also concerned about preference erosion since they
receive tariff preferences from the developed countries and any reduction in tariffs would negate the advantage that they
possess over other non-recipient developing countries.

The NAMA Negotiations have revealed deep divisions amongst the developing countries regarding trade in T&C with
some countries supporting (lead by Turkey) for separate sectoral negotiations within the NAMA talks. This would allow
WTO members to negotiate different treatment for T&C as compared to other products that would be covered under the
general formula of tariff reductions. This development prompted Pascal Lamy, the WTO Director-General, to express his
“surprise” terming this as a “new animal – a NAMA minus – in a negotiation where we have always structured the thing
so that there may be NAMA-plus.”

Indeed, this stance of certain developing countries that insist on continuance of a discriminatory regime in another form
by terming it as “fair” raises important issues regarding worldwide reduction of tariffs and non-tariff barriers in order to
boost trade amongst nations. NAMA negotiations assume all the more importance in the era of global recession which has
impacted exports and imports of T&C products from developing countries to developed countries and vice versa. Needless
to say, the contraction in demand of T&C in the developed markets due to financial crunch and mass retrenchments would
result in an adverse impact on developing economies raising serious socio-political and economic consequences. Simply
put, labour in developed economies may weather lay-offs but labour in most developing countries is not so fortunate.
The paper highlights the conflicting interests in NAMA negotiations with regard to T&C sector. It discusses various stances
of countries, their proposals in the WTO and attempts to assess their viability in an era of uncertainty and divergence.
The paper also explores the effects of preference erosion for the developing countries which is the major motivating factor behind their calls for separate sectoral negotiations for T&H sector. The ultimate success of NAMA negotiations in a world fraught with conflicting trade interests is dependent on reductions of tariffs in sectors that are of more interest to developing countries.

Biography
Umair hails from Pakistan and is currently undertaking a PhD at the Faculty of Law, UNSW. His research focuses on International trade in textiles and the major issues affecting this sector of world trade that is critical to developing and least developed countries. This sector has been the subject of controversial and discriminatory regulatory practices in the form of quotas and raises issues ranging from law, economics, public policy, trade remedies and labour rights. In his presentation, Umair aims to highlight the conflicts and divisions within the ranks of developing and least developed countries that have surfaced in the newly 'liberalised' trade environment after expiration of quotas in 2005.

Rebecca Goodbourn (PhD, University of Melbourne)

Law of bodies, bodies of law

Abstract
Law presumes a body. Crucial to any understanding of approaches to law is an understanding of what bodies are. In much recent writing, bodies are seen to be determined by law and language, passive recipients or vessels who have significations stamped upon them by cultural and social circumstances. In this kind of figuring, bodies are reduced to their symbolic capacity, incapable of action that isn’t framed as a response to, or result of, the cultural and social circumstances. This leaves the body at a point of physical inaction – it is no longer a moving, sensing, physical body, but purely a symbolic one.

What becomes problematic then, is a figuring of active, bodily interactions with law. In my research, I am looking at the physical experiences of Melbourne’s laneways, focusing on movement and sensation. Some of the regulations that govern the laneways relate to activities such as physical interaction with property (for example, sitting on or walking on parts of buildings), using threatening, abusive or insulting words, consuming liquor, sounding or playing a musical instrument, singing, performing any conjuring, miming, juggling, puppetry or dancing, and drawing any messages, pictures or representations on walls or surfaces. Not only do these regulations engage our senses and movement, but it is in its physical, active capacity that a body comes into contact with these laws.

My empirical research, coupled with an understanding of bodies developed by Henri Bergson and the use of his theory in Gilles Deleuze and Brian Massumi, will refigure understandings of bodily interactions with law. Writing on the physical, sensing body does not limit a discussion of law and bodies to the empirical world or to complete physicality. Instead, it opens out the body to other concepts that allow for greater fluidity in our conceptions of the interactions between bodies and law. This research, then, will contribute to an understanding of the impact of local regulations in Melbourne’s CBD laneways on the bodies that inhabit and use those laneways, emphasising the action that has been lacking in recent legal and social theory. More broadly, this research will endeavour to change understandings of the institution of law in it’s engagement with, and application to, bodies – bodies that move and bodies that sense.

Biography
I moved to Melbourne to undertake a Bachelor of Arts (Honours in Criminology) at the University of Melbourne, which I completed in 2007. For me, living in Melbourne ignited an interest in cities and city spaces, which was complemented by a focus on crime prevention through architectural and urban design in my undergraduate studies. My honours thesis examined the politics of entry into Melbourne’s CBD bars, and currently, I am continuing with my interest in Melbourne’s laneways with a doctoral thesis on physical experience in the laneways. I contend that a focus on the immediacy of movement and sensation in Melbourne’s laneways could allow for a rethinking of space, bodies, mobility and agency in relation to regulation in city spaces.

Catherine Gross (PhD, The Australian National University)

Listening for a change? Perceptions of injustice in water distribution decisions

Abstract
Concepts of justice and the distribution of public resources have been at the heart of social debate for centuries. A current concern in Australia is how to achieve a fair distribution of water in dry areas where competing interests and extended drought conditions put increasing demands on a diminishing resource. Yet, even though Australian governments have a long history of dealing with water shortages, they have largely failed to establish a legal or institutional framework in which water is allocated in ways that are seen as equitable, fair and just. Where such allocations or decisions are perceived
as unjust, underlying social tensions can emerge and result in social conflict. This paper explores two such social conflicts in which communities expressed their dissatisfaction with government plans and decisions through organized protests. The first case study explores community reactions to a NSW government action to cut a specific water allocation in the Murray Irrigation District in 2006. The second investigates community reactions to the Victorian government’s North South Pipeline and Food Bowl Modernisation Project.

This research investigates the case studies from a justice perspective. Using a transdisciplinary investigative framework the research focuses on stakeholder perceptions of procedural justice and distributive justice. Procedural justice is concerned with the fairness of elements of the decision-making process. Distributive justice is concerned with the outcome or decision.

The findings reveal widespread perceptions of injustice in the way people felt they were treated during the decision-making processes, and in the proposed or actual outcomes of the decisions. Stakeholders experienced a variety of ways in which the process or outcome impacted their lives: these included material, social and personal impacts. A diversity of motivations for seeking justice emerged. These included protection of livelihood and property rights, protection of community interests, retaining water for the environment, justice as an end in itself, and justice as a means of respecting people's contribution to society.

The paper first examines these findings in relation to theories of justice and injustice and then how they relate to philosophical questions about the law. This includes a discussion on conceptual distinctions and boundaries in three areas: between fairness and justice, between injustice and justice, and between justice and the law. The paper concludes by reflecting on the value that this type of empirical research can add to a better understanding of the tensions inherent between perceptions of what is legal and what is just.

Biography
Catherine Gross is currently in her third year of doctoral research in the Fenner School of Environment and Society at the Australian National University. Catherine's research focus is the application of justice theory to environmental decision-making. Taking a transdisciplinary approach Catherine has carried out research in two main areas: the social acceptance of renewable wind energy and social conflicts in the allocation of water. A central aim of Catherine's PhD research is to find out how people interpret and react to fairness, or the lack of fairness, in environmental decision-making, particularly in relation to water.

David Heckendorf (PhD, The Australian National University)
Mr David Heckendorf is currently undertaking his Ph.D. at the Australian National University’s College of Law, Canberra. He is researching disability and the law with a particular interest in Wolf Wolfensberger's Social Role Valorisation (SRV). He is considering whether SRV should influence our understanding of human rights and law generally. David has a personal as well as a professional interest in disability. He works for the Australian Capital Territory Government in disability policy and both his wife, Jenni, and he both have a significant degree of Cerebral Palsy.

Ben Hightower (PhD, University of Wollongong)

Refugee limbo: what is it and why should we consider it?

Abstract
As Dante comes to the gate of Hell, the entrance to first ring of Inferno; Limbo, he reads the inscription, "Lasciate ogne speranza, voi ch'intrate"; "Abandon all hope, ye who enter in".

In contemporary usage, what is 'limbo'? In addition, and for the purposes of law reform and social justice, what can we also say is meant by 'legal limbo'? The word 'limbo' is used in evidence, decisions and in news media reports yet, there is no legal definition of limbo. Investors are left in limbo. Gay couples marriages are in limbo. Children are in limbo. The list goes on. Many people are said to be 'living in limbo' and for the most part, it is the law which creates and regulates these limbo. It seems the word is used as a 'throw-away word'; a word which says to listener, "You understand what I mean when I say it." It remains vague and allusive. As a result, an understanding of the physical and metaphysical manifestations of limbo goes unmentioned. Put another way, limbo continues under the guise that it exists outside a realm of creation and less emphasis is placed on what the limbo will look like, what the limbo will feel like, and how long it will last.

My research concerns itself with the limbos encountered by refugees. It begins with and maintains a theme which considers theological Limbo not only for the obvious etymological purposes, but also for the many parallels it shares with 'legal limbo'. Firstly, people of both limbo do not 'find' themselves in limbo; they are placed there by an outside force. Secondly, people do not have a choice about being placed in limbo. Thirdly, Limbo (along with Inferno and Paradise) is used to physically separate the 'good', the 'bad' and the 'other'.
Dante's Inferno is relied upon as an illustration of theological Limbo. The poem not only describes the afterlife, but allegorically models a setting for a fourth consideration; one of rewards and punishment. Unlike the first circle of Hell, where people have no hope of salvation, 'legal limbo' suggests that one action is halted until another has been carried out. In some ways, a 'punishment' must be endured until the 'reward' is granted. For Foucault, the 'spectacle' of punishment is the most hidden part of the penal process. The pursuit of justice - the legal process - distances itself from the violence associated with its own practice. Like punishment, the mechanics of seeking protection are guided by an abstract consciousness; that limbo is inevitable and part of the protection seeking process.

Biography
Ben Hightower has come to the Law Faculty of the University of Wollongong via a Masters degree from the Centre for Asia Pacific Social Transformation Studies (CAPSTRANS). His research background in semiotics is reflected in his PhD work; "Refugee Limbo". Ben uses devices such as allegories and puns to identify issues of debate in legal discourse.

Robyn Holder (PhD, The Australian National University)
Robyn Holder has worked in justice, law and service reform for nearly 30 years in Australia and the UK. Since 1996 she has performed the duties of an independent statutory advocate under the ACT Victims of Crime Act 1994 to promote reform, investigate complaints and advise the Attorney General. Robyn is enrolled as a doctoral candidate at the Research School of Pacific & Asian Studies at the Australian National University.

Elinor Jean (PhD, The Australian National University)

How integrated is integrated water management? Application of the Marxist metabolic rift theory to water law

Abstract
Water is a critical political topic in Australia today. Water systems have been declared to be in crisis, and water management has undergone and is undergoing significant legal and policy reforms. But while there is a plethora of academic research into water management and water law, analyses from more radical perspectives are hard to find. This paper explores the role that Marxist ecological theory can play in assessing the structure of water law and water entitlements. The paper forms part of a larger project to develop an historical materialist understanding of water entitlements across NSW.

Marxist ecology is often seen to be an oxymoron. However, a close reading of classical Marxism reveals a very strong ecological philosophy. The paper will use the Marxist concept of the metabolic rift (as developed particularly by John Bellamy Foster) to explore the structure of water law. Marx wrote of capitalism causing an "irreparable rift" in the metabolism between humans and nature. In sum, the metabolic rift can be described as the material separation of human beings under capitalism from the natural world — and particularly from the natural conditions that form the very basis for human existence itself. The metabolic rift provides a powerful framework to explore the human relationship with water, and thus to analyse both environmental and social questions surrounding water management.

The paper explores manifestations of the metabolic rift within water management and water law. The paper focuses on two key areas. Firstly, it explores the development of environmental awareness within water law, especially the concepts of 'environmental water' and 'heritage rivers'. Secondly, it approaches the question of access to and control over water resources from a class perspective. In particular, it explores how water rights tend to almost universally separate human consumptive uses of water (e.g. household use) from productive water uses (e.g. agricultural water use).

This research is of great academic importance, in both developing our understanding of water law and of Marxist ecological theory. However, Marxist research can never be purely academic. In the Theses on Feuerbach, Marx wrote "The philosophers have only interpreted the world, in various ways; the point is to change it." Acquiring a better understanding of water law is thus only the first step in achieving real environmental and social improvements in water management.

Biography
Elinor is a full-time PhD student at the ANU College of Law and a recipient of the ANU Vice-Chancellor's Scholarship for Doctoral Study. She is an ANU graduate, with two first-class honours degrees (LLB and BA). Elinor specialises in environmental law and has a particular interest in water law. Her PhD focuses on developing an historical materialist understanding of water entitlements in NSW, both historically and today. She also has expertise in privacy law, particularly health privacy. She works as a casual tutor and occasional lecturer in the ANU College of Law.

Brad Jessup (PhD, The Australian National University)

Brad is a geographer and environmental law specialist. Before commencing his teaching appointment and PhD at the ANU College of Law in late 2007, Brad practiced as an environmental and planning lawyer in Melbourne and completed his
Masters in Geography at the University of Cambridge. Brad’s PhD research focuses on concepts of justice in Australian environmental law. Brad hopes to define a concept of environmental justice that can be used to evaluate and shape environmental laws. He will test his theory using contemporary case studies in environmental assessment law, species conservation law, and pollution control law.

Rezana Karim (PhD, The University of New South Wales)

Victims, politics and moral panic: a critical appraisal of sexual assault law reform

Abstract

This paper aims to examine the relationship between the sexual assault complainant, the contemporary victim’s movement and the adversarial criminal trial process through a comparative study of NSW and UK sexual assault law reform. The research is premised on the notion that the success of the criminal justice system to engage with its victim participants is an important evaluative tool for the criminal trial process.

The paper is critical of current legal changes in NSW which originate from politically fuelled events in the area of sexual assault. While the United Kingdom has experienced slight changes to criminal law procedure arising from high profile cases such as Stephen Lawrence and Julia Mason, NSW has experienced dramatic changes to sexual assault law and procedure following the moral panic phenomenon of the ‘deviant’ Bilal Skaf and the ‘Sydney gang rape’ trials. NSW parliament, since 2001 has enacted a steady stream of legislation predicated on protecting sexual assault victims from re-trauma and empowering victims. While changes have been victim centric and highly punitive against the accused, they have produced nominal results for sexual assault complainants. By deconstructing recent legislative reform from its moral panic origin to current practice, some measures can be seen as contrary to the needs of sexual assault complainants perpetuating further marginalisation within the criminal trial process.

The situation in NSW partly parallels developments in the United Kingdom. UK researcher Paul Rock’s analysis of the impact of gender and race politics on victim’s rights exposes that pursuing a political agenda to give victims’ rights that is superficial in approach means than no such rights are actually given. UK academics Trevor Jones and Tim Newburn’s research with respect to the transfer of policy in crime control observe that the impact of reactionary politics can render reform as simply rhetoric in outcome. They conclude that it is imperative to look at types of influence on reforms that have the hallmarks of a politicised process. My paper uses this transfer of policy form of analysis, i.e. historical, political, agency-led, structural and empirical analysis of the ‘mode’ of policy incorporation, to research examine sexual assault law reform in New South Wales and the United Kingdom. This form of research ultimately assists to explain processes of change; how policy adhesion occurs and reveals what ability the criminal trial process in both jurisdictions has to successfully incorporate victims.

Biography

Rezana completed a combined Bachelor of Arts (sociology) / Bachelor of Laws and Masters of Law (criminal Justice) at The University of New South Wales (UNSW). Currently a sessional lecturer (litigation); tutor (criminology); and undertaking my Doctor of Philosophy (PhD) at UNSW. I previously practiced as a prosecuting lawyer at both the Office of the Director of Public Prosecutions (NSW) and the Commonwealth Director Public Prosecutions. My specific research interest lies in changes in prosecution processes for sexual assault, the criminal trial and its structural nuances, comparative criminal trial systems and the quest for multidisciplinary approaches to legal reform in the criminal justice system.

Jessica Kennedy (PhD, University of Canberra)

Striving for Solace: Sexual Assault Law Reform in Practice - Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)

Abstract

In rape and sexual assault cases, the victims are not a party to the proceedings, but the primary witness to the crime. Cross-examination of complainants in sexual assault trials often involves an extremely arduous test of their credibility. Although there have been numerous legislative amendments which address these issues, their application continues to be influenced by socialised mythological attitudes. As a result of this, cross-examination of victims of rape and sexual assault can be quite traumatic. Victims of sexual assault often feel scared, anxious, sad, angry, shameful, responsible and unconfident after the assault. Cross-examination of these victims can re-trigger these emotions and augment the trauma of the circumstances. Although there has been significant law reform in the area of sexual assault, in application, the indeterminacy of legislation can lead to ineffective reform.

The Sexual and Violent Offences Legislation Amendment Act 2008 amends the trial process for victims of sexual assault and introduces the concept of a “pre-trial hearing” for some victims. The amendments provide special measures for the
Diversity: a sustainability approach for a system of international environmental law

Rakhyun Kim (PhD, The Australian National University)

The interplay of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity: a sustainability approach for a system of international environmental law

Abstract

Framed in the context of the fragmented nature of international environmental law which is founded on reductionism of the environment, the thesis questions whether the current system of international environmental law is capable of protecting global ecological integrity by preventing perverse and unintended consequences across multilateral environmental agreement regimes and capturing synergies between them. As a meta-case study for an investigation of the cross-regime interlinkages and interplay, I have selected the international climate change and biodiversity conservation treaty regimes represented by the United Nations Framework Convention on Climate Change (and its Kyoto Protocol) and the Convention on Biological Diversity. Noting that the implementation of some climate change mitigation measures available under the UNFCCC/KP may have positive or negative effects on biodiversity, I am planning to conduct three specific case studies at the interface of the two treaties for a deeper analysis of this overlap (and gaps) and associated conflicts.

The areas of intersection to which this thesis will devote a chapter each include: (1) land use, land-use change and forestry (afforestation, reforestation, and avoided deforestation and forest degradation); (2) biofuel (with an emphasis on peatlands and biochar); and (3) ocean iron fertilization. In analysing these cases, I will necessarily look into other multilateral environmental agreements such as the Ramsar Convention on Wetlands, the United Nations Convention to Combat Desertification, the London Convention/Protocol, the Law of the Sea, and a range of forest-related instruments, as well as some national examples of coordination and implementation. The Vienna Convention on the Law of Treaties is also of key relevance. The actual practices of various governmental and non-governmental actors at international, national, and project levels in relation to the above three cases will also need to be surveyed. Through such a systems and layered case study approach, I will draw conclusions on whether there is an inherent limit to which the current system of international environmental law, or more specifically the UNFCCC/CBD approach, can be effective in protecting the integrity of the atmosphere and the biosphere simultaneously, and bring about positive synergistic outcomes. If it is found that there is a limit, I will offer answers as to why, and when, where, and how the integration should take place. As a potential way forward, the normative application of the principle of sustainability as a central concept for a holistic approach will be considered throughout the thesis. The IUCN Draft International Covenant on Environment and Development, the Earth...
Charter, and New Zealand's Resource Management Act will be used as a reference for contemplating 'earth system governance for sustainability'.

Biography
My name is Rakhyun Kim and I'm currently a PhD student in the Fenner School of Environment and Society at the ANU. I have graduated the University of Auckland with a Master of Environmental Legal Studies (for non-lawyers) with First Class Honours, and I have a few academic publications some of which are published in international and postgraduate level journals. I'm a member of IUCN (World Conservation Union) Commission on Environmental Law and I also serve as Advisor to a transnational environmental NGO called Birds Korea based in South Korea.

Johannes Krebs (PhD, The Australian National University)
The right to a fair trial in the context of counterterrorism

Abstract
After 9/11, many western democracies including Australia determined it necessary to introduce new legislation in the face of a perceived increase in the threat of terrorism. It readily became obvious, however, that a greater emphasis on security potentially has quite significant implications for individual rights and freedoms.

In this counter-terrorism context, the right to a fair trial becomes particularly crucial due to its importance in upholding other rights in court and its legitimising function for the state in relation to prosecution and punishment. In the light of the potential threats to this right in Australia posed by powers such as control orders and preventative detention orders, the blur between intelligence and evidence and the increased classification of information before and during relevant trials, various questions arise: what are the limits and scope of the right to a fair trial? What are the restraints created by the legal framework this right is operating in? And in how far do counter terrorism measures change the role of the judge in upholding the principles of a fair trial?

Given that Australia does not have a comprehensive bill of rights, the paper will first address the nature of the right to fair trial, which will expose some general limitations to that right. It will then consider the implications on the criminal trial most characteristic of counter terrorism measures: first, the repercussions of calling a trial a "terrorism trial", which potentially influences proceedings; second, the pre-emptive nature of many terrorism measures, which challenges the ideas of when a trial starts; and finally, the cultivation of secrecy that often goes along with terrorism trials in order to protect public interests, and in particular national security.

This research will demonstrate in how far the recent Australian governments have achieved a "balance" between security and liberty. As many counter terrorism measures have either sunset clauses or review mechanisms attached to them, it will also include propositions for law reform. Further, many aspects of the paper will feed into the wider debate about whether Australia would benefit from a bill of rights.

Biography
Johannes Krebs is a PhD student and tutor at the ANU College of Law. He studied law at the University of Vienna (Magister iuris, 2005), at the Institut d'Études Politiques de Paris (cycle du diplôme, 2003-2004 as part of the Erasmus program), and at the Australian National University (Master of Laws specialising in International Law, 2006). His main areas of interests are human rights law, criminal justice and international law. He was the Co-Convenor of the European Studies Summer School 2008 held at the National Europe Centre, ANU.

Wendy Kukulies-Smith (PhD, The Australian National University)
Wendy is a Teaching Fellow at the ANU College of Law. Prior to this she worked at the National Judicial College of Australia on the creation of the Commonwealth Sentencing Database and is currently the editor of the 'Principles and Practice' component of the database. Wendy's PhD explores the gendered interaction between the family and the State. Her research focuses on the operation of the principle allowing the effect of a sentence upon family or dependants to be taken into account in the sentencing of an offender.

Joanne Lee (PhD, The Australian National University)
The International Criminal Court’s State Cooperation Regime

Biography
Joanne is currently in the final stages of her PhD at the ANU College of Law, under the supervision of Professor Don Rothwell (ANU) and Professor Andrew Byrnes (UNSW). Her thesis incorporates both a legal analysis of the ICC Statute and
a consideration of current international relations theories as to why States comply with international laws. Joanne also works as a regular sessional academic at the ANU College of Law, lecturing in International Criminal Law and tutoring in International Law, Contracts, and Civil Practice.

Nina Leijon (PhD, The Australian National University)
Nina Leijon is a PhD student in the Regulatory Institutions Network (RegNet), ANU. Her research explores regulatory approaches to concepts of dignity, honour and morality, in particular with reference to legislation around sex offences. Prior to this, Nina worked as a Research Officer in RegNet.

Bruce Lindsay (PhD, The Australian National University)
I have been a HDR student at the ANU College of Law since 2007, although commenced my research at La Trobe University in 2005. My research is on inter-disciplinary decision-making in universities, and has focused on combining legal research and social-science methods. For numerous years I worked as a student advocate and researcher for student organisations, before VSU interrupted with an enforced 'sea-change' that allowed me more time to do this and look after young children.

Peng Liu (PhD, The Australian National University)
Three Essays on Immigration

Biography
Peng is a PhD student at Crawford School of Economics and Government. Currently he is working on the Impact of Terrorist Attacks on Middle Eastern Immigrants.

Wenwen Lu (LLM, The University of New South Wales)
Terrorism and international security: a comparative study of Australia and Hong Kong

Abstract
Using case studies of terrorists and terrorist organizations and in-depth research into anti-terrorism strategies in Australia and Hong Kong, the paper examines the similarities and differences of anti-terrorism laws in the two jurisdictions. The first part of the paper concludes the legal systems of the two jurisdictions with an emphasis on the Hong Kong Bills of Rights acting as a Constitutional guarantee while Australian is still struggling in passing its own Bills of Rights Charter. The next section examines the definition of terrorist act which is the standing point in counter-terrorism strategies and critically analyses whether a political, religious or ideological motivation and exclusions for legitimate civil protest or demonstration raise any controversies. The next part continues to compare anti-terrorism laws in Australia and Hong Kong with special attention to criminal offences, preventative detention and prohibited contact orders and critically examine whether these measures are in accordance with Constitution and their international legal commitments especially from a human rights perspective. Moreover, this part explores other strategies held by the judicial branch and executive branch empowered by anti-terrorism laws beyond criminalizing the suspects. The next part probes the role of transparent and independent judicial review and parliamentary review in Australian and Hong Kong’s security laws and activities in the maintenance of public confidence in the fairness of the anti-terrorism strategies. The final section critically review the Constitutional debate Basic Law Article 23 in Hong Kong which leads to the security law of Hong Kong shelved indefinitely and would be reintroduced only after popular consultation. At the same time, Australia is facing increasing pressure of an in-depth survey into the Criminal Code and ASIO Act about the proportionality and boundary between human rights and public security when facing terrorism. The thesis concludes that although Australia and Hong Kong enjoys a high standard of human rights protection, certain criminal offences, preventative orders and some executive powers have a potential risk of offending public interests. The solution lies in the check and balance of human rights and national security as well as sticking to international legal commitments.

Biography
Wenwen Lu is a Master by Research student in the Faculty of Law, The University of New South Wales. She previously studied in City University of Hong Kong, where she obtained her LL.M degree. Wenwen is working on the thesis - Terrorism and National Security: A Comparative Study in APEC Countries, which aims at comparison of anti-terrorism strategies especially in criminal offences and preventative detention in APEC Countries. The presented thesis of comparison of Australia to Hong Kong is Stage I of the whole thesis.

Alison McLennan (PhD, The Australian National University)
Intellectual property and synthetic biology

Abstract
Synthetic biology is an emerging field of biotechnology research. It involves designing and building artificial biological constructs, such as bacteria and viruses, to perform new and useful functions. Synthetic biologists hope that these new devices will deliver profound benefits in areas such as the production of medicines and 'clean' energy. Venture capitalists, philanthropists and others are channelling huge financial resources into these new avenues of research. The Bill and Melinda Gates foundation has granted US $40 million to a synthetic biology project aiming to produce a cheaper form of an anti-malarial drug.

As is often the case where life sciences are concerned, synthetic biology is moving ahead faster than the development of regulatory responses to it. This paper will consider intellectual property issues raised by recent developments in synthetic biology. Several applications have already been filed to patent products and methods of synthetic biology research in the United States, causing some commentators to raise concern that these could lead to a dangerous 'Microbesoft' monopoly in the field. A group of synthetic biologists have been advocating an open access agenda for synthetic biology research. They have developed an accessible registry of 'standard parts' or 'Biobricks' for use by researchers. Scientists are able to use the standard DNA parts contained in the registry, contribute new parts and improve on existing parts.

Intellectual property in biotechnology has been a controversial issue for more than a decade. This paper asks whether synthetic biology presents a continuation of debates over patenting and biotechnology research, or whether synthetic biology is sufficiently unique that new intellectual property law issues are raised and novel approaches required. The paper will examine the current patent environment in synthetic biology and related areas of research. Important existing patents and applications will be evaluated. Approaches to intellectual property in synthetic biology will be examined in the context of the history of regulation of biotechnology research through intellectual property devices.

Biography

Alison is a PhD Candidate at the Australian National University College of Law. She studied science (cellular and molecular biology) and law as an undergraduate at ANU. Before commencing a PhD Alison worked as a tipstaff in the Land and Environment Court of New South Wales and in the Commonwealth Attorney-General’s Department. She is interested in the regulation of emerging technology, particularly biotechnology. Alison is currently researching legal issues relating to synthetic biology, a new field of biology involving designing and synthesising new constructs such as bacteria and viruses. She hopes to explore the regulatory, intellectual property, bioethics, and environmental law issues raised by recent developments in this field. Alison is also interested in health and medical law, public health policy and history and philosophy of science.

Melinda McPherson (PhD, University of Ballarat)

Gender blind justice: impediments to claims of gender based persecution by asylum seeking women in Australia

Abstract

The icon of justice stands blindfolded, reflecting an ideal about unbiased application of the law – an application without ‘fear or favour’. Modern epistemological and sociological perspectives have raised our awareness about the ways in which such ‘favour’ operates in reality. In particular, feminist and anti-racist perspectives have illuminated the white, Western, middle class, male subject of justice, and the commensurate invisibility or unfavourable treatment of other, marginal subjects (Scutt 1987, 1994; Kennedy 1992). Gender blindness in the law can be observed in the absence of women’s mention in it, the absence of their concerns from it, and in the continuing interpretation of the law against a male standard (note the reasonable man test). This paper is concerned with the ways in which international law, and its application in Australia, take account of women’s experiences of gender based persecution. It uses advocate perspectives as a means of interrogating women asylum seekers’ access to justice. Ultimately, it is through observing institutional laws and policies in practice that we might gain a deeper understanding of the operations of insidious biases.

Gender is not mentioned amongst the specific grounds for protection in the 1951 Convention relating to the Status of Refugees. Critics of the definition have argued that, despite the existence of UN guidelines on gender, women’s rights remain subject to the good will of nation states, the ad hoc development of progressive case law, and changes to cultural attitudes (Kumin 2001:1 – see also Callamard 1999; Castel 1992; Indra 1987; MacKinnon 1986; Valji, De La Hunt & Moffett 2003). The UN asserts that women’s interests and needs are adequately covered by the current definition (UN 1991). Critics maintain that gender based persecution should not remain an intangible ground for claiming asylum. Australia is amongst those nations which have adopted ‘Gender Guidelines’ in the processing of asylum claims.

The current study is interested in factors which might be active in limiting claims of gender based persecution in the Australian determination process. Interviews were conducted with 17 asylum advocates, one Department of Immigration and Citizenship (DIAC, formerly DIMIA) staff member, and one woman asylum seeker. In particular, questions probed the experiences of advocates supporting women with regard to preparation of applications, appearance at interviews, and support after the interview process.
Ultimately, advocates express frustrations over inconsistent approaches to determination, arbitrary understandings of the nexus between gender and culture amongst departmental staff, and an insufficient insight by those staff into the way that current processes push gender ‘beneath the radar’. Based on these interviews, women remain marginal to discourses of persecution, rather than constituting part of a fundamental international subject of justice.

**Biography**

Melinda McPherson is a researcher with particular interests in gender, diversity, and inclusive educational practice. Her qualifications include a BMusEd, a GrDip in Drama Education, an MEd in Education and Women’s Studies and International Education, and certificates in Small Business Development and TESL in the mainstream classroom. She is currently pursuing doctoral research examining the relationship between representations of refugee women and educational programs. Melinda’s work history has included advocacy, educational program management, policy development, and strategic planning. She is committed to research which promotes social justice, and currently sits on the board of the Victorian Immigrant and Refugee Women’s Coalition.

**Rebecca Monson (PhD, The Australian National University)**

*Feminist participatory research on land issues in the Solomon Islands*

**Abstract**

Land issues are once again on the agenda of governments and donors in the South Pacific, and there appears to be an emerging consensus about the benefits of customary tenure vis-à-vis state legal systems. While this issue is extremely contentious among women’s groups and feminist scholars elsewhere in the world, it has received very limited attention in the South Pacific. Armed with an understanding of these global debates, I commenced fieldwork in Solomon Islands in 2008.

There are a multitude of dilemmas for a ‘First World’ and ‘White’ woman studying legal issues faced by ‘Third World’ and ‘non-Western’ women. The subject of my research is highly sensitive, and I am aware of the need to examine my own role in the construction of global knowledge and discourses. In the field I faced expectations that I could purchase carvings, act as a conduit to funding, or provide training in areas completely unrelated to my field. All this contributed to a sense of inadequacy, but also strengthened my commitment to conducting research that was both relevant and sensitive to local contexts.

This led to a shift in my research agenda as I allowed it to be influenced by local people, particularly women. I also discovered that while in some senses the state is ‘distant’ in Melanesia, many men and women in rural areas were keenly interested in the operation of state law. Inspired by Hirsch’s work on participatory feminist legal research (2002), I began to ask myself not only whether, but how, legal literacy workshops could be used as both a site for data collection and provide people with the information they were requesting.

This paper focuses on a workshop held in late April 2009 with a group of women in a peri-urban area on the outskirts of Honiara, the capital of Solomon Islands. I explain the background to the workshop as well as the process of instigating and organizing it. I then analyse the workshop itself, and attempt to draw out some of the specific lessons learned. Like Hirsch, I have found that methods from wider feminist scholarship and activism have enabled me to negotiate some of the thorny issues in research, including the problematic relationship between the researcher and the research subject in ethnographic fieldwork; and the blurred boundaries between scholarship and activism, particularly in sociolegal studies.

**Biography**

Rebecca is a lawyer and a geographer with a background in both research and practice, focusing on emergency management law, public law, and planning and environment law. Rebecca’s PhD research is on gender and land tenure in Melanesia, with an emphasis on Solomon Islands. While land issues are extremely contentious amongst feminist scholars and women’s groups elsewhere in the world, they have received less attention in the South Pacific. Rebecca hopes to support local women’s initiatives, as well as contribute to regional and global debates about land reform.

**Louise Parrott (PhD, The Australian National University)**

*Constitutionalising Indigenous self-government rights: the migration and transplantation of foundational ideas from Canada to Australia*

**Abstract**

Inspired by the *Migration of Constitutional Ideas*, a recent work edited by Sujit Choudhry, in this paper I explore the extent to which foundational ideas have migrated or could potentially migrate from Canada to Australia in the field of indigenous self-government rights. However, in contrast to Choudhry, I draw a distinction between the ‘migration’ and ‘transplantation’ of foundational ideas. Although transplantation can be conceptualised as a mode by which ideas migrate,
I use ‘transplantation’ in the sense of the deliberate adoption or modification of the approach of another jurisdiction as a means of reform (considering, for example, the feasibility of amending the Australian Constitution in order to explicitly recognise indigenous rights) and ‘migration’ in a looser sense (for example, by looking at how ideas spontaneously move from one jurisdiction to another in the arguments of counsel, judicial determinations and academic critique). I have also opted for the word ‘foundational’ so as to encompass both constitutional and common law ideas. Although the direct transplantation of constitutional ideas regarding self-government rights may be unlikely in the near future, the more foundational ideas migrate, the more feasible the transplantation of constitutional approaches may become. Conversely, depending on the extent to which foundational ideas migrate and in what forms, significant convergence in approaches may occur without the need for direct transplantation. Such possibilities depend, however, on our ability to break down the barriers that are preventing meaningful reform and a more progressive development of the law.

Biography
Louise is currently working on her thesis ‘Constitutionalising indigenous self-government rights in common law settler societies: the migration and transplantation of foundational ideas’ at the ANU College of Law under the supervision of Professor Kim Rubenstein. Louise has a degree in Arts and an Honours Degree in Law from the University of Melbourne. A scholarship student at Melbourne Law School, Louise was a member of the editorial board of the Melbourne University Law Review and the Citation Coordinator for the Melbourne Journal of International Law. She was also a research assistant at the Asia-Pacific Centre for Military Law. Louise is presently employed as Counsel in the Office of General Counsel of the Australian Government Solicitor, Canberra. She has published articles in the Journal of Indigenous Policy, the Australian Journal of Peace Studies and the High Court Quarterly Review.

Khaleda Parven (PhD, University of Wollongong)
Genetic information and privacy challenges

Abstract
The rapid growth of technological advances has enabled the researchers around the world to use more and better human genetic material and information than has ever before been possible. This increasing utilization of genetic information for legal, commercial and social purposes are causing some challenges, such as, familial and predictive nature of genetic information is very critical for genetic privacy, since it could be abused to infringe privacy and discriminate people. This attitude towards genetically identified people could give rise to a new concept of ‘genetically sub-class’ in society and be as harmful as racism. Ownership over genetic information is one of the potential ways of privacy protection. Privacy issues are therefore linked with another controversy: who should be owner of genetic material and information: the individual or the researchers? Individual claim is that ownership right over genetic sample should belong to that body. On the other hand, the claim of the researchers is that ownership right is not applicable to the researcher participant from whom the genetic information derived as this person neither analysed his own genetic information nor generated new information. Moreover, after analyzing genetic information, in many cases researchers extracted unique kinds of data and they could want their exclusive rights over this new discovery through patent protection. Another argument is that genetic material and information are ‘common heritage of humankind’ and there should not be any exclusive control over it.

Legislative development has not resulted yet in order to address these legal issues. Legal research in this highly interdisciplinary field of human genetics is, therefore, significant to keep pace with new changes and to ensure social harmony and justice. Therefore, the emerging genetic privacy, discrimination and ownership issues require special legislation to address them. This paper proposes that an effective international convention or treaty is critical to realize public health benefits and to improve law and society, rather than acting as an impediment to the development and application of genetic technology. The intention is to ensure that, even in exceptional circumstances, human rights, justice and sustainable development are not compromised. Therefore, international legislative measure is potentially important in order to control misuse and also to ensure proper use of human genetic material and information.

Biography
I am a full-time PhD scholar at the Faculty of Law, University of Wollongong. I got the Australian Leadership Award for my doctoral study. I have particular interest in international law relating to the protection of human genetics, its sustainable use and human rights. Main focus of my research is to explore global awareness of genetic privacy and commercial exploitation of genetic information. I would like to explore the suitability of international legislative framework governing human genetic information. Previously I completed LLB (Honours) and LLM from the University of Dhaka, Bangladesh, and LLM in ‘Law and IT’ from Stockholm University, Sweden.

Kym Sheehan (PhD, The University of Sydney)
History never repeats? The global financial crisis and government policies on executive remuneration
Abstract
In 2008-09 the Australian government is again contemplating further regulation of executive remuneration, a mere five years after the adoption of the remuneration report and advisory shareholder vote as part of CLERP 9. In part, the latest actions seek to address remuneration practices that encouraged excessive risk taking in the financial services sector. The policy imperatives for this issue derive from global initiatives sponsored by organisations such as the Group of 20, the Financial Stability Forum, the Institute of International Finance and the OECD. APRA's new remuneration principles represent a significant departure from previous practices in regulating remuneration.

In respect of executive remuneration practices more generally, the Federal Government has initiated a major review by the Productivity Commission of the regulation of executive remuneration in Australia, while the Commonwealth Treasury is currently finalising amendments to the termination provisions in the Corporations Act 2001 (Cth). The current CAMAC inquiry into various aspects of market integrity too touches upon executive remuneration.

In light of these developments, this paper presents a timely review of recent attempts to 'control' executive remuneration practice via regulation. Beginning with the amendments to s 300A introduce in 1998 and continuing through the policy goals behind the CLERP 9 reforms in 2004 and current policy goals, it will argue that the government faces the seemingly impossible challenge of effectively regulating to achieve policy goals in the presence of market forces that do not agree with the policy goals. Furthermore, it will suggest that reducing the various policy goals to the one goal of ensuring accountability of directors and officers for company remuneration practices will leave the government with regulation that is consistent with other legislative interventions into company affairs such as the regulation of related party transactions. The advantage of targeting legislative initiatives in these areas is that it can lead to the creation of enforcement mechanisms that could include disgorgement type remedies as well as the opportunity to create civil penalty provisions and, in certain limited circumstances, offences.

This paper relates to the conference theme of law and change by demonstrating how legal research can provide much needed objective perspectives on the regulation of an area that is subject to evocative rhetoric from politicians and regulatory capture by various stakeholders.

Biography
Kym Sheehan is in the final stages of her PhD at the Melbourne Law School on the regulatory framework for executive remuneration in Australia and the UK. She currently works in the Faculty of Economics and Business at The University of Sydney.

Leon Terrill (LLM, The University of New South Wales)
The days of the failed collective

Abstract
Changes made to the Aboriginal Land Rights (Northern Territory) Act in 2006 in relation to community leasing were among the most significant in the history of the Act. When introducing the amending legislation, the then Minister Mal Brough told Parliament that the changes were required because the Land Rights Act had been successful in returning land to Aboriginal people but had failed to unlock its potential.

The problem, he identified, was that communal ownership of land was restricting economic development in Aboriginal communities. The solution was a new form of township leasing, called 'section 19A leases', under which a community is leased to a government entity who then subleases blocks to individuals, organisations and businesses. 'The days of the failed collective', he said in his first reading speech, 'are over'.

With few exceptions, the public debate about the amendments divided along the lines the Minister had anticipated. Supporters of the amendments, mostly on the political right, referred to the need to open communities up, to allow businesses to be established, and for Aboriginal people to have the same rights and responsibilities as mainstream society. Opponents of the amendments, mostly on the political left, either pointed to other reasons why economic development in remote communities was restricted, or argued that white norms were being imposed on Aboriginal people instead of respecting cultural forms of land ownership.

Whatever the merits of these various view points, what they have in common is that they are peripheral to the real impact of the amendments. If the aim of the amendments was to introduce individual property rights then a number of other models were available, and Land Councils and community members were ready to consider them. The real impact of the amendments was to create a model for individual property rights in which full authority for the most important decision making rests with a government entity, rather than with community members, community organisations or traditional Aboriginal land owners.

This paper will begin by briefly describing both the amendments and the way in which they have been treated in
public debate, in particular the way in which well formed divisions along ideological lines impose a limitation on public understanding. Why, for example, does the ideological right support the socialisation of community land while the ideological left comes to the defence of private property? The paper will then consider how, in the post-Intervention environment, a legal researcher who wishes to contribute to the public debate about Aboriginal issues such as community leasing needs to not only present the substantive issues but also to be conscious of these traditional divisions.

In particular, the role that traditional, rights based advocacy has played in advancing the concerns of Aboriginal communities will be considered. The paper will refer to recent contributions to public debate about Aboriginal issues in other contexts, consider how they deal with the challenge of breaking through the traditional ideological framework and identify the problems that they encounter in so doing. The paper will conclude by considering whether there needs to be a new way of describing our responsibilities in relation to Aboriginal communities and how this impacts on the work of a researcher.

Biography
Leon Terrill recently commenced a master of law by research at The University of New South Wales. His research considers recent changes to the Aboriginal Land Rights (Northern Territory) Act and its implications for communities, for Aboriginal land ownership in Australia and for the treatment of indigenous land in other forums. He has previously worked as a senior solicitor with the Central Land Council in Alice Springs, the body representing traditional Aboriginal owners in Central land ownership in Australia and for the treatment of indigenous land in other forums. He has previously worked as a senior solicitor with the Central Land Council in Alice Springs, the body representing traditional Aboriginal owners in Central Australia, and at the University of the South Pacific Community Legal Centre in Port Vila, Vanuatu.

Alana Thompson (PhD, The University of Western Australia)

**Abstract**

The legal resolution of issues to do with the protection and care of children or family conflict, have been in the adversarial context of litigation. However, both the legal and wider communities are becoming increasingly aware of how the legal process impacts upon the wellbeing of those involved, and how an "adversarial approach to resolving family conflict can often aggravate rather than entirely resolve that conflict thereby perpetuating the family's legal problems".

Until recently, there has been no overarching framework to structure the analysis of legal issues, the involvement of legal systems and the impact of legal processes upon participant wellbeing. This gap has been filled by therapeutic jurisprudence. Therapeutic jurisprudence is an innovative approach to examining legal issues, and provides a potentially useful perspective by using a language that social workers and other allied disciplines can understand, as well as a familiar way of assessing the effect of the environment – in this case, the legal system – on an individual, family or community. Therapeutic jurisprudence scholarship can be used as a lens through which the legal rules, policies and practices around statutory child protection matters can be critiqued, in order to see whether they are therapeutic or non-therapeutic.

A therapeutic jurisprudence approach has been applied to various areas of the law, however to date, there has been very little scholarly investigation/writing on the application of a therapeutic jurisprudence framework to the Children’s Court processes in the Australian context. This research will therefore seek to broadly investigate how a therapeutic jurisprudence framework can be understood and applied to the protection and care proceeding process in the Children's Court jurisdiction. This will be done by examining the therapeutic and non-therapeutic effects of the legal process on the parent(s) and family members involved in protection and care proceedings, and by considering how existing laws and practices can be most therapeutically applied within the Children's Court jurisdiction. The perspectives of those involved in the Children's Court will be gathered through the use of in-depth interviews and court observations by the researcher as well as secondary analysis of key documents will serve as another source of data.

The significance of this investigation is that it will happen at a time when major challenges are being articulated about how we manage child welfare decision making in Australia. This study will contribute to expanding our knowledge base of how to improve the child welfare system in Australia and internationally, and will have practical application for Magistrates, lawyers, court staff and social workers for applying therapeutic jurisprudence principles within Children's Court jurisdictions specifically, and to child welfare decision making in general. This research objective fits within the ethos of law reform and social justice, and sits squarely within the conference theme of 'Law and Change'.

Biography
Alana is a PhD candidate with a dual enrolment across the Discipline of Social Work and Social Policy, and the Law School at The University of Western Australia. Her area of interest is therapeutic jurisprudence in relation to child protection legal proceedings. Whilst undertaking her PhD research, Alana has completed contractual research and evaluation work on behalf of the Centre for Vulnerable Children and Families within the Discipline of Social Work and Social Policy. The Centre draws together and coordinates research and consultancy activities relating to Children’s Welfare and strengthening families. Alana recently had the opportunity to present her work in Sydney to a national research consortium that she continues to be involved in as a Research Assistant. Alana was recently a recipient of a Dean’s Postgraduate Award to...
Leilani Ujvari (PhD, University of Melbourne)

To what extent are legal standards vis-à-vis children’s rights and the rights-based approach to development understood and incorporated into post conflict psychosocial recovery programs for children?

Abstract

Addressing the impact of armed conflict on children is one of the most pressing and high profile items on today’s international human rights and security agendas, attracting significant cross-sectoral attention. For lawyers and human rights advocates, it raises important legal issues of rights, violations and redress, while humanitarian aid and relief agencies are more apt to focus on the long- and short-term health and developmental impacts for the child. Poverty reduction organisations have adopted a more utilitarian approach, regarding children’s wellbeing as a critical aspect of international peace and security, and crucial to ensuring sustainable post-conflict reconstruction and development.

Commitments to children’s rights and rights-based approaches have, to varying degrees, been articulated by a number of high profile international NGOs, with many explicitly citing legal instruments such as the Convention on the Rights of the Child and the Geneva Conventions. Most, however, are still grappling with how to effectively implement these commitments on the ground. A consistent theme across both law and development discourse over the last decade is the need to move from the setting and elaboration of standards to effective implementation. Yet legal norms do not operate in a vacuum, and cannot be separated from the social, political, cultural and economic contexts in which they purport to operate. It is my contention that, express commitments to human rights notwithstanding, an organisation’s in-country development practice is influenced by its organisational policies and mandates, its country-specific policies and mandates, and by on-the-ground cultural, ideological and personal factors.

In broad terms, my research aims to analyse the relationship between human rights discourse and practice, and the reasons for any disjunctures between the two. Ultimately, I hope that my research will benefit local communities recovering from armed conflict – particularly children and youth – by contributing to a greater understanding of the meaning of, relevance of and challenges to rights-based child protection in the post-conflict transition. After all, the true value of academic discourses, legal norms and standards, and organisational commitments cannot lie merely in the poignancy of their articulation or the tenor of debates; rather, these discourses, norms and commitments are as valuable as the extent to which they change lives for the better.

Biography

Leilani is a development practitioner and child protection specialist. She has worked for various organisations in Timor-Leste, where she also co-founded Ba Futuru, a local NGO that works with conflict-affected and at-risk children, youth and carers to promote children’s rights and non-violent conflict transformation. Leilani holds a BA (Hon. I) and LLB (Hon. IIA) from Monash University and an MA in Development Studies from the University of Melbourne. She is currently writing her PhD on the extent to which international children’s rights inform and are incorporated into psychosocial recovery and social reintegration programs for young people affected by armed conflict.

Dawn Voon (LLM, The University of Western Australia)

From non-interference to just intervention: an association of southeast Asian nations humanitarian intervention legal framework

Abstract

The Association of Southeast Asian Nations (ASEAN) has been in existence for a little over 40 years. Yet, during this period, millions of people in Southeast Asia have died or suffered tremendously as a result of heinous acts or omissions of state authorities. The international community has failed to act with urgency as these tragedies were unfolding in Cambodia, East Timor and Myanmar, perhaps due to the lack of strategic importance of the region to the powerful Western states. Therefore, as the only major regional organisation in Asia, ASEAN appears best poised to keep grossly abusive governments in Southeast Asia in check. Yet, in the face of atrocities and loss of lives in the region, ASEAN has often been depicted as a callous bystander that turned a blind eye.

My LLM dissertation will outline a legal framework for ASEAN to carry out humanitarian intervention in Southeast Asia,
and discuss the key content issues that will arise when drafting a treaty that would enable ASEAN to carry out such intervention. A key impediment to ASEAN effectiveness in dealing with gross human rights abuses has been its insistence on upholding the values of the ASEAN Way, particularly the practice of decision-making by consensus and the policy of non-interference in the affairs of another state. My proposed legal framework hopes to change this passive ASEAN attitude towards the worst human rights abuse situations, and I believe this framework will be a viable one for several reasons, including the following.

Firstly, the framework does not support a policy that that ASEAN is ideologically opposed to, but merely aims for ASEAN to adopt universal values of moral human decency and set a limit as to how far ASEAN will tolerate tyrannical state behaviour. Secondly, I intend to build in safeguards and strict criteria into the framework so that it will likely be acceptable to a grouping like ASEAN, such as limiting the situations warranting intervention to the most egregious human rights abuses, and requiring a high threshold level of approval to authorize any intervention.

My thesis will define, analyse and present eclectic views on various issues that need to be addressed when determining the content of a treaty for ASEAN to carry out humanitarian intervention. The questions that I will attempt to answer include whether ASEAN can intervene (how legitimacy can be acquired for an intervention), when ASEAN should intervene (what situations would justify intervention) and how ASEAN should intervene (what needs to be done to secure morality and success in intervention). My goal is for the legal framework to enable ASEAN to carry out just intervention (modeled on the just war theory), so that it will be effective in preventing and halting serious human rights abuses, yet at the same time take a cultural relativist approach so that such a framework will be acceptable to and be suitable for ASEAN.

Biography
I pursued my Bachelor of Laws at the National University of Singapore beginning in August 2000 under a Singapore Land Authority undergraduate scholarship. Upon graduating in June 2004, I commenced serving my scholarship bond at the Singapore Land Authority, initially in its core business departments, and during my final 2 years there as its in-house legal counsel. In February 2009, I started my postgraduate studies in international law at The University of Western Australia.

Greg Walsh (LLM, The University of Sydney)
Greg Walsh is a postgraduate student at The University of Sydney writing a thesis on the exemptions granted from the operation of anti-discrimination legislation. He has lectured at a variety of universities including The University of New South Wales, University of Western Sydney and the University of Notre Dame, and has tutored at The University of Sydney and at the Australian National University. Previous legal roles include working for the Redfern Legal Centre and for the DPP in NSW. He completed a Bachelor of Laws degree, Bachelor of Science degree and a Graduate Diploma in Legal Practice at the Australian National University, and a Master of Laws degree at The University of Sydney.

Jian (Chris) Wen
Comparison studies of regulatory framework in education service for overseas students: Australia, New Zealand, United Kingdom and China

Biography
Chris Wen (LLB(China & UTS) LLM(UNSW) GDLP(ANU)) currently works in the international division of NSW Department of Education and Training and is also a part time SJD candidate with School of Law, La Trobe University. His doctoral research focuses on the regulatory and policy developments concerning international students and international education industry, in Australia, United Kingdom, New Zealand and China. Chris was admitted to practise in Supreme Court of New South Wales and High Court of Australia. He is a NAATI accredited translator (Chinese/English) and is also a leadership fellow with the Asialink Centre, University of Melbourne.

Weibing Xiao (PhD, University of Tasmania)
Freedom of information in China: a special case study

Abstract
Most non-Chinese writers have approached Freedom of Information (FOI) in China as a relatively recent and ‘strange and intriguing phenomenon’. This study uses an extensive array of Chinese sources, interviews with Chinese officials and academics and comparative analysis to propose a more complex and detailed understanding of the evolution of FOI in China.

This thesis suggests a rearrangement and reassessment of the many drivers of FOI reform in China. In particular the thesis recommends that democratisation and administrative law reform should be accorded a more central role in the understanding of the development of FOI in China, and the roles of informatization and anti-corruption in the process be
reassessed and allocated important but more secondary roles.

Contrary to the external perception that FOI reform in China occurred essentially overnight, the reform was part of a much longer process of increased transparency. Gradualism has been the hallmark of administrative law reform in China, and FOI legislation has been no exception. This gradualism explains the government’s adoption of a more pragmatic and limited model of FOI legislation where the focus is on forming institutional processes of proactive disclosure, rather than significant and relatively unrestricted access to government information.

The thesis finds that existing compliance analysis focuses too heavily on the demand side, and thus fairly restricted in its application to China. This thesis therefore utilizes a revised compliance analysis model which incorporates a supply and demand focus. This revised model allows us to conduct a more calibrated analysis of the strengths and weaknesses of the enforcement of China’s FOI legislation, thereby hopefully helping future FOI reform to be more effective, and assisting longitudinal comparison of FOI developments.

The thesis provides a more effective explanation of the apparently rapid process of FOI reform in a country dominated by the Communist Party which has had a long standing reputation for excessive secrecy and authoritarian rules. Whereas most of the existing literature, especially non-Chinese writers’, has treated the FOI phenomenon as a paradox, or is dismissive of its long term capacity for effective reform, this thesis treats it as part of a longer term and significantly wider political and law reform process. The thesis also suggests that future FOI reform should focus more on the right to know through persevering in and strengthening the existing proactive disclosure arrangements, as well as improving the current relatively weak access mechanism.

Biography

Weibing Xiao is a PhD candidate in law who studied freedom of information law under the supervision of Mr. Rick Snell and Professor Don Chalmers at the University of Tasmania. I am also the lecturer of Shanghai University of Political Science and Law. I published about 10 academic articles relating to freedom of information law.

Nahao Yan (SJD, La Trobe University)

Nahao Yan is current SJD student of La Trobe University, and her research topic is Corporate Governance and Independent Director System in Chinese listed companies. She is also President/ liaison of La Trobe University Committee, Victorian Chinese PHD Students and Young Scholars Association. The Association of Chinese PhD Students and Young Scholars is an active part of the Chinese academic community in Australia. Chinese students, visiting scholars, invited scientists and academics, come to Melbourne from all over China and across broad research fields. Due to the unique background of its members, the association is one of the most influential groups that bridges academic as well as cultural exchanges between Australia and China. Prior to her current position, she created and led the La Trobe University Chinese Scholars network. Raised in Harbin, northeastern agricultural province near Russian Border in China, Nahao got her LLB in China and two masters from Tsinghua & Temple University (Philadelphia, US) majored in International Trade Law in 2006 and UNSW majored in financial service law in 2006. She has been interested in legal reform study in China and other China’s economics issues for years and would like to meet more scholars in similar research areas.

Chen Zhang (PhD, The University of Queensland)

Establishing a public interest litigation system in China

Abstract

Public interest litigation, as now understood, received a considerable impetus from the civil rights movement in the United States in 1950s and then experienced a dramatic growth in the common law jurisdictions. Due to the increasing recognition of the importance of public rights, the courts in Australia and UK have allowed a liberal access to court under a generous conception of standing. They have also tended to vary the ordinary rule that costs follow the event when they are satisfied that public interest is involved in the case.

However, in China, since the first public interest litigation appeared in 1996, it has proceeded with difficulties. Compared with the encouraging results in the common law jurisdictions, most public interest actions brought to the Chinese courts were either dismissed or rejected under the restrictive rule of standing and limited scope of judicial review. To improve the undesirable conditions, in the Expert Proposal on the Revisions of the Civil Procedure Law, it was unanimously recommended to incorporate public interest litigation into the Chinese legal system, but the recommendation was finally rejected. It seems that public interest litigation is excluded by the Chinese legislators from the contents of judicial reform.

Society characterising under the rule of law requires that rules are generally abided and enforced. It also requires public interests to be protected by a mechanism for enforcement. Foreign experiences prove that public interest litigation is an
efficient instrument to achieve the values of the rule of law. It also gives judicial assistance to ensure the enforcement of political rights. Through public interest litigation, the courts have promoted human rights, environmental justice, and social justice. Public interest litigation is also democratic in the sense that it enhances each citizen’s participation in the proper management of State affairs. Nonetheless, the deficiency of public interest litigation in modern China restricts the supervision and enforcement of public rights by citizens, which, to some extent, defers the development of the rule of law and democracy.

Against this background, the research aims, using legal and comparative perspectives, to explore the legal and institutional factors that impede the progress of public interest litigation in China and how these factors are addressed with in the common law jurisdictions. Based on the exploration, the research will work out some legal solutions which are helpful to the establishment of public interest litigation system and which could be achieved in the short term in company with national long-term-oriented judicial reform.

Biography
Chen Zhang is currently a PhD candidate at UQ. She obtained the LLB degree at East China University of Political Science and Law in 2004. As a part of her three-year study of the master degree in international law in China, Chen came to Australia as an exchange student and completed LLM at UQ in mid-2006. Chen’s PhD research focuses on public interest litigation in China. While public interest litigation has experienced a dramatic growth in the common law jurisdictions, it has not been legally accepted in China. Chen intends to work out some feasible legal solutions to improve the undesirable situation and to facilitate the law reform.
Conference Attendees

Abdulatif, Naeima  University of Wollongong
Adey, Philip  Graduate of Universities of Sydney, Newcastle and Auckland
Arnold, Bruce  University of Canberra
Bates, Rebecca  The University of Sydney
Bell, Justine  Queensland University of Technology
Bird, Susan  Victoria University
Blackhall, Lachlan  The Australian National University
Boland, Jeremy  The Australian National University
Boom, Keely  University of Wollongong
Buchan, Jennifer  The University of New South Wales
Chowdhury, Jamila  The University of Sydney
Cordes-Holland, Owen  The Australian National University
Davis, Roger  The Australian National University
Dhall, Amar  University of Canberra
Fernando, Michelle  University of Tasmania
Ghori, Umair  The University of New South Wales
Goodbourn, Rebecca  University of Melbourne
Gross, Catherine  The Australian National University
Heckendorf, David  The Australian National University
Hightower, Ben  University of Wollongong
Holder, Robyn  The Australian National University
Jean, Elinor  The Australian National University
Jessup, Brad  The Australian National University
Karim, Rezana  The University of New South Wales
Kennedy, Jessica  University of Canberra
Kim, Rakhyun  The Australian National University
Krebs, Johannes  The Australian National University
Kukulies-Smith, Wendy  The Australian National University
Lee, Joanne  The Australian National University
Leijon, Nina  The Australian National University
Lindsay, Bruce  The Australian National University
Liu, Peng  The Australian National University
Lu, Wenwen  The University of New South Wales
McLennan, Alison  The Australian National University
McPherson, Melinda  University of Ballarat
Monson, Rebecca  The Australian National University
Parrott, Louise  The Australian National University
Parven, Khaleda  University of Wollongong
Sheehan, Kim  The University of Sydney
Terrill, Leon  The University of New South Wales
Thompson, Alana  The University of Western Australia
Ujavari, Leilani  University of Melbourne
Voon, Dawn  The University of Western Australia
Walsh, Greg  The University of Sydney
Wen, Jian (Chris)  La Trobe University
Xiao, Weibing  University of Tasmania
Yan, Nahao  La Trobe University
Zhang, Chen  The University of Queensland
Conference organisers

Student organising committee
Alison McLennan
Brad Jessup
Elinor Jean
Owen Cordes-Holland
Rebecca Monson
Wendy Kukulies-Smith
Dr Mark Nolan, Director, Higher Degree Research

Conference administrator
Dinah Rigg (6125 5877)

Conference Location

Map Location: E3
Sparke Helmore Theatre
ANU College of Law
Fellows Road
The Australian National University
Canberra