RECOGNISING PERSONHOOD

AN EXAMINATION OF THE EVOLVING RELATIONSHIP BETWEEN THE LEGAL PERSON AND THE STATE

Proceedings of a workshop at Melbourne Law School

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Workshop sponsors

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I. OVERVIEW

The past decade has seen substantive shifts in the recognition of what constitutes legal personhood, the relationship between legal persons and human persons, and the role of the state in enabling personhood.[1] There has been a transition across multiple fields of law, as the obligations on the state have shifted from non-interference in personhood, to active support and enabling of personhood. In disability contexts, international law now requires the state to recognise legal capacity of all persons with disabilities and provide appropriate measures to exercise decision-making.[2] In environment law, rivers and other natural objects have been recognised as legal persons with specific rights, although highly varying levels of state support and increasing tensions between legal subjects and legal objects.[3] What these new recognition or granting of legal personality have in common is that the legal subject is expressly considered to be vulnerable. Conferral of legal personality has been advocated as a corrective legal tool to address this vulnerability, but rights alone will be inadequate to protect otherwise weak persons.[4]

These ground-breaking developments raise important questions: what do these new obligations say about the role of the state in enabling personhood? How is law evolving to both *recognise* new persons as well as *enable* their full agency? Does this re-framing also re-assert the power of the state, or does it harness this power to support vulnerable persons to exercise their own agency? An increasing emphasis on the obligations of the state provides a new way to imagine and envision the role of the state, as well as reconnecting 'rights talk' to a meaningful discussion of obligations, particularly in the context of vulnerability.

The workshop began with a Welcome to Country from Uncle Dave Wandin, of the Wurundjeri Woi-Wurrung people, who connected the exploration of legal personality and environmental protection to Wurundjeri values and the importance of reconciliation: 'it is only through walking the country together, black and white, that we can heal this country.'

The idea for this workshop emerged from a chance conversation between Dr Anna Arstein-Kerslake and Dr Erin O'Donnell at the LSAANZ 2018 conference. We immediately recognised the opportunities created by sharing insights between the different fields of disability law and environmental law on legal personality. We wanted to broaden these conversations across the multiple fields of legal research engaged with the question of legal personhood and the role of the state.

Due to time limitations, for this workshop we have restricted ourselves to four main themes: Indigenous rights, environmental protection, legal theory, and disability law. Each theme featured two speakers, followed by a discussant response, and then a facilitated discussion between all

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[1] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009); David R Boyd, 'Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution?' (2018) 32(4) *Natural Resources & Environment* 13; Visa A.J. Kurki, *A theory of legal personhood* (Oxford University Press, 2019).

[2] Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realizing the Right to Equal Representation Before the Law* (Cambridge University Press, 2017); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

[3] Erin O'Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 2018)

[4] Erin O'Donnell and Julia Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) 23(1) *Ecology and Society* 7.

workshop participants. The ideas canvassed by the speakers and during the discussion were captured by note-takers and used to generate this report. Over 40 participants attended the workshop, including legal scholars and practitioners from across Australia and select international guests from Aotearoa New Zealand. This report reflects the outcomes from the day, and sets the scene for a future special issue in which the various developments in legal personhood are explored, including the role of the state, and the wider implications for law and legal theory.

A. WORKSHOP PROGRAM

Time	Theme and speakers	Chair
11am	Welcome and introductions **Welcome to Country: Uncle Dave Wandin, Wurundjeri**	Erin O'Donnell
11:30-12:30	**Indigenous rights** Dr Katie O'Bryan Dr Anne Poelina Professor Kirsty Gover (discussant)	Erin O'Donnell Notes: Philippa Duell-Piening
12:30-1:30	**Environmental law and rights for nature** Dr Elizabeth Macpherson Professor Alessandro Pelizzon Professor Afshin Akhtar-Khavari (discussant)	Erin O'Donnell Notes: Ashleigh Best
1:30-2:30	*Lunch*	
2:30-3:30	**Legal theory** Professor Ngaire Naffine Dr Laura Griffin Professor Kristen Rundle (discussant)	Erin O'Donnell Notes: Jade Roberts
3:30-4pm	*Afternoon tea*	
4-5pm	**Disability law** Professor Rosemary Kayess (pre-recorded presentation) Dr Jo Watson Dr Piers Gooding (discussant)	Erin O'Donnell Notes: Siane Richardson
5-5:30	**Wrap up and next steps**	Erin O'Donnell

The following sections capture material presented by the speakers and the discussants, as well questions and comments raised by the other workshop participants. Quoted material is taken from the detailed notes prepared by the note taker for each session. Details on speakers and workshop participants can be found in Appendix A.

II. LEGAL PERSONHOOD AND RIGHTS OF INDIGENOUS PEOPLES

Speakers: Dr Katie O'Bryan and Dr Anne Poelina

Discussant: Professor Kirsty Gover

A. NATURE AS A LEGAL PERSON: INDIGENOUS LAW AND LEGAL PLURALISM

> I am a woman who belongs to the Fitzroy river. The river owns me and I am bound to protect the river.[5]

By the mid-2000s, legal personhood for the environment had become a legal reality, but recognizing the personality of nature has been a lived reality for Indigenous peoples for many thousands of years. Indigenous peoples have played a significant role (often leading the work) in recognizing nature as a legal person. However, context matters, and legal personhood may not be the appropriate vehicle to represent the relationship between Indigenous peoples and nature in all cases. The growing list of examples in which Indigenous Law has provided the basis for recognizing the rights of natural entities provides an opportunity for Indigenous peoples (as well as non-Indigenous people) to share lessons and insights.

Indigenous involvement in the recognition of legal personhood for nature

2008 – Constitution of Ecuador – Indigenous people assisted with drafting and inclusion of rights for Indigenous peoples

2010, 2012 – Bolivia's legislation recognising rights of nature - enacted under Bolivia's first Indigenous president. Bolivian constitution doesn't acknowledge nature as the bearer of rights unlike Ecuador. Bolivia's Indigenous nations were involved in developing that legislation.

2014, 2017 – Treaty dispute settlements in Aotearoa New Zealand recognized natural elements as having legal personality including a national park (*Te Urewera Act 2014* (NZ)) and a river (*Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ)). Negotiated settlements come with state support.

2017 – Río Atrato case (Colombia), where an NGO worked with local and Indigenous communities to protect their constitutional right to a healthy environment, leading to the court recognizing the river as a legal person.

There is a need to reframe 'personhood' arguments to support both Indigenous human and river rights to equity and justice. Legal personhood as it currently stands is challenging for Indigenous peoples, as the river is already a living entity, and its status as such should not have to rely on settler law. Indeed, it can be argued that by attributing legal personhood to the river (particularly as the river is conceived in Indigenous Law), it is reducing an important, powerful, ancestral being to an entity which is subordinate to settler law.

[5] Dr Anne Poelina, Nykina woman from the Martuwarra/Fitzroy river catchment, member of the Martuwarra Fitzroy River Council, and lecturer at Notre Dame University.

What does legal personality look like in Indigenous legal traditions, and how do these traditions pose a challenge to major settler legal theories? For instance, settler legal theory creates a sharp divide between the human, the divine, and nature, a division reflected specifically in property law to recognize rights *in rem* over objects (including nature) that are held by people. Indigenous legal systems do not operate with this distinction in the same way.

Legal personality for non-human actors in the natural and super-natural world can be a very effective bridge between Indigenous and settler legal systems, but it is not enough on its own, because it does not require the recognition of the independent legal authority of Indigenous law. Many agree that recognition of the independent authority of Indigenous law is the kind of legal pluralism that would be most just in settler societies.[6]

Further, enhancing and formalising the legal status of a natural entity such as a river could result in the river having *more* rights and recognition in settler law than Indigenous peoples. In 2018, a case before the Aotearoa New Zealand High court considered the status of an unincorporated tribal entity Ngāti Te Ata. Iwi claimed legal personality in tikanga Māori (Māori law), and so claimed standing to sue in settler court.[7] However, the court found that unincorporated groups do not have legal personality at common law, although this appears inconsistent with the United Nations Declaration of the Rights of Indigenous Peoples.[8] As a result, a river (Whanganui) now has more rights in (settler) law than Ngāti Te Ata iwi as a group.

B. INDIGENOUS VALUES DRIVING LEGAL CHANGE: AUSTRALIAN EXAMPLES

Creation stories continue in modernity.[9]

So far, Australia has not formally recognised natural entities as legal persons, but recent legislation in Victoria explicitly adopted an Indigenous world view to recognise the Yarra River (Birrarung) as 'one living and integrated natural entity'.[10] The legislation also established the Birrarung Council as the voice of the river (including at least two Indigenous members), and established the Yarra River Protection Principles, including Aboriginal cultural values.[11] The legislation is Victoria's first bilingual legislation, using Woi-wurrung language in the title and the preamble.[12]

The Mardoowarra/Martuwarra/Fitzroy River represents an example of ongoing work to recognize the river and the relationship between First Nations peoples and the river. The Mardoowarra river is located in the Kimberly region of Western Australia, and is currently experiencing extreme political and financial pressure to increase development, including large scale irrigation projects. In an attempt to create a voice for the river, and for the First Nations people who have lived with the river for millennia, the native title holders in the catchment created the Martuwarra Fitzroy River Council.

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[6] Kirsty Gover, 'Legal Pluralism and Indigenous Legal Traditions' in Paul Berman (ed), *The Oxford Handbook on Legal Pluralism* (Oxford University Publishing, 2019) forthcoming.
[7] *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058.
[8] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples,* 2 October 2007, A/RES/61/295.
[9] Dr Anne Poelina.
[10] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic), ss 1(a), 5(b).
[11] Ibid, ss 12(1), 46, 48, 49.
[12] Katie O'Bryan, 'The changing face of river management in Victoria: The Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic)' (2019) *Water International* (online) DOI: 10.1080/02508060.2019.1616370.

Although this has not been formally recognized by the Western Australian state government, the council is providing another forum for First Nations people to express their rights and interests in sustainable development, and to showcase their ongoing relationship with the river.

Dr Poelina argued that we should look to the 'First Law' of Indigenous peoples, as these stories are ways of teaching ethics for maintaining society, including codes of conduct. In doing so, they explore the relationship between people and nature, and frame this relationship as one of interdependence and co-existence. Under First Law, there is a fiduciary duty to protect the river's right to life. First Nations people hold communal property in the Mardoowarra, on trust for the river itself, and future generations.

Dr Poelina went on to argue that although the notion of guardianship is yet to be established in Australian native title law, the unique 'sui generis' nature of Native Title rights and interests, in the form of the co-guardianship authority possessed by the Mardoowarra's Indigenous people, must be respected and recognised.

Significant questions emerge from the experience of the Mardoowarra:

- is native title the best vehicle through which to implement First Law and give legal recognition to the ontological living ancestral being, and to recognize the existing guardianship responsibilities of First Nations?
- does the river need legal rights itself as it has legal guardians who speak for it? In the case of the Yarra/Birrarung, legal personality was not considered to be necessary provided that the river has a voice.
- could giving the river personhood allow other parties/government rights to speak for the Mardoowarra as equals to traditional owners or in some cases more than equal? Would the Traditional Owners and their prescribed bodies corporate become no more than shareholders with a vote?

III. RIGHTS FOR NATURE AND ENVIRONMENTAL LAW

Speakers: Dr Elizabeth Macpherson and Dr Alessandro Pelizzon

Discussant: Professor Afshin-Ahktar-Khavari

A. LEGAL RIGHTS FOR NATURE: A GLOBAL OVERVIEW

> Legislative action is promising. But broad declarations require institutions in order to implement them. If you don't have people with defined functions to implement these rights, they face the risk of becoming meaningless.[13]

In 2017, four rivers were recognised as legal persons: the Whanganui in Aotearoa New Zealand, the Ganga and Yamuna rivers in India (shortly followed by recognition for all of nature in the state of Uttarakhand, including streams and glaciers), and the Río Atrato in Colombia.[14] This ground-breaking development gave rise to headlines around the world proclaiming that rivers were now people, and

[13] Dr Elizabeth Macpherson, University of Canterbury.
[14] Erin O'Donnell and Julia Talbot-Jones, 'Legal rights for rivers: what does this actually mean?' (2017) 32(6) *Australian Environment Review* 159.

built on over a decade of advocacy and legal reform to recognise the rights of nature in the US, Ecuador, Bolivia and Aotearoa New Zealand.[15]

Rights for nature and legal person models give us a new way of thinking about and regulating the natural world. In Maori culture, the idea of a river or mountain being a person is not unusual or new. This helps us to question settler colonial assumptions embedded within our legal frameworks.

However, many of these developments are on shaky ground: they are vulnerable to challenge or irrelevancy. By fitting nature within existing legal frameworks that take an anthropocentric approach, there is a risk that rather than changing law to reflect nature's needs, we can end up altering our understanding and conception of nature so that it fits more neatly within settler laws. There is also a need for strong institutional frameworks to give nature's rights force and effect.

Efforts to recognise nature as a legal person have emerged in a context of environmental crisis: including biodiversity loss,[16] and the impact of climate change.[17] The recent *Amazonas* case, heard by the Supreme Court of Colombia, applied the precedent created by the Río Atrato case to recognise the Amazon forest in Colombia as a legal person. The Amazonas decision was based on the claim that the loss of Amazon rainforest to deforestation was breaching the human right to a healthy environment of young people and future generations, by increasing their exposure to the impacts of climate change.[18]

The movement to recognise the rights of nature is transnational, but there is variance in the ways legal rights for nature models have been implemented.[19] In seeking to learn from the experiences of other countries, we need to be mindful of this context. For instance, creation of legal rights for nature may occur via Constitutional amendment, or the specific creation of a legal subject in legislation or case law. The drivers of these reforms are also extremely variable, with some being in response to environmental concerns (such as the new legal rights for nature in Mexico City, and the line of judicial decisions recognising natural entities as legal/living persons in India), whereas others are in response to the rights of Indigenous peoples (such as the Whanganui/Te Awa Tupua legislation in Aotearoa New Zealand), or constitutional human rights (such as the judicial decisions in Colombia).

[15] C Clark et al, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45(4) *Ecology Law Quarterly* 787; Peter Burdon, 'The Rights of Nature: Reconsidered' (2010) 49 *Australian Humanities Review* 69.

[16] S. Díaz et al (eds), *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat, 2019).

[17] IPCC, 'Climate Change and Land' (Intergovernmental Panel on Climate Change, 2019) <https://www.ipcc.ch/site/assets/uploads/2019/08/Fullreport-1.pdf>

[18] See also, Everaldo Lamprea and Daniela García, *Recent Trends in Climate Change Litigation: Colombia's Amazon and Juliana v U.S* (13 April 2018) OxHRH Blog <http://ohrh.law.ox.ac.uk/recent-trends-in-climate-change-litigation-colombias-amazon-and-juliana-vs-u-s>

[19] E O'Donnell and E Macpherson, 'Voice, power and legitimacy: the role of the legal person in river management in New Zealand, Chile and Australia' (2019) 23 (1) Australasian Journal of Water Resources 35.

Recent examples of rights for nature

Mexico City, 2018

Mexico City became recognized as a state in 2016, and from that period, advocates began building support for constitutional recognition of the rights of nature. In 2018, the new Mexico City constitution formally created the rights of nature, including the human right to live in a healthy environment, an obligation on authorities to guarantee this right, and a commitment to create a secondary law to protect the rights of nature and ecosystems as legal subjects.[20] Since then, three relevant secondary laws have been passed, none of which refer to nature as legal subject. No guardian or other institutional arrangements have been established, nor have any funds been provided. Mexico City's constitution is currently being challenge in court, and there is a risk that this provision under Article 13 may fall away.

Department of Nariño, Colombia, 2019

The state has passed legislation to recognize the rights of nature throughout the *department* (state) of Nariño. This legislation begins with an eco-centric preamble, drawing on the case law in Colombia. However, it then adopts the Ecuadorian approach, which establishes nature's rights, but does not specifically create a legal person (and has not been widely effective when it comes to protecting the interests of nature).[21] There is no provision for guardians or institutions, and it is unclear how this law will play out in practice.

There are two key lessons from the global experiment with rights for nature so far: (1) a connection with the specific natural resources who receive rights is important, otherwise both the rights and the reason for protecting the environment itself lose meaning; and (2) clarity and detail of the new rights, as well as establishing the necessary institutions, such as a legal person and a guardian, are crucial to enabling the rights to deliver better environmental protection.

B. THE ORIGINS OF PERSONHOOD: DO WE NEED A NEW MODEL?

Sometimes you need to go backward before you can move forward. Understanding the implications of legal rights and personhood for nature requires us to examine the origins of personhood within law, which in turn can point towards new models of personhood that better reflect the interests of nature.

There are currently three general approaches to protecting the environment in law:

- Collective responsibilities to care for nature, including limits on human actions to protect the environment;

[20] *Constitución Política de la Ciudad de México* [Constitution of Mexico City] 2017, Artículo 13 [Article 13], translation of the content of this article provided by Dr Elizabeth Macpherson.
[21] Craig M Kauffman and Pamela L Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail' (2017) 92 *World Development* 130; Lida Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(1) *Resources* 10.3390/resources7010013

- Rights of nature and legal personhood; and
- Ecological civilisation (embodied in the legal frameworks of China, Korea, and Japan).

The most dominant has been the rights framework, which has included three overlapping phases. The first of these focused on creating broad rights for nature, including legal standing as well as rights to exist and flourish. The second phase began with the recognition of nature as a legal person, with the *Te Urewera Act 2014* in Aotearoa New Zealand. In this phase, rather than granting rights to nature as a whole, specific natural entities have been recognised as legal persons. This has generated debate about personhood vs rights, with some advocates focusing on the rights themselves and arguing that personhood is an unnecessary complication, and others arguing that personhood is essential to give effect to the legal rights. A further critique is that by casting nature as legal person, rights are conferred but liabilities are also imposed.[22] There is also a question around the boundary of a person's identity: this is easy to identify for humans, but not complex systems of natural phenomena.

There is also tension between common law and civil law definitions as to what constitutes a legal person. At present, legal personhood includes 'natural' persons (human beings, but historically constrained to those considered to have sufficient capacity to exercise their rights), and artificial persons (corporate personhood). One theory of corporate personhood is "fiction theory",[23] which recognises that the law has created corporations to fulfil a specific function, and in order to do this, the law needs to recognise the personhood of an organization. The realist theory, by contrast, is that persons exist and are to be recognised at law, but not created by law. Each of these theories has implications for the role of law (and the state) in recognising or creating rights of nature, and the ways those rights can be given legal form.

Within the civil law jurisdictions, fiction theory is dominant, enabling the law to explicitly create artificial legal persons with precise sets of rights and liabilities tailored to the individual context. This is apparent in the civil law jurisdictions of South America, where the law has been used by judges and legislators to create legal persons with some rights but not all rights typically associated with personhood (for example, the Río Atrato is the holder of rights, but these do not include property rights).[24]

In common law jurisdictions, however, the influence of realist theories means there is much less scope for adapting legal personhood to the needs of the situation. This can lead to surprising uses of legal personhood (in Aotearoa, it was necessary to recognise the river as a legal person for the purposes of some legislation, even though it was not the intent to create legal personhood for nature per se), as well as uncomfortable mingling of legal concepts. The line of decisions in India (and more recently, Bangladesh) recognizes nature as a hybrid of both legal and living persons,[25] reflecting the difficulty the common law faces when attempting to come up with a new concept of personhood that is neither a human nor a corporation.

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[22] Erin O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2018) 30(1) *Journal of Environmental Law* 135.
[23] Lon Fuller, 'Legal Fictions' (1930) 25 *Illinois Law Review* 363.
[24] Elizabeth Macpherson and Felipe Clavijo Ospina, 'The pluralism of river rights in Aotearoa New Zealand and Colombia' (2018) 25 *Journal of Water Law* 283.
[25] O'Donnell, above n 22.

By understanding this history, and the influence of different legal theories in different jurisdictions, the limitations of existing categories of legal personhood to capture 'nature' become clear. We may need a new model of personhood, such as an 'ecological' person, or, by drawing on the First Law of Indigenous peoples, an 'ancestral' person.

C. A FUTURE OF PERSONHOOD FOR NATURE?

> Working with concepts like rights and personhood does not mean that everything about the natural world is suddenly beautiful and kind. There's violence, anger and harm. How do we navigate the spectrum of what life is on this planet?[26]

As nature has gained legal rights, important questions are beginning to emerge:

- What is the driving power behind concept of personhood for nature? The power behind corporate personality was the desire for innovation and entrepreneurship. How does this individualist, neoliberal approach apply to the recognition of nature's rights? Should giving effect to nature's rights be funded by the state, or private organisations?
- When we refer to ecosystems becoming persons, sometimes it is ecosystems as a whole and other times it is all the components, including the animals of that ecosystem that acquire personhood. Are there issues of consistency when the animals of one ecosystem obtain the benefit of rights, but the animals of another ecosystem do not?
- One of the common critiques is that if nature has rights and obligations, it could be held liable. If a river floods private property, the river would be liable. In NSW, there is legislation limiting government liability in relation to the absence of water and flooding. What would stop the government from enacting similar provisions to limit liability?
- Can personhood for nature turn environmental law into a more dynamic system where we don't simply legislate (or assess) and forget? Environmental law largely starts and stops with environmental assessment, and this *frontloading* of environmental law loses sight of the ongoing complexity required for environmental management and protection. Can personhood for nature enable the environment to challenge the state? Can legal personhood assist with enforcement of environmental laws?
- Nature works on different timescales to humans. How can personhood deal with the idea that nature's time is different to the human construct? Are we creating problems by forcing nature into law's time frames?
- If the personhood idea is to continue, is it more than just a response to the acceleration of environmental crisis? Can we create new narratives to shape the relationship between humans and the environment? Are we looking for a new enforcement mechanism, or are we seeking to fundamentally transform our relationship with the natural world?

[26] Professor Afshin Ahktar-Khavari, Queensland University of Technology

IV. LAW'S PERSON: THE ROLE OF THE STATE

Speakers: Professor Ngaire Naffine and Dr Laura Griffin

Discussant: Professor Kristen Rundle

Although human beings are automatically considered to be 'natural persons', the law often obscures (or elucidates) personhood of human beings in specific contexts. In doing so, the law both reflects and helps to shape the values and norms of society about who matters, and why. For this reason, the role of the law in recognising legal personality of humans is inherently political. In law, the conditions for being *acted upon* (by the state, or others) are as deliberately created and articulated as the conditions for individual agency *to act*. The state constructed phenomenon of personhood in criminal law, as well as the administrative functions of the state, enable a certain kind of agency/recognition of capacity but also indicates belonging to a polity. Administrative law requires two persons to be constituted: the repository of power, and the person seeking the exercise of that power.

A. THE SELF VERSUS THE STATE-MADE PERSON

The following text (Part IV A) is taken from a short paper authored by Professor Ngaire Naffine

Among criminal law theorists, there is a live and robust debate about the nature of criminal law's persons. The prevailing view is that the state, intent on criminalising certain acts and leaving others untouched, directs its laws at self-made, already constituted, individuals, both as defendants and as victims, though the criminal law theorist is principally interested in the defendant. This defendant person is treated as a reasonably rational chooser and actor, in a Cartesian split of the person between their conduct and their thoughts. And when the criminal law engages with these choosing persons it takes them at the moment they decide to act, to commit a criminal wrong. If they desist from or have a defence for their actions, at that moment in time, then they are not criminal persons and really they cease to be of interest. These persons are already made, already themselves, before they enter the legal arena. When they enter the legal arena they are taken to be self-directed decision makers, deciding to act, knowingly and probably self-interestedly. But they do exist as persons before they enter the system. In this view (sometimes called legal moralism) the task of criminal law is to match a pre-legal criminal wrong to the evil act and intention of this choosing agent.

The still subordinate and counter view of criminal law's persons is that they are socially constituted, they are made in and by society, and so to understand these persons, and regulate them appropriately, one must understand them as social and group beings, as members of populations within particular societies rather than as pre-social individuals. And the social population of greatest interest for criminal law is the population of men. Criminal laws which name their social targets (as English rape law still does in naming men as the potential community of criminal actors) accords with this social view and focuses on the group rather than the individual. Still criminal law and its theorists display a remarkable lack of curiosity about their social population of main criminal concern: men.

But there is a third way of viewing the person of criminal law and this is as an entirely state constituted being. This is a more lawyerly view and it is also, perhaps surprisingly, potentially much

more subversive in that it acknowledges the total power of the state and its delegates to bring a defendant or victim into legal being by state acts of recognition which convey profound social messages and equally the power of state actors not to do so. The focus here is on state power and then on those who are the powerful figures and groups within the state and what they do and why they do as they do. If the state does not recognise a defendant or victim, they do not exist as legal beings. These acts of recognition or non-recognition tell us a great deal about the values of the powerful, rather than about the inherent nature of persons.

To illustrate: the husband's immunity from rape prosecution, which persisted until the 1990s, made it impossible for husbands to exist in law as rapists: as legal beings constituted by the rights and duties of rape law. They could not be legally responsible for this crime; they were outside what is sometimes referred to as the community of responsible persons; and it could be said that they were not of interest to law or to theorists as a consequence. In fact they were hardly visible. They could not be reported for the crime; they could not be charged by the police; police would be acting outside their powers if they arrested and charged for a wrong not known to law; they could not be prosecuted, for the prosecution service could not proceed when there was no suspected criminal wrong. They could not be tried for the offence for there was no offence for which they could be tried. The state did not recognise men in this capacity. There was no offence to bring the husband into legal being; for the purposes of the law of rape, the husband was a nonperson. And of course one could say that husbands therefore had no criminal legal obligation not to rape because the offence was not there. Of course the values conveyed were that this was acceptable behaviour. The message of the law was you can 'rape' with impunity. Indeed you won't be raping at all for rape is a legal concept and here there is no law.

Equally the wife rape victim was outside of the community of protected persons. She was not owed a duty by the husband not to rape her. She too was a non-person for the purposes of this serious crime, an idea perhaps with which we are more familiar. Legally she was invisible to the police, to the prosecution, to the courts and also to the legal community. Criminal law did not bring her into being and so the representatives of the state could not act. They had no-one to engage with.

In this view the defendant and victim are both state creations and if one is concerned about the failures of the criminal law to bring them into being, then one must pay attention to state institutions and to who holds power within those institutions and how and why specific legal obligations are created or denied and what are the messages about appropriate and inappropriate conduct thus conveyed.

To provide another illustration of how the state through criminal law creates persons and simultaneously empowers or disempowers its own institutional representatives (from police, to prosecutors, to judges) and so communicates standards of acceptable and unacceptable conduct: the offence of gross indecency, until quite recently, brought gay men into legal being both as defendants and as victims. The operation of this criminal law had a dramatic ripple effect in that it neutralised the rights of gay men within other parts of criminal law, thus shrinking their legal persons: say their right not to have their property stolen, or to be assaulted, if the report of those offences would expose their own acts of gross indecency.

In saying that the holders and enforcers of state power, such as the police, or the prosecution service, cannot bring a criminal legal person into being in the absence of state laws creating the

relevant rights and duties, I am not referring to the discretion held by such state actors to proceed or not to proceed against a person. Certainly the decision not to proceed because of the existence of discretion keeps potential criminal actors and victims outside the system. But it is the absence or presence of person-constituting laws which is my concern, not the decision whether or not to make use of existing laws.

I am also not saying that behind the presence of bad laws or the non-existence of good laws there are true invisible persons – the unrecognised malefactor and the unrecognised victim. That the true wrong and the truly wronging person stands outside the law and demands the application of the right criminal law to draw them in (as the legal moralists would have it).

Rather I am directing attention to the state-made nature of legal persons and then to the public standards set and communicated by the state through the presence and absence of criminal laws which make or do not make such persons. It is the decision to make or not to make a legal person, and the social values and public power which go into that decision that call for inspection. Persons, values, standards all emanate from state law and from those who are most powerful within its institutions; who decide which legal persons we should have.

This way of thinking about the state and its persons (and my interest here is in the persons of criminal law) destroys the legal division between humans, animals and the rest of nature. The human being for whom a given set of legal rights and duties has no purchase, who is not engaged by them (as in the raping husband and the raped wife) are nonpersons for the purposes of this law in much the same manner as animals are outside the law. The thing to do, then, is to consider whether these personning and unpersonning moves of the state reflect the values that we want to have.

B. WHEN DOES THE STATE RECOGNISE THE BEGINNING OF PERSONHOOD?

> The idea of the unborn is nebulous; it is a beautiful and dangerous concept.[27]

By examining the role of the law in pregnancy loss in relation to registration and certification of unborn children, it is possible to see how the law frames personhood, and makes some experiences visible to the law, but not others. The language in this area is fraught: “pregnancy loss” here is given a broad meaning, being any ending to a pregnancy which is not a live birth. Calls to recognise the personhood status of stillborn babies or miscarried foetuses come from grieving parents, seeking formal recognition and acknowledgement of the *grievability* of their personal losses.

There is a historical trajectory of state recognition of pregnancy loss. The ‘born alive rule’ is a legal principle that laws only apply if a child is born alive. All states and territories also issue stillbirth certificates in the case where pregnancy extended beyond 20 weeks or at birth, the foetus weighed at least 400g. Legally speaking, the unborn (also an extremely fraught term) lack personhood, until they are born or if stillborn. In utero, the unborn have a questionable legal status.

However, there have recently been calls for greater recognition of the unborn. In NSW, Zoe’s Law created a new offence of grievous bodily harm to a foetus where actions to the mother result in harm to the foetus. In SA, a new registration bill (Jayden’s Law) sought to change the date at which

[27] Dr Laura Griffin, Latrobe University

the state would issue a stillbirth certificate from 20 to 14 weeks, with an option to apply for a birth certificate.

There has been resistance to these new forms of legal recognition out of concern they represent a potential threat to reproductive and abortion rights. The calls for reform have emanated from grieving mothers, who may be pro-choice. But the language of grief has also been adopted and mobilised by anti-abortion groups. The argument of feminist scholars is that the recognition that a foetus has personhood displaces the woman.

At the same time, the state is playing a greater role in mourning and memorialising, and in doing so is normalising grief as the appropriate response to pregnancy loss. This also means that the voices of those who experience miscarriage or abortion differently are not heard.

Grief shapes demands upon state, and also shapes individual experiences of loss. In turn, grieving is shaped by state recognition of the stillborn or miscarried foetus as a legal person.[28] However, recognition of a foetus as alive and worthy of grief does not necessarily require legal personhood, which brings with it a set of rights which may conflict with the rights of the person bearing the pregnancy. We need to ask: why is personhood the only way to accord value?

We can draw lessons from this on the potential and limits of legal personhood more generally. Perhaps we should not be seeking to include more in the category of personhood, but to transform it, to decolonise it, to imagine personhood differently – in ways that can incorporate our precarious, dependent and vulnerable nature.

V. PERSONS WITH DISABILITIES AND LEGAL AGENCY

Speakers: Professor Rosemary Kayess and Dr Jo Watson

Discussant: Dr Piers Gooding

Under Article 12 of the *Convention on the Rights of Persons with Disabilitie*s, persons with disabilities have the right to enjoy legal personhood on an equal basis with others.[29] Arstein-Kerslake argued that full legal personhood cannot be predicated on actual or perceived cognitive ability or communication skills – and neither can the freedom to exercise legal personhood (via legal agency). Instead, legal personhood must be recognised in all humans and where there is a desire and/or need for support for exercising that personhood, the state has an obligation to provide access to that support.[30]

[28] Judith Butler, *Frames of War: When Is Life Grievable?* (Verso Books, 2009); Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso Books, 2006)
[29] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.
[30] Arstein-Kerslake, above n 2.

A. CONTEMPORARY NOTIONS OF 'DISABILITY' AND ARTICLE 12

Part VA is summarised by Siane Richardson from a pre-recorded presentation by Professor Rosemary Kayess

Disability is a fundamental part of human diversity and a universal feature of the human condition. No one has all abilities, in all contexts and all environments. We are all relatively limited at some point in our lives. However, certain areas of limited ability or impairment are characterised as 'disability' as they do not sit comfortably within current social contexts and arrangements. This reflects an invisible norm which claims objectivity rather than recognising the subjective social ordering which forms the basis of this characterisation. The social model of disability attempts to account for this subjective social ordering by recognising that it is not the individual who has a disability but the environment which has a disabling effect upon the individual. For instance, a wheelchair user only experiences disability when faced with stairs and other inaccessible spaces. The individual is disabled by society. In appropriately accessible spaces, the disabling barriers are removed, and the individual is no longer disabled. It is society's inability to account for the full spectrum of human diversity which results in disability. The theory of ableism challenges this by drawing attention to the unstated characteristics of the normative 'able' citizen that underlies normativity and the law. Universalism requires the adaptation of society in order to move away from ablest norms and the removal of disabling barriers. Until this occurs, individuals will continue to be denied the full enjoyment of their rights due to the paternalistic and ablest construction of the normative person.

1. EQUALITY BEFORE THE LAW

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) both recognise the right to equal recognition before the law for all persons.[31] There are no circumstances permissible under international human rights law where a person may be deprived of the right to recognition as a person before the law (their legal personhood). However, the non-derogability afforded to legal personhood has historically not been extended to the right to legal capacity or legal agency. Legal capacity refers to the right of the individual to be an actor before the law and to create, modify or end legal relationships. The Travaux Préparatoires on Article 16 of the ICCPR that the Article is concerned with the capacity to be a person before the law and 'was not intended to deal with the question of a person's legal capacity to act, which might be restricted for such reasons as minority or insanity…'.[32] A distinction was drawn between the universal right to legal personhood and the right to legal capacity that could be restricted. The right to legal personhood, without the accompaniment of the right to legal capacity, is of itself diminished. Formal legal recognition does little for the protection or enjoyment of an individual's rights without the ability to exercise those rights in a way the law recognises. For instance, the right to legal personhood may

[31] *International Covenant on Civil and Political Rights* ('ICCPR'), opened for signature 19 December 1966, GA Res 2200A (XXI), 999 United Nations Treaty Series 171, Australian Treaty Series 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Article 41, which entered into force on 28 January 1993) art 16 <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND>

[32] Marc J Bossuyt, *Guide To The "Travaux Préparatoires" Of The International Covenant On Civil And Political Rights* (Martinus Nijhoff, 1987), 486.

confer upon you the right to inherit property but without legal capacity you are unable to legally act upon that property (to sell it, lease it or give it away). Quinn describes legal capacity as an epiphenomenon that exists alongside personhood to enable people to sculpt their own lives.[33] Accordingly, legal capacity should be understood as an essential element of legal personhood.

2. ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) has removed the distinction between legal personhood and legal capacity. The Committee on the Rights of Persons with Disabilities has held that Article 12.2 recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life. Legal capacity to act under the law recognizes all individuals as agents with the power to engage in transactions and create, modify or end legal relationships. Under Article 12 of the CRPD legal capacity is a non-derogable right.[34] Equal recognition of legal capacity requires the law to recognise persons with disabilities as the holder of rights (affording full protection of their rights) and as legal actors (an agent with a power to engage in transactions and create, modify and end legal relations). Article 12 places obligations on member states to support individuals to exercise their legal capacity and reiterates that any perceived impairment or lack of ability is not a ground for the removal or restriction of legal capacity.[35] Accordingly, Article 12 draws a clear distinction between legal capacity and mental capacity. Legal capacity refers to standing and agency and is the key to accessing meaningful participation in society. While mental capacity refers to an individual's decision-making skills that vary between everyone and may depend on a range of factors, experiences and contexts. Any perceived deficit in mental capacity is not sufficient to remove legal capacity.[36]

B. IMPLEMENTING ARTICLE 12 FOR THOSE WHO COMMUNICATE INFORMALLY

Many signatory nations to Article 12 of the CRPD have struggled to reconcile this question of how to account for and recognise the rights of individuals who do not use language to communicate. Although there is general recognition that everyone has the right to legal capacity, a question continues to arise around individuals who are thought to be unable to express their will and preferences. The conversations around this are palpable and there is ongoing controversy.

Legal capacity is a universal construct that applies equally to everyone. However, some believe, including Peter Singer, that those who do not communicate intentionally do not meet the cognitive

[33] Gerard Quinn, "Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD." Paper presented at HPOD Conference, Harvard Law School, Cambridge, MA, USA, 20 February 2010. Available online: http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html (accessed on 27 September 2012).
[34] Committee on the Rights of Persons with Disabilities, *General Comment No.1 (2014) Article 12: Equal recognition before the law,* 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [9].
[35] Ibid, [16]; *Convention on the Rights of Persons with Disabilities* ('CRPD'), opened for signature 30 March 2007, 2515 United Nations Treaty Series 3, Australian Treaty Series 2008 No 4, (entered into force 3 May 2008, entered into force for Australia 16 August 2008) art 12(3) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en>.
[36] Ibid, [15].

criteria of persons as they are not intentional or conscious communicators.[37] Many people express themselves unintentionally using communicative behaviours such as facial expression, body movements, and sometimes behaviours that are considered by some as challenging. For many signatory nations this is a sticking point which is rooted in the idea that personhood is based on our ability to be cognitive beings and intentional in our communication and action. Quinn recognises that this privileging of intellect is a social construct that began following the Enlightenment. A hierarchy of personhood developed, which linked intellect to personhood and resulted in the valuing of certain persons over others.[38] However, what if we break this perceived bond between personhood and intellect and rather came to understand personhood through our interrelated connectedness. We can flip the idea of personhood and its link to intellect on its head.

Relational autonomy recognises that autonomy is exercised in relation to our social environment. The West continues to struggle with this idea and many groups, including First Peoples, understand and more readily engage with this concept of relational autonomy. Self-determination is a collective act that relies upon and reflects our supports and context. Support circles – that is, groups of people who assist a person with a cognitive disability – can be integral for the expression and recognition of will and preferences for some people, and the transformation of will and preferences into legally binding decisions and acts. Relational closeness is at the core of this and is an important part of understanding what someone's will and preference is and acting upon it. This is particularly true for those who communicate in the ways outlined above, yet in a sad irony these individuals are some of the most isolated in our society. This may require active efforts to expand an individual's circle of support. Watson unpacked the concept of relational closeness for these people, finding a reoccurring theme of intuitive knowing. Supporters who reported having an intimate or very close relationship with a person they support demonstrated greater levels of responsiveness to that person's expressions of will and preference. Watson advocates the use of a technique whereby supporters are asked to consider who the person they support is "beyond their disability". This turns supporters' focus from them seeing the person beyond their immediate care needs, to a person with a will and preference. What would their life look like were they in control? What car would they drive? What clothes would they wear? What music would they listen to? Who is this person beyond their disability? From there a conversation can be had exploring what a person's will and preference might be.

[37] Peter Singer, *Practical Ethics* (Cambridge University Press, 3rd ed, 2011), 159.
[38] Gerard Quinn. *'From Civil Death to Civil Life Perspectives on Supported Decision-Making for Persons with Disabilities'* Paper presented at Tbilisi State University, Georgia, 20 December 2015. Available online: http://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Tbilisi-State-University-Talk-GQfinal-Dec-2015.pdf (accessed on 14 October 2019) 11.

Figure 1 Characterising decision-making support for persons who communicate informally (credit: Dr Jo Watson)

Emphasising the role of the 'circle of support' for people who communicate informally helps to elucidate how to identify the will and preferences of these people (Figure 1). Two things become clear when researching the use of this supported decision-making model. Firstly, everyone has the mental capacity to have will and preference, even those with profound cognitive disabilities. Secondly, that expression of will and preference can be interpreted by a closely related support circle who can then act upon these expressions to support someone in the exercise of their legal capacity.

C. THE LONG ARC OF SEPARATING RATIONALITY AND PERSONHOOD

The distinction between personhood and legal agency rests on the perception that only rational actors can make decisions that should be recognised by the law. In order to sever the false connection between rationality and personhood we must go beyond liberalism's concept of the ideal subject, the rational actor. We must come to fully appreciate the unbounded irrational emotional self that is so much more reflective of the diverse human experience. Article 12 recognises the right to support for the exercise of legal capacity that goes beyond traditional liberal notions of individualised rational actors. It is important to bring voice to those who are unable to easily express their legal agency and seen as lacking the mental capacity to enjoy their legal agency.

Some people with cognitive impairment require specific measures to articulate their will and preference, and give effect to their autonomy. The law fails to recognise this lived experience of connection as it so bound up with the idea of the rational person. Arstein-Kerslake uses and engages with the experience of women and the denial of their legal capacity for their "protection and benefit" as an example of historical paternalism as the basis of the removal of legal capacity.[39] There has been a long arc of law reform in order to ensure the right of women to exercise their legal capacity. Different areas of law have been chipped away at to recognise the legal personhood of women. This long arc is beginning for people with cognitive disabilities in order to chip away at the current restrictions upon the exercise and enjoyment of legal capacity. Arstein-Kerslake employs the term 'empowered dependency' which views autonomy as created by and intertwined with dependency, with respect on both sides of the relationship. Empowering dependency draws on relational autonomy and feminist ethics of care to create a notion of dependency that restores dignity to individuals and their circles of care.[40]

[39] Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realizing the Right to Equal Representation Before the Law* (Cambridge University Press, 2017), 11.
[40] Ibid, 192.

Disability service provision has seen the growth of the privileging of independence. In the 1980s service provision was all about living independently. However, people with more severe cognitive disabilities are often left out of this conversation. If we privilege the idea of independence (particularly with an individualistic view of independence, and one that elevates cognitive capacity), people who are highly dependent upon their circles of support, or other supportive relationships, are effectively left out. It is necessary to value dependence and the reliance we all have on others as social beings and recognising this as integral to some people's lives.

VI. INTERSECTING THEMES

By bringing together legal scholars and practitioners in corporations law, statelessness and refugee law, animal law, environmental law, disability law, legal pluralism, Indigenous law, human rights, water law, integrated urban water management, criminal law, and legal theory, this workshop created an opportunity for lessons and insights from these different fields of research to be shared. The relatively informal nature of the presentations enabled speakers to consider and identify these intersections throughout the day, and the discussion session of each panel was an especially fruitful space for interaction.

A. MODELS OF LEGAL PERSONALITY

The existing legal persons in common law are well defined and fall into three categories: corporations, states and human beings (although each of these retains some grey areas). The boundaries of these concepts are tightly policed in law, and new models of legal personality need to consider the history and practice of the ways these concepts have been given effect in law.

Legal personhood as it is develops hierarchies: the 'sovereign man' is at the top of the hierarchy. This individualized and atomized understanding of personhood can appear monolithic. However, thinking more broadly about this, and embracing the often unspoken uncertainty inherent in the common law constructions of the person (particularly the human person) creates space for legal pluralism.

Law can play a transformative role in reshaping narratives, and bringing personhood to new entities. However, the corollary is that law can also fracture aspects of personhood (such as the relationship between Indigenous peoples and Country), as well as sharply dividing who we choose to care about, and who matters in law.

Building on the examples from Parts IV and V above, the uneasy alliance between grieving mothers and anti-abortion activists brings to mind the fact that disability rights campaigners are often challenged by feminist arguments about aborting foetus with disability. There is a need for conversations around whether human rights law is the best forum for campaigners to have discussion about these issues.

Should we also be uneasy about the claims to the human rights of future generations? Recent rights for nature cases being brought by members of future generations (e.g. the *Amazonas* case in Colombia was brought by 25 children). These claimants otherwise wouldn't have legal standing, and the decision explicitly referred to the human rights of future unborn generations. This strategy holds significant potential in future climate change litigation, but is it appropriate to create legal personality for future generations which brings with it rights that conflict with the rights of extant human beings?

Anti-abortion reforms have rested on the language of violence against unborn, ignoring the actual harm being done to women. We need to retain space for imagining what is beyond resistance. We need to be able to retain the freedom to be ambivalent, and actively embrace the are multiple narratives at play.

Finally, as environmental law grapples with what an appropriate model of legal personhood could be, new ideas begin to shed light on possibilities of future personhood. For example, the 'living and integrated entity' model used in the Birrarung/Yarra River in Victoria, Australia raises the profile of the river in the eyes of the law, but does not create specific legal rights held by the river. Could this be a way of recognising other living entities where legal personality is inappropriate, such as the unborn, or (possibly) future generations?

B. LEGAL PERSONALITY AS A COUNTER TO OPPRESSION?

Repeatedly, women, disabled people, and other minorities are being denied legal personhood due to prejudicial misperceptions of who and what is a legal person with full agency. Even when the state is not taking an active role in supporting the efforts of these groups, women, disabled people, and gender minorities are often exercising their legal personhood – not as the idealised, atomistic, isolated, able-bodied male (that is so commonly envisioned in traditional notions of the legal person) – but, instead, as an integral component of social communities in which most legal decisions are a part of relational exchanges between individuals and groups.

Legal rights for nature have been actively advocated for as a means by which nature can be empowered to voice its own interests and protect its own rights.[41] In doing so, this movement aligns with the work of other oppressed groups within humanity. However, it also raises questions about whether this is the correct fit: nature is not human, and attempts to collapse the concept of the all-encompassing environment into an anthropocentric legal framework is challenging and almost always at least somewhat imaginary and artificial. But the lessons of nature's rights and personality also highlight risks for the various human groups: rights require the capacity to enforce them. In addition to considering legal personhood, we need to pay attention to legal processes, functions, and institutions. In creating a voice for nature (or other historically or contemporaneously disempowered groups), we risk creating a false sense of a level playing field, unless that voice has the power to be heard.

C. THE ROLE OF THE STATE

The role of the state is inherent (and yet again, often unspoken) in all recognized legal persons, both in terms of who has legal personality, as well as which legal persons are considered visible or relevant to any given factual situation.

For instance, scholars of criminal law emphasise *defendants* as the possible perpetrator and the person of greatest focus and interest to the law. In environmental law, the idea of the Anthropocene also focuses on perpetrators, and the multiplicity of responsible actors. However, the focus on legal personhood for nature emphasises the victim and risks de-emphasising the perpetrators of harm. However, legal personhood debates in relation to nature have arisen as a response to the crisis of

[41] Christopher D Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450

the actions of humans. There is not a binary distinction between nature and humans and it is important to recognise the duties and responsibilities of the perpetrators of harm in a concept of legal personality. Drawing these connections emphasises the importance of obligations, as well as rights, and in institutions that can give effect to these obligations.

However, the state itself is frequently untrusted and unreliable in jurisdictions where the rule of law is weak. In some Latin American countries, government, and its role in protection and regulation is far away from the geographical locations where rights are being claimed. There is an argument for powerful institutions with real autonomy and the power to speak for themselves on the ground.

D. GUARDIANSHIP AND 'RELATIONAL CLOSENESS'

The concept of guardianship is one of the most interesting intersecting ideas. In disability law, the concept of the guardian has been well-established and is central to denial of legal capacity and personhood. Guardianship is substituted decision making, which the Convention on the Rights of Persons with Disabilities forbids under article 12. Despite Australia's reservation to this article, there are clear moves in policy and law towards supported decision making. The relatively recent emphasis on the *will and preferences* of a person who may require support in making decisions is at the heart of the new paradigm is an important shift away from 'best interests' standards. This emphasis is reflected in the approach endorsed by the Committee on the Rights of Persons with Disabilities of treating will and preference as paramount and reducing the importance of the concept of best interests. However, someone's will and preferences may be more difficult to determine when they communicate informally, and may only be clear to someone close to them. In this instance, the guiding principle should be the *best interpretation* of a person's will and preference. The duty that arises for guardians (and other support people) is to act in the interests of the supported person but not to determine what those interests are. Some have argued that will and preference already informs the 'best interests' approach but historically, this has not been the case. For many Indigenous Australians a history of wardship and the Aboriginal Protection Boards saw the use of the "best interests" approach as mechanism for continuing paternalistic notions of inherent incompetence, and nationwide, many Aboriginal children are still placed in out of home care, under the guardianship of the state.

From the perspective of Indigenous Laws, guardianship concepts in common law can be seen to emerge from settler legal frameworks, rather than First Law, the Law that is *in* the land. Rather than control and management, Indigenous Law seeks to create empathy. First Nations people in the Mardoowarra interpret guardianship as creating a form of fiduciary duty to Country and the river.

In considering what it means to be a 'voice of the river', we need to think about the *relationship* between humans and the river. In the Birrarung/Yarra, the conversation is moving from the resource-management framing of 'what do we want *from* the river?' to a more empathetic, river focused 'what do we want *for* the river?' and is beginning to be 'how do we get there *with* the river?'. This shift in thinking is being driven by embedding Indigenous values within settler legal frameworks (although this case falls short of formally recognizing Indigenous law).

By explicitly learning from the concepts and re-thinking of guardianship in disability law from substituted decision making, to supported decision making lead by a person's 'will and preference', opens up other spheres of law to the concept of 'relational closeness'. By focusing on our own

relationships with other legal persons, we can re-think concept of guardianship so that it actively supports and embeds these relationships as the source of power to speak for that legal person (or living entity). Relational closeness may also help to answer the question of how we can reach the best interpretation of *nature's* will and preference. The identification of will and preference can occur through this lens of relational closeness and recognising the interdependency of the environment and humanity, thus enabling support persons to interpret expressions of will and preference, to acknowledge them, and then act on these expressions.

VII. APPENDIX A

For more detail on the chairs, speakers and discussants of this workshop, please see the websites provided in the table below.

Name	Profile Link
Dr Erin O'Donnell	https://law.unimelb.edu.au/about/staff/erin-odonnell
Dr Anna Arstein-Kerslake	https://law.unimelb.edu.au/about/staff/anna-arstein-kerslake
Uncle Dave Wandin	https://www.wurundjeri.com.au/
Indigenous Law	
Dr Katie O'Bryan	https://research.monash.edu/en/persons/katie-obryan
Dr Anne Poelina	https://www.notredame.edu.au/research/nulungu/staff/Anne-Poelina
Prof Kirsty Gover	https://law.unimelb.edu.au/about/staff/kirsty-gover
Environmental Law	
Dr Alessandro Pelizzon	https://www.scu.edu.au/about/contacts/staff-directory/staff/30709.php
Dr Elizabeth Macpherson	https://www.canterbury.ac.nz/business-and-law/contact-us/people/elizabeth-macpherson.html
Prof Afshin Akhtar- Khavari	https://staff.qut.edu.au/staff/afshin.akhtarkhavari
Legal Theory	
Prof Ngaire Naffine	https://www.adelaide.edu.au/directory/ngaire.naffine
Dr Laura Griffin	https://scholars.latrobe.edu.au/display/lgriffin
Prof Kristen Rundle	https://law.unimelb.edu.au/about/staff/kristen-rundle
Disability Law	
Prof Rosemary Kayess	https://www.arts.unsw.edu.au/about-us/people/rosemary-kayess/
Dr Joanne Watson	https://www.deakin.edu.au/about-deakin/people/joanne-watson
Dr Piers Gooding	https://law.unimelb.edu.au/about/staff/piers-gooding

Participants included experts in corporations law, statelessness and refugees, animal law, environmental law, disability law, legal pluralism, Indigenous law, human rights, water law, integrated urban water management, criminal law, and legal theory from the following institutions:

- Australian National University
- Deakin University
- EDO NSW
- Latrobe University
- Monash University
- Notre Dame University Australia
- Queensland University of Technology
- RMIT
- Southern Cross University
- University of Adelaide
- University of Canterbury (Aotearoa New Zealand)
- University of Melbourne
- University of New South Wales