

This is the accepted manuscript of the Foreword to the Special Issue on Accountability in Crisis: The Rise of Impunity as a Challenge to Human Rights in *Australian Journal of Human Rights* (30(2) 2024, 141-147 by Justine Nolan, Ramona Vijeyarasa & Jose-Miguel Bello Villarino

The impetus for this Special Issue was a conference hosted by the Australian Human Rights Institute in October 2023, which was driven by questions concerning the adequacy of international and national institutions and the overarching frameworks that shape their actions to achieve human rights accountability. The conference, 'Accountability in Crisis: The Rise of Impunity as a Challenge to Human Rights', discussed accountability and human rights challenges in light of the ongoing impacts on rights stemming from matters as diverse as armed conflict, misinformation, rising inequality, arbitrary detention and declining trust in democratic institutions both at home and abroad. Discussions drew on the perspectives of rights holders and duty bearers and considered the separate, but complementary roles of the state, business, media and civil society in both upholding as well as challenging accountability for human rights abuses.

Accountability is a complex and contested concept<sup>1</sup> and it can mean dramatically different things to different people. Debates on accountability are not so much focused on the need for accountability to exist but rather what form it should take. Some question its ongoing utility if it is perceived as an 'ever-expanding concept'.<sup>2</sup> At its core, accountability can be summarised simply, as a need for powerful actors to be called to account to an authority for (in)action if wrongs are to be made right and future harms are to be prevented.

The 2023 conference relied on a working definition of accountability that refers to 'the obligation of those in authority to take responsibility for their actions, to answer for them by explaining and justifying them to those affected, and to be subject to some form of enforceable sanction if their conduct, or an explanation for it, is found wanting'.<sup>3</sup> Zadek offers a perspective according to which '[a]ccountability can be usefully thought of as the temporary accommodation between the needs of power and the claims of justice. Society or groups of stakeholders cede authority, willingly or otherwise, to those with power. In return, conditions are imposed on those with power'.<sup>4</sup>

Zadek goes on to offer an insightful observation: that these 'accommodations, or deals, are temporary because accountability mechanisms often degrade over time and need renewing'.<sup>5</sup> The conference acknowledged this degradation as a growing 'crisis of

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<sup>1</sup> Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' *European Law Journal*, Volume 13, issue 4, July 2007, 447-468.

<sup>2</sup> Richard Mulgan, 'Accountability': An ever-expanding concept?' *Public Administration*, Volume 78, Issue 3, Autumn 2000, 555-573.

<sup>3</sup> United Nations Human Rights Office of the High Commissioner, 'Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda', *United Nations* (Report HR/PUB/13/1, 2013). Available at: <<https://www.ohchr.org/sites/default/files/Documents/Publications/WhoWillBeAccountable.pdf>>.

<sup>4</sup> Simon Zadek, 'The meaning of accountability' in Dorothee Baumann Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice*, Routledge, 2016, 240 [CHECK PAGE!].

<sup>5</sup> Simon Zadek, 'The meaning of accountability' in Dorothee Baumann Pauly and Justine Nolan, *Business and Human Rights: From Principles to Practice*, Routledge, 2016, 240.

accountability', where institutions designed to protect human rights are ineffective or under siege. In some cases, states and powerful actors evade or deflect responsibility, through political or social manoeuvring or weak enforcement of laws. These failures not only exacerbate an accountability gap but also actively undermine public trust in the rule of law and democratic institutions. The rights holder might be seen as battling simply to be seen and heard with limited opportunities to pursue claims for accountability. In such circumstances, the role of law is arguably a necessary but insufficient element in developing an effective framework for accountability for human rights abuses. Like this Special Issue, the conference unpacked the reasons behind failures of accountability and explored possible pathways for strengthening global and domestic accountability frameworks.

The articles in this Special Issue adopt a broad approach to canvassing the topics of accountability, impunity and the protection of human rights. They recognise that human rights accountability is not limited to legal processes nor focused exclusively on the state as a duty bearer of rights. They also purvey a sense that accountability mechanisms might be perceived as failing rights holders, particularly in upholding the right to access justice, and access to remedies and reparations, both central tenets of the global human rights system.<sup>6</sup>

Readers will agree with these editors that the global human rights system is in a state of crisis. There is a persistent and stubborn gap between the ideals of human rights and on-the-ground realities where rights violations too often occur with impunity. Addressing that gap should be a primary global concern. The question of accountability should be and should remain at the forefront of human rights discussions globally.

The articles in this Special Issue reflect a range of interdisciplinary approaches to how that gap is being (and can be) addressed. They recognise that human rights challenges intersect with law, politics, economics, and culture. By bringing together a diverse array of voices—academics, practitioners, and advocates—contributors examine accountability through three key lenses, taking into consideration: the perspective of rights holders, the role of institutions, and the impact of regulation, specifically the legal system in upholding its enforcement. By exploring these three interconnected dimensions, the articles offer a nuanced approach to understanding how accountability is shaped in the human rights sphere.

### **Rights and rightsholders**

To many scholars, rights holders are the pinnacle of the human rights system. Human rights treaties and the obligations they impose on States Parties exist to serve those most at risk of human rights violations. For many rights holders, however, and particularly those already particularly marginalised in society – women, children, migrants and prisoners – rights violations continue with inadequate attention. In turn, civil society plays a fundamental role in protecting their interests.

Yet, human right advocacy is not without its challenges. Rightsholders can be disempowered and often lost in the well-intended work often led and shaped by human rights advocates on

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<sup>6</sup> See for example *International Covenant on Civil and Political Rights 1966* (United Nations Treaty Series, Vol. 999, p. 171), Art. 2(3).

their behalf.<sup>7</sup> At other times, there is competition for ‘credit’ when the called-for change comes to fruition. Moreover, some scholars suggest that rights only continue in force so long as they are not in conflict with other rights.<sup>8</sup> Rights are, therefore, inherently limited. Further challenges arise with the emergence of new rights that do not yet carry the weight of the long-acknowledged ones, particularly in an era of new and emerging technologies.

Several of the articles in this Special Issue speak to all three of these concerns. Sexual violence in educational institutions – a concern that is as present globally as it is in Australia<sup>9</sup> – undermines the right to freedom from violence, non-discrimination and the right to education of its predominantly female-identifying victims. In such a context, Allison Henry’s contribution brings visibility to the critical role of Australian civil society in defending the rights of victims of sexual violence in tertiary education in Australia. Henry deploys social movement theory to illustrate how the interventions and advocacy by survivors and survivor advocates of sexual violence on Australian campuses shifted the approach from one of responding to sporadic episodes to a system-wide acknowledgement, rethink and investment to hold universities, residences and state, territory and federal governments accountable. In doing so, Henry brings visibility to the dynamic and innovative nature of rights-based activism, drawing from decades of student activism and intergenerational violence, employing student surveys, documentary film, and springboarding off the back of the greater acknowledgement of the lack of accountability for sexual violence in other institutions in Australia such as the Defence Force.

Andreea Lachsz and Monique Hurley bring our attention to another group of marginalised rights holders in their discussion of accountability for torture in places of detention. In addition to setting out the extensive obligations on the Australian government to prevent such torture, their discussion makes explicit the racialised nature of such exploitation and the heightened exposure of Australia’s First Nations people – and particularly Indigenous youth – to such abuse. In making the case that torture is one of the most egregious of all human rights violations, Lachsz and Hurley persuasively demonstrate the relevance of peremptory norms of international law, from which no derogation is permitted, to places of imprisonment and therefore the obvious need to hold ratifying states like Australia to account for the suffering inflicted on the disempowered in prison contexts. This is particularly evident with respect to solitary confinement. Yet the disproportionate impact on Indigenous Australians remains inadequately accounted for.

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<sup>7</sup> Sarah Knuckey et al, ‘Power in Human Rights Advocate and Rightsholder Relationships: Critiques, Reforms, and Challenges’ (2020) 33 *Harvard Human Rights Journal* 1, 46 (‘Power in Human Rights Advocate and Rightsholder Relationships’).

<sup>8</sup> Andrei Marmor, ‘On the Limits of Rights’ (1997) 16(1) *Law and Philosophy* 1, 2.

<sup>9</sup> Valerie Halstead, Jessica R Williams and Rosa Gonzalez-Guarda, ‘Sexual Violence in the College Population: A Systematic Review of Disclosure and Campus Resources and Services’ (2017) 26(15–16) *Journal of Clinical Nursing* 2137 (‘Sexual Violence in the College Population’); Victoria L Banyard, Mary M Moynihan and Maria T Crossman, ‘Reducing Sexual Violence on Campus: The Role of Student Leaders as Empowered Bystanders’ (2009) 50(4) *Journal of College Student Development* 446 (‘Reducing Sexual Violence on Campus’).

The perspective of rights holders is front and centre in the *Current Perspectives* article by Jennifer Kanis and Nicki Lees, which focuses on ensuring the visibility of asylum seekers' experiences in seeking accountability for their treatment in Australia's offshore processing centres is enduring. The authors highlight the toll that litigation can take on rights holders and argue that 'justice' may not be served simply by rightsholders receiving a favourable outcome in the courts. Kanis and Lees discuss how an innovative use of AI technology - 'photorealistic' images of witness statements (provided by over 60 individuals during the litigation) - were generated and then made accessible to the public. The purpose of this public display was to serve as a form of accountability by ensuring the experience of rights holders remained visible long beyond the legal case.

### **Institutions**

Institutions play a pivotal role in the protection of human rights by establishing frameworks that ensure accountability and uphold justice. In this Special Issue, the concept of the 'institution' is expansive and not limited to formal structures. We expand its reach to archetypical constructions that allow for formal and informal processes of accountability.

The more formal ones provide mechanisms for redress and ensure that perpetrators of abuses or public bodies not adequately protecting fundamental rights are held accountable, but they can also pre-emptively intervene in debates and processes to achieve more human-rights compliant outcomes. This accountability culture is essential to fostering a culture of respect for human rights and the closing of the gap discussed above.

In this issue, Sarah Williams's article and Phil Orchard and Mareen Broskinsky's *Current Perspective* explore the use of domestic mechanisms to address—although not necessarily redress—violations of international human rights norms. Their pieces explore ways that ensure accountability, albeit limited, when the natural avenues for redress are not responsive to the needs of the most affected right holders. Their informative analyses give readers an excellent insight about the limits of these processes in domestic courts and government settings, but also of the opportunities that these institutional spaces offer for some degree of redress and, perhaps more promisingly, the prevention of future violations of human rights. In their writings, the authors invite readers to consider how these institutions can formally establish and publicise the responsibility for past prohibited practices, and, above all, what this means for human rights accountability now and going into the future.

From an international point of view, Yifan Jia offers a complementary angle of institutional accountability. With a first-hand perspective, Jia describes how issues of accountability of countries both subjected to and imposing unilateral human rights sanctions, were aired in the 139<sup>th</sup> CCPR session. Jia explores how this international mechanism can offer some advantages to provide a framework to explore the legitimacy and human-rights responsiveness of unilateral sanctions, beyond the current practice of limited and cumbersome litigation in domestic jurisdictions.

Analysis of accountability in institutional contexts often focus on their effectiveness in concrete cases, or the general ability of institutions to operate independently and impartially, free from undue interference. This independence is crucial for maintaining public trust and ensuring that human rights are protected without bias. Yet when these institutions adopt positions and intervene in public debates, it is unavoidable to situate themselves as actors in the political debate. Amy Maguire and Natalie Baird offer a regional glimpse of these institutional functions in their analysis of national human rights institutions (NHRIs). Their current perspective explores how NHRIs can work around the parameters of their statutory mandates to make powerful policy statements with horizontal effect. Their analysis illustrates this point with the respective work of NHRIs in the Free and Equal project in Australia and the Right to a Decent Home in Aotearoa New Zealand.

Overall, the diversity of human-rights-related institutions reflects the varied cultural, social, and political contexts in which they operate, allowing for tailored approaches to human rights protection. Despite their shared commitment to the protection of fundamental rights and freedoms, their natures, mandates and approaches differ significantly. The pieces in this Special Issue offer readers the opportunity to reflect on their complementarity, overlaps and potential for future developments in the institutional accountability space.

## **Regulation**

Accountability for human rights harms is the primary responsibility of the state and a common reaction of governments to addressing human rights deficits is to establish new regulatory frameworks. Regulation is a broad term that incorporates much more than ‘just’ law but reliance on legislation and the legal system is a key part of the regulatory toolbox for both regulators and rightsholders and is the focus of several articles in this Special Issue. Contrastingly, the various authors effectively demonstrate how regulation can both expand and diminish pathways for seeking accountability by providing both positive and negative examples of this occurring.

A key element of accountability is the ability to express dissent and publicly call institutions and stakeholders to account for developments that are at odds with human rights. Azadeh Dastyari examines this issue through the lens of, what Dastyari alleges is, a diminishing right to protest in NSW. Human rights defenders around the world have been increasing critical of the use of regulation to limit the ability of rights holders to freely express opinions and assemble in public. Dastyari insightfully focuses on the misalignment between Australia’s international human rights obligations and the legal restrictions limiting protest rights in NSW, in particular with respect to environmental issues. The author demonstrates how regulation is being employed to restrict the ability of activists and the broader community to engage in meaningful forms of protest and direct action and critiques how pathways to accountability have been diminished and power imbalances concerningly reset in favour of the state.

Laurie Berg and Bassina Farbenblum offer a more positive perspective on how regulation can boost accountability in their contribution that includes a proposal for reform to provide remedies for wage theft suffered by migrant workers in Australia. The tendency for such rightsholders to suffer violations of their rights in silence, particularly fearing visa cancellations and deportation, is evident in their discussion of a proposed model for accountability. Positively, Berg and Farbenblum's timely discussion offers an opportunity to share with readers legislative reforms from Canada, Finland, Ireland, New Zealand and the United States of America that better protect exploited migrants to, for example, bring labour claims, seek alternative employment and assist in investigations of rights violations. Yet recognising the limitations of existing approaches, the authors contribution sets out their own pragmatic model for a Workplace Justice visa, several aspects of which at the time of print, were being piloted by the Australian government to overcome employer impunity.

As the 2023 conference highlighted, a focus on accountability should include consideration of the roles played by a range of stakeholders, not only governments but also business. The role of social media platforms in safeguarding and/or eroding accountability has come under intense scrutiny in recent decades. Social media platforms have been accused of spreading misinformation and undermining democracy, while at the same time they offer rightsholders a 'loud hailer' opportunity to express opinions and seek public accountability for wrongs suffered. As Michael James Davis and Sacha Molitorisz keenly note, 'social media platforms have become an unprecedented battleground for the public conflict of rights, where freedom of expression runs up against – and in practice, usually dominates – the right of others to protect themselves from harm.' The authors usefully examine the tension between holding such platforms accountable, while at the same time, limiting potential overreach by governments to regulate free expression.

In their *Current Perspectives*, Nur Hafidah Abd Kadir, Safinaz Mohd Hussein and Zinatul Ashiqin Zainol address head-on the issue of conflicting rights and interests. How should the law respond when – often well-meaning – parents seek to 'sharent' their children's happy moments on online social media platforms, such as Facebook, Instagram, TikTok and YouTube in ways that create contact, financial and security risks for children. As the authors point out, even after raising awareness among parents, their informed decision may still decide upon sharing. In a system that recognises the evolving capacities of the child, the authors pragmatically propose a 'right to be forgotten', drawing upon the 'right to erasure' under the *EU General Data Protection Regulation* and suggesting the use of Children's Rights Impact Assessment, as a way of recognising the evolving privacy needs and concerns of children as they grow. Their contribution reminds us of the centrality of a business and human rights framework to how to regulate the practices of social media platforms. In the example offered, significant discretion lays in the hands of Facebook's Oversight Board to navigate through these conflicts of interest. We are again reminded of the challenge in making accountability real when parents, children and private entities have vested and distinct interests.

It is our hope that the debates triggered by this Special Issue help set in motion steps towards more accountability, including but not limited to, through legislative reforms

and contexts in which rights holders can believe in the system designed to uphold their rights. It is a conversation that started well before ours and the 2023 conference yet it comes at a particularly pivotal moment of disbelief in the global order and global governance. This Special Issue reflects varying levels of both optimism and pessimism in the human rights system ability to meet this challenge.