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# THE CASE OF NIE'S REFUSAL: GENDER, LAW AND CONSENT IN THE SHADOW OF PACIFIC SLAVERY

*Penelope Edmonds**

In 1881 Nie (also known as Nai), a Pacific Islander woman, walked off 'Virginia' plantation, south of Maryborough, in the colony of Queensland. Crossing through cane fields, she travelled in the thick tropical heat to nearby 'Gootchie' plantation to take up work as a domestic servant. Walking off Virginia plantation was a courageous act – and indeed a sovereign act of refusal – for within two weeks Nie was violently retrieved from Gootchie by her former employer and British lawyer, Theodore Wood, who believed she had broken a verbal contract with him. Wood arrived at Gootchie with another man, Harry, where they found Nie working in the kitchen of the main house alongside Irish servant Annie O'Leary. When Nie refused to go with the men, they took hold of her by force. Nie clung to the leg of the kitchen table, but the men overpowered her. As Annie looked on in dismay, the men dragged Nie across the floor, tied her hands up, put her into a cart and took her back to Virginia plantation. The Polynesian Inspector (or Protector), H.M. Hall, was alerted to the incident at Gootchie and the matter soon went to court, where Wood was charged with assault.

The criminal case which ensued garnered intense public interest with the *Bundaberg Star* reporting on the incident with the sensational headline, 'A Female Slave in Queensland', invoking both Nie's 'rights' and a much broader and sensitive political context around matters of labour, unfreedom and slavery in Queensland at this time.[1] Significantly, Nie gave testimony of her assault and abduction by Wood in the Tiaro Court of Petty Sessions (Magistrates' Court), an opportunity rarely given to a Pacific Islander woman at this time in Queensland.

The Nie case, where a perpetrator was put on trial and a Pacific Islander woman could speak in her own right under oath in a colonial court may appear, at first glance, to be a triumph of the law over the persistence of slavery, the violation of human liberty, and the erasure of consent through physical violence, as was suggested by

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[1] 'A Female Slave in Queensland', *Bundaberg Star*, 28 December 1881.

the sensational news headlines. As I show, however, the conditions in which consent could be freely given by a female Pacific Islander labourer in Queensland at this time were far from simple. Two years earlier in Fiji, Wood and his wife, Nie's well-connected and yet perennially insolvent English employers, had engaged her as a domestic servant and nursemaid. Although some newspaper accounts presumed that Nie was Fijian, she stated in court that she was from 'Star Peak', or Star Island, a small volcanic island called Mere Lava in the Banks Islands group in the northern province of Vanuatu (or the New Hebrides as Europeans referred to it then). Nie was a ni-Vanuatuan woman.[2] We cannot know with certainty the facts of Nie's journey, but it seems that she had already travelled far, leaving her home at Mere Lava, and then perhaps travelling on to the main port of Vanua Lava, which was, at that time, the terminal point of the Burns, Philp & Co. steamer line. She may have journeyed voluntarily as a servant or been taken involuntarily by boat and blackbirded (trafficked) in the Pacific labour trade, travelling to Fiji, where she was engaged as a servant to the Wood family in around 1879.[3]

After two years in Fiji, the Wood family moved to the Queensland plantation Virginia, and Nie was 'imported', as the newspapers noted, with the family to work as a nursemaid without any documentation. In this way, Nie slipped through the cracks of legislation between the British sugar colonies of Fiji and Queensland in a trans-Pacific frontier of mobile labour which was, as I show, by turns consensual and non-consensual in its operations. When Mrs Wood and her daughter decided to travel back to England, Nie was apparently left to take her place, remaining with Mr Wood without payment. This status of ersatz wife and unpaid domestic and housekeeper, with its tacit intimation of other forms of wifely service, was clearly not acceptable to Nie, and, asserting her autonomy, she left the employ of Wood. At this time in the colony, such flight would only expose a Pacific woman to further risk, and therefore Nie must have been in fear or deeply unhappy to seek to leave Virginia plantation. Finding herself in Queensland, Nie was doubly, and perhaps triply, displaced, and yet she was determined in her action to leave Virginia.

In this article I examine the case of Nie's striking refusal, her abduction, and the subsequent court case about her to prise open matters of consent, gender, legal personhood, protection and the law in a trans-Pacific frontier. I interpret Nie's determined departure from Virginia plantation as a potent and sovereign act of refusal and pay close attention to her testimony as we 'hear' her voice at the Tiaro Court speaking in her own defence, a form of 'testimonial transaction' as a ni-Vanuatuan woman from the small volcanic island of Mere Lava who travelled to Fiji and then found herself giving evidence in a Queensland court room.[4]

[2] Mere Lava, also called Star Island or Star Peak, is a small volcanic island with an area of 18 km$^2$. The inhabitants speak an Oceanic language known as *Mwerlap*. I refer to the Indigenous peoples of the colonial New Hebrides by the contemporary term ni-Vanuatu.

[3] Percy S Allen, *Stewart's Hand Book of the Pacific Islands; A Reliable Guide to All the Inhabited Islands of the Pacific Ocean, for Traders, Tourists and Settlers* (McCarron, Stewart & Co 1919) 9.

[4] On 'testimonial transactions' see Gillian Whitlock, *Postcolonial Life Narratives: Testimonial Transactions* (Oxford University Press 2015).

Bringing a combined feminist, critical legal and postcolonial approach to the case, I argue that in Nie's refusal, her court testimony, and the terms of the court case, we see the gendered, non-consensual and mobile dimensions of the trans-Pacific labour frontier, where developing systems of protective governance sat both within and in response to various complex labour Acts, in the shadow of the 'new' Pacific slavery. In this article, I ask, To what extent did Nie consent or accept to be imported, if at all, and did she form and then break a verbal labour contract with Wood to remain in his employ? In the court of public opinion, the editor of the *Bundaberg Star* judged that Nie was a 'female slave', a woman trafficked from Fiji, whose 'rights' were denied.[5] In order to understand what 'consent' might mean in this case, attention must be given to the intersectional vectors of race and gender that produced Nie's legal personhood as a mobile Pacific labourer and as a woman in domestic service to a white male plantation owner. I query the extent to which consent could be possible for Nie, a displaced ni-Vanuatuan woman from Mere Lava, within the broader economic and social context of power imbalances between white landowners and mobile Pacific labourers, masters and servants, and husbands and wives.

In this article, I examine a court case that sat at the intersection of the colonies of Fiji and Queensland, a mobile trans-Pacific frontier space that was, as Tracey Banivanua Mar remarks, not lawless but a 'legally produced place' where 'violence and its sanction was normalized'.[6] As I argue, while Wood's violent assault to force Nie back to his plantation instigated the legal proceedings in a colonial Queensland court, the trial that followed instead addressed itself to a determination of her contractual status, that is, it was directed to the question of employer ownership of Nie rather than to the legality of the violent act. While the judge momentarily delved into the question of Nie's consent, ultimately it was framed as a legal dispute between Wood, who claimed that Nie had violated the terms of a verbal agreement, and H.M. Hall, the government Polynesian Inspector, whose office was responsible for the protection of imported Islander labourers under the terms of Queensland's newly implemented *Pacific Island Labourers Act 1880*. As I reveal, it is here, in this legal case at the Tiaro court with Nie's potent refusal and Wood's claim of continued right to her labour, or servitude, that the illusive quality of 'consent' is writ large.

## 1.0 CONSENT AND COLONIAL LEGAL PERSONHOOD

Scholars in this special issue seek to widen the discussion of consent well beyond sex to argue that sexual intimacy is not the only domain where consent operates as a conceptual pivot between the legitimate and the illegitimate. Consent is not transcendent of social relations, nor does it sit as an isolated event or in a moment in time unmoored from its deeper genealogies. Just as social relations always co-create and come to bear on the law, so too there are ideational and material genealogies of cultural practice and imagining that form the prehistory of any legal 'moment', and

[5] 'A Female Slave in Queensland' above note 1.

[6] Tracey Banivanua Mar, 'Frontier Space and the Reification of the Rule of Law: Colonial Negotiations in the Western Pacific, 1870–74' (2009) 30(1) *Australian Feminist Law Journal* 28.

especially of contract and consent. Here, I historicise the particular local, intersectional and imperial inflections of consent and consider its deeper lineages within colonial law and labour and an emergent protective governance that sought to manage, proscribe and 'protect' the lives of Islander workers in Queensland.

Writing on sexual consent in empire and colonial legal personhood, historian Antoinette Burton has recently observed that the procedural processes of the law give rise to a depersonalising effect in which 'the specificities of the victim's or victims' circumstances and identities drop out in favour of a more abstract concept of legal personhood'. This legal personhood is constructed in particular ways, where at 'the root of the consolidation of the abstract legal person are, ultimately, the interests of patriarchy as a social, cultural, and political formation'.[7] Not only, then, is it crucial to re-story Nie's circumstances as a ni-Vanuatuan woman from Mere Lava and to closely consider her testimony in court; in line with Burton, I underscore the value of a feminist and intersectional reading when taking account of her legal personhood, and, by extension, the question of consent as it was legally imagined in this particular colonial Queensland legal case from the late nineteenth century.[8]

As Nie was engaged first in Fiji as a nursemaid and domestic, the gendered aspects of female service within the guise of the domestic, consensual, and potentially coercive 'family' setting requires exploration. Here, the liberal notions of contract and consent include the hidden sexual service implied within domestic servitude, where Nie was effectively 'taking Mrs Wood's place' while the latter was away. As a ni-Vanuatuan woman, Nie also occupied a different social position to fellow servant Annie O'Leary. While both women – one a nursemaid and domestic servant from Mere Lava and the other an indentured domestic servant from Ireland – no doubt endured some overlapping modes of displacement, control and unfreedom, their experiences as working women would have been very different given their racial positioning at this time. White women, for example, were not the intended objects of slave-trade legislation or of the 'blackbirding' practices in the Pacific, nor were they subject to the laws of protective governance that sought to regulate trafficking and the labour of Pacific Islanders once in the colony.[9] As a female Melanesian labourer, Nie's relationship to consent and obligation was decided through a legal apparatus that had the power to determine her labour status and conditions, quite specifically, as an imported, colonised person. As historian Tracey Banivanua Mar has observed, the 'applicability and severity of colonial jurisdiction over colonised people was not just formulated in such high profile cases as those relating to massacres or kidnapping. Rather, this was a constant process of reformulation that took place every day in Queensland's lower courts'.[10] As we shall see, despite the outcry of the *Bundaberg*

[7] Antoinette Burton, 'Accounting for Colonial Legal Personhood: New Intersectional Histories from the British Empire' (2020) 38 *Law and History Review* 146.
[8] As above at 144.
[9] For example, under the *Polynesian Labourers Act 1868* (Qld); the *Pacific Islanders Protection Act 1872* (UK) or 'Kidnapping Act'; and the *Pacific Island Labourers Act 1880* (Qld).
[10] Tracey Banivanua Mar, *Violence and Colonial Dialogue: The Australian-Pacific Indentured Labor Trade* (University of Hawai'i Press 2007) 142.

*Star* that Nie was a 'Female Slave' whose rights should be restored, ultimately her legal status was mediated less by legislation outlawing slavery or trafficking (as a moral violation of human liberty and dignity) than it was by the far more banal, but no less political, application of labour and contract law and the measures of government protection embedded within them.

## 2.0 Domestic Service, Protection and the Law on Queensland's Plantations

It has been estimated that between 62,000 and 65,000 Pacific Islander workers were brought to Queensland to labour in cane, cotton and other plantations, and as domestic servants and farm hands, between around 1860 and 1900, and that of those workers around 6.5%, or some 4000, were women.[11] These Pacific Islander workers came from the nearby Melanesian Islands including the Solomons, the New Hebrides (now Vanuatu) and the small Loyalty Islands of New Caledonia. They were a cheap labour force whose hard work provided the economic backbone for the development of Queensland. While there is an extensive and robust scholarship on the experiences of these mainly Melanesian workers who were indentured or kidnapped to work on Queensland's vast network of sugar plantations from the 1860s, it largely centres around experiences of the majority male workers.[12] Until recently, much scholarship has been framed around traditional questions of economy and (male) contractual, imported so-called 'coloured' versus white labour. In addition, often simplistic debates turning on the question of 'was this slavery or not?' have offered blunt instruments with which to understand the conditions of unfreedom, consent and the past.[13]

There remains very little detailed scholarship on Islander women's work in the plantation and cane fields and, in particular, their domestic service in the plantation 'home', and still scant analysis of their encounters with the law. Much of the foundational work on Melanesian women's presence and labour in Queensland on plantations and in domestic service was authored nearly thirty years ago by historian Kay Saunders and her insights continue to be important.[14] Yet, further attention to women and the critical intersections of gender, race and unfree and bonded labour remains necessary. The plantation home and 'family' constituted a gender system as well as an (un)familiar frontier characterised by hard work, cross-cultural proximity and intimacy for Pacific women who were dislocated from their own homes, family and homelands. Seemingly invisible and yet in plain view, these women had migrated voluntarily or by force between various Pacific islands and colonies, and

[11] Kay Saunders, 'Melanesian Women in Queensland 1863–1907: Some Methodological Problems involving the Relationship between Racism and Sexism' (1980) 4(1) *Pacific Studies* 28.
[12] See Clive Moore (ed), *The Forgotten People: A History of the Australian South Sea Island Community* (Australian Broadcasting Commission 1979); Clive Moore, *Kanaka: A History of Melanesian Mackay* (PhD Thesis., University of Papua New Guinea 1985).
[13] Lydia David, 'Slavery under the British Flag: Representations of the Pacific Labour Trade in the Anti-Slavery Reporter, 1867–1901' (unpublished manuscript, 1 January 2015) 4. <http://hdl.handle.net/2123/14006> (last accessed 7 June 2021).
[14] Kay Saunders, *Workers in Bondage: The Origins and Bases of Unfree Labour in Queensland 1824–1916* (University of Queensland Press 2011); Saunders above note 11.

between plantations in Queensland and northern New South Wales. The bonded and unfree domestic and plantation labour of Pacific Islander and Aboriginal women was used extensively in this colony, in a region where European women were scarce. As Banivanua Mar remarked nearly two decades after Saunders' work, 'only a handful of historians have focused on, and debated the histories of, this labour trade and fewer still have considered the experiences and treatment of [Pacific] women or explored the gendered nature of their work. Theirs is a story that can be painstaking to access in the archives, for if Islanders were a subaltern group written out of colonial memory, Islander women were doubly so'.[15]

The law was a key instrument through which colonial administrators sought to regulate settler societies such as the colony of Queensland in often rapid states of change and growth. In Queensland especially, the juridical operations of the law worked at the intersections of the dispossession of Aboriginal peoples and of the immigration of settlers and imported Pacific labourers, as well as within a shifting and plural legal regime between various colonies. In this way, the 'law constituted a fluctuating colonial culture of its own' that required constant modification and renewal.[16] The law was a central point through which colonial officials, planters, Pacific labourers and their advocates – such as protectors and missionaries – were brought together, and through which their interactions were played out. Legal histories therefore open onto complex stories of the social connections and conflicts that shaped gendered, interracial labour relationships in evolving frontier economies and settler cultures.[17]

There is burgeoning scholarship exploring Aboriginal protection in the 19th century Australian colonies, including Queensland, but less in-depth work on protection of Pacific Islanders.[18] As scholars have shown, protective governance is an inherently ambivalent mode of colonial practice, and scrutiny of various imperial forms of protection reveals how humanitarian initiatives to ameliorate colonial violence could be coupled with forceful and regulatory measures to build the terms of governance in the British Empire. Indeed, such measures could codify new forms of violence, which

[15] Tracey Banivanua Mar, 'The Contours of Agency: Women's Work, Race, and Queensland's Indentured Labor Trade' Carol Williams (ed), *Indigenous Women and Work: From Labour to Activism* (University of Illinois Press 2012) 73. See also Victoria K Haskins and Claire Lowrie (eds), *Colonization and Domestic Service: Historical and Contemporary Perspectives* (Routledge 2015).

[16] See Australian Research Council Discovery Project DP150100914, 'Intimacy and Violence in Anglo Pacific Rim Settler Colonial Societies', CIs Lyndall Ryan; Victoria Haskins; Amanda Nettelbeck; Penelope Edmonds; Anna Johnston; Angela Wanhalla. See also Penelope Edmonds and Amanda Nettelbeck, 'Precarious Intimacies: Cross-Cultural Violence and Proximity in Settler Colonial Economies of the Pacific Rim' in Penelope Edmonds and Amanda Nettelbeck (eds), *Intimacies of Violence in the Settler Colony: Economies of Dispossession around the Pacific Rim* (Routledge 2018) 1.

[17] Edmonds and Nettelbeck, above note 16 at 1.

[18] Amanda Nettelbeck, *Indigenous Rights and Colonial Subjecthood: Protection and Reform in the Nineteenth-Century British Empire* (Cambridge University Press, 2019); Samuel Furphy and Amanda Nettelbeck (eds), *Aboriginal Protection and Its Intermediaries in Britain's Antipodean Colonies* (Routledge 2020). In Queensland, the first of Queensland's 'protectionist' laws for Aboriginal peoples was 'The Aboriginals Protection and Restriction of the Sale of Opium Act' (1897), which established the framework for government control of reserves and the lives of Aboriginal people, thereby removing the basic freedoms of all Aboriginal people in Queensland.

too often compromised the lives and sovereignties of Indigenous peoples. The widespread claims of slavery and a push for imperial intervention did not result in the banning of imported labour to Queensland; rather, authorities tried to regulate it through legal means, including measures of 'protective governance' for Melanesian workers.[19] The *Polynesian Labourers Act 1868* (Qld) sought to regulate this trade, although it was deemed ineffective and was followed by the *Pacific Islanders Labour Act 1880* (Qld), as amended by, the *Pacific Islanders Labour Act Amendment Act 1884* (Qld). These legislative Acts and enquiries sought to deter and expose the blackbirding of Melanesian peoples in the region and to regulate the sea frontier and indentured labour inland.[20] One of the key interventions of the 1880 Act was the institution of the office of Polynesian Inspector (or Protector). These officials, notes Amanda Nettelbeck, had 'much in common with Protectors of Immigrants, or Immigration agents' and 'were responsible for tracking the lives of indentured labourers in the colony'. This included 'verifying their contract, overseeing the conditions of their employment, and authorising their location' to ensure that no workers could be 'transferred from one location to another, or recruited onto another labour sector without written permission'.[21] Ultimately, as Nettelbeck has noted, such forms of protective governance which purportedly 'protected' Pacific peoples subjected them to regulation, surveillance and coercion, and served to draw them 'into the embrace of the law', thus shoring up the sovereignty of the state.[22]

In all major sugar-producing regions, Inspectors of Pacific Islanders, such as H.M. Hall, had been 'officially installed to safeguard the limited rights of Melanesian indentured servants and to initiate proceedings in a magisterial court when any case of maltreatment or other irregularity was detected', notes Saunders.[23] Overall, however, this 'system of official protection was largely haphazard and ineffective' and servants had to resort to a range of informal methods to counteract or diminish their exploitation, writes Saunders.[24] At the same time, overseers 'had at their disposal a number of tactics to enforce commands and to ensure that servants remained as subservient and subordinate as possible'.[25] These included bringing official charges in the local Court of Petty Sessions for breaches of the *Masters and Servants Act 1861* (Qld).[26] This, in effect, is what occurred at the local Tiaro Court of Petty Sessions (Magistrates' Court) between the Polynesian Inspector H.M. Hall and Theodore Wood, where Hall sought to draw Nie into the realm of protective governance, charging Wood with assault, while at the same time the court sought to test Wood's compliance with the *Pacific Islanders Labour Act 1880* (Qld). In turn, Wood, himself a lawyer, made a cross-summons against Hall for trespassing on his property, 'enticing'

[19] Nettelbeck above note 18 at 176.
[20] As above.
[21] As above at 177, note 55.
[22] As above, Introduction.
[23] Saunders above note 14 at 126.
[24] As above.
[25] As above.
[26] As above.

Nie to leave Virginia and causing her to 'desert her hired service', all crimes under the *Masters and Servants Act 1861* (Qld).[27]

## 3.0 AT THE TIARO COURT: LAW, CONSENT AND THE FICTION OF LEGAL PERSONHOOD

The *Queenslander* reported on this 'important case', emphasising that it was heard 'before a full bench of magistrates'.[28] The *Bundaberg Star* also reported the case in 1881, as noted, with the leading headline 'A Female Slave in Queensland'. It went on:

> At the Tiaro Police Court … the Polynesian Inspector (H. M. Hall) charged Mr Theodore Wood with committing an assault on a Polynesian woman named Nai. It appeared from the evidence adduced … that the woman had been brought by [the] defendant from Fiji as a domestic servant under a private agreement. She arrived in Queensland in May or June 1880 and remained with him till November last year.[29]

It reported the witness (Annie O'Leary) recounting that Wood and another man 'fastened Nai's hands; Nai resisted, and held the table; [the] defendant and the man forced her to walk between them to a cart and took her away'. The editor of the *Star*, defending Nie's personal liberty, suggested that for Nie to be taken back to Virginia in this way was tantamount to slavery. As the newspaper protested, this was not only a case of assault, but ought to be a case of abduction, and invoked Nie's 'rights':

> For this offence against the personal liberty of this woman the bench fined [the] defendant the sum of £1 16s 4d. It appears to us that the graver charge of abduction arises out of the above evidence and should be inquired into. The reputation of the colony demands that the law should be *put in motion to vindicate the rights of this helpless and oppressed Polynesian woman*.[30]

By this time the 'grave charge' of abduction, implying slavery, was morally and in theory legally unacceptable. The abduction of Pacific Islanders, Aboriginal peoples and New Guineans by the labour trade and fisheries was a great cause for concern in the Queensland legislative chambers, and the colony sought show the Colonial Office it was in earnest about averting kidnapping.[31] For the editor of the *Star*, an individual with humanitarian leanings, Queensland's reputation as a self-governing British colony had to be upheld and it was obliged to defend and protect the 'rights' of Islanders in accordance with the British Parliament's passing of the *Pacific Islanders Protection Acts* of 1872 and 1875, commonly referred to as the 'Kidnapping Act' (i.e. the recruiting of islanders by force or deception and their detention

[27] Courts of Petty Sessions also known as Magistrates' Courts provide the lowest level of redress in civil and criminal matters: 'Wide Bay' *Queenslander* 31 December 1881, 839.
[28] As above.
[29] 'A Female Slave in Queensland' above note 1.
[30] As above, emphasis added.
[31] N A Loos, 'Queensland's Kidnapping Act: The Native Labourer's Protection Act of 1884' (1980) 4(2) *Aboriginal History* 150, 169.

without consent). This Act, to protect 'natives of islands in the Pacific Ocean, not being in Her Majesty's dominions, nor within the jurisdiction of any civilized power' was created in response to pressure from abolitionists and the Aborigines Protection Society, which sought to combat the large and unscrupulous labour trade in Queensland and Fiji.[32]

Nie gave testimony in the court case, rare for a Pacific Islander woman, and something that Aboriginal people in Queensland could not do at that time.[33] Her testimony is thus extraordinary, and we can hear Nie's voice, albeit mediated by the *Maryborough Chronicle*, in December 1881, which carried a thorough report of the case. 'Nai, being duly sworn':

> [I] Am Polynesian from Star Peak; [I] know defendant; saw him first in Fiji; he was my master and brought me here; had agreement has been finished three months; remember leaving Mr Wood at Virginia and going to Gootchie, he [Mr Wood] said, 'I tell you straight you come along with me'; I said, 'No'; Mr Wood and Harry (a white man) fastened my hands behind me; pulled me along the floor, and put me in a cart; I sang [out]; I held on to leg of table before my hand were fastened, because I did not want to go, was taken in a cart to Virginia.[34]

When Nie was cross-examined, she replied:

> When he [Wood] came to Gootchie, told me several times if I did not go he would take me; [I] did not walk to the [cart]; you carried me; after my agreement was finished, *I did not promise to stop* until after Mrs Wood returned from England.[35]

Clearly Nie was adamant to leave Virginia; she said 'no' to the prospect of returning to the plantation. She physically fought to stay at Gootchie and did not walk with her own volition to the cart. Importantly, she asserted that she did not make any 'promise' – that is, she did not make a verbal agreement or contract to stay on. Nor did she consent. The transcript added, 'By the Bench: Left Virginia because I was tired of stopping there.' O'Leary was then sworn in as a witness and described herself as a 'general servant at Gootchie':

> [I] know [the] defendant and the girl Nai; remember the morning of the 9th December; Nai was with me in the kitchen, when defendant came; called a boy to help him take Nai out first she refused; then he laid hold of her; Nai fell on the floor and resisted by catching hold of the table; after a tussle Mr Wood tied her hands behind her back; I then left the kitchen.

[32] Preamble, *Kidnapping Act 1872* (UK) (35 & 36 Vic c 19); Loos, above note 31 at 159.
[33] Taylor notes that Polynesians were allowed to testify under the *Oaths Amendment Act 1876* (Qld). It appears that Aboriginal people were excluded from this first amendment, but later were allowed to testify in courts through the *Oaths Amendment Act 1884* (Qld): Greg Taylor, 'A History of Section 127 of the Commonwealth Constitution' (2016) 42(1) *Monash University Law Review* 221.
[34] '"Assault", Tiaro Police Court' (Before Messrs. W.G. Bailey, H. Gordon, and J. Dowser, J.J.P.)' *Maryborough Chronicle* 23 December 1881.
[35] As above, emphasis added.

For the defence, Harry Jackson stated:

> [I] Reside at Virginia; [I] know Nai [and] went to Gootchie on 9th December and assisted Mr Wood to take Nai from the kitchen; she resisted and bit me in the hand and drew blood; I helped to strap her hands behind her back; no other violence was used.
> …
> By the Bench: When we reached Virginia, she got out of the cart herself; when she resisted at Gootchie it was with her strength.

Harry Jackson's testimony is curious–does it mean to imply that Nie's lack of physical resistance at Virginia ('she got out of the cart herself') rather than her verbal resistance was taken as a sign of consent? In contrast, Nie's own testimony stated: 'I said, "No".' And, as if Jackson's actions could be considered to be reasonable force, Harry added to his testimony the statement that 'no other violence was used'.[36] Such a statement also appears to suggest that according to the legislation some force was permissible. It seems the magistrate was attempting to ascertain the limits or extent of the force used.

Wood was then cross-examined, admitting he had neglected to observe a range of legal and reporting obligations in accordance with Queensland's *Pacific Labour Act 1880*, and that he had not paid Nie. In his words:

> Nai came to Queensland about May or June, 1880; she came as nursegirl with my wife; before importing her I did not make application to the Colonial Secretary, Brisbane, stating the number of islanders I required or how they would be employed; I did not enter into a bond with two sureties to return Nai to her native island at the expiration of 39 moons from date of her arrival; I did not register the arrival of Nai at the Immigration Office; Nai has not been engaged in tropical or semi-tropical agriculture; I had an agreement not with Nai but the Fijian Government; this agreement terminated 3 months ago, except that I am still under a bond of 50 pounds and one surety to return her to Fiji; Nai deserted from my service about a fortnight ago; [I] did not report her desertion to the nearest bench of magistration or to the Immigration Agent … she deserted not during the three years agreement, but after the verbal agreement had been made; the terms of the verbal agreement were that she was to work as a general servant until my wife's return, wages to be 5s per week, or an equivalent; Nai deserted on the 15th of December; [I] have not paid Nai wages under the verbal agreement; I think about 1 pound is due.[37]

In this astounding testimony from Wood, it is clear that he was being questioned on his compliance with the stipulations of the *Pacific Islanders Labour Act 1880* (Qld). Wood admitted breaching multiple requirements of the 1880 Act, as well any 'verbal agreement' if indeed there was one, after the 3 year agreement with the Fijian government, as he had not paid Nie. Wood's references to 'two sureties', '39 moons' (that is, three years and three months being the standard period of indenture), and 'registering arrival' are references to the requirements of the 1880 laws. It appears that Wood may have breached the Queensland 1880 Act in addition to the Fijian

[36] 'Wide Bay' above note 27 at 839.
[37] As above.

codes regarding Nie's return. Moreover, once the period of agreement with Fiji was complete, Wood had behaved as if Nie was contracted to him under the *Masters and Servants Act* – though even under this Act, employers could be fined for assaulting workers. Under this Act wages were to be paid quarterly, therefore Wood perhaps believed he could get away with not having paid Nie. Even under the *Pacific Island Labour Act 1880*, 'wages had to be paid at the end of each six months in the presence of an inspector'.[38]

Questions around consent, indentured and unfree labour must also be contextualised within the wider regime of labour within these early settler colonies. From the beginning of free settlement in 1842 until 1906, the northern districts of Australia were where the 'institution of indentured service provided the mainstay' for sections of the rural industry.[39] Pacific Islander labourers could be subject both to the *Masters and Servants Act* and the *Pacific Islanders Labour Act 1880*. Indentured workers' agency was highly delimited under the *Masters and Servants Act*. During the 1880s 'Queensland was the immigrant colony of Australia', writes MacGinley.[40] Various immigration Acts encouraged and regulated the flow of immigrants into Queensland, and paid for passages, especially from the United Kingdom and elsewhere in Europe, and were often used by the Irish in Queensland to bring out relatives. The *Masters and Servants Act* also made provision for the Governor in Council to authorise free passages for farm labourers and female domestic servants.[41] It is likely that Annie O'Leary came from Ireland under such an assisted plan. Domestic servants, including women, were included in *Masters and Servants Acts*, and this was a 'calculated response due to their scarcity and "troublesome" character, as well as their propensity to abscond', writes Michael Quinlan.[42] Due to labour shortages, 'absconding was treated as a serious offence in every colonial act', with 'virtually every colonial act prohibiting "harbouring" or "enticement", with up to fifty pounds for inducing workers to break their agreement or employing or sheltering absconders'. The Queensland *Masters and Servants Act* of 1868 imposed a twenty-pound fine for harbouring runaways.[43]

In the case before the Tiaro police court, Wood defended himself as he was a trained lawyer, and argued that 'the woman [Nie] … [had not ever] been under the regulations of the Polynesian Act, and that therefore the Inspector had no authority to interfere'.[44] He then made a cross-summons against Mr Hall, the Polynesian Inspector, for trespassing on his property and causing Nie to 'desert her hired

[38] Tracey Flanagan, Meredith Wilkie, Susanna Iuliano, *Australian South Sea Islanders: A Century of Race Discrimination under Australian Law* (2003) Australian Human Rights Commission <https://humanrights.gov.au/our-work/race-discrimination/publications/australian-south-sea-islanders-century-race> (last accessed 7 June 2021).
[39] Saunders above note 14 at xvii.
[40] M R MacGinley, 'Irish Migration to Queensland, 1885–1912' (1974) 3(1) *Queensland Heritage* 12.
[41] As above.
[42] Michael Quinlan, 'Australia, 1788–1902: A Workingman's Paradise?' in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004) 219, 234.
[43] As above at 232.
[44] 'Wide Bay' above note 27.

service'. Hall had been to Virginia two weeks prior to Nie's leaving and had been seen talking to her. Wood therefore accused Hall of enticing Nie to leave Virginia, and the proprietors of Gootchie station of harbouring her, which as shown above constituted a crime under the *Masters and Servants Act*. Wood maintained that Nie was under contract and that he had been deprived of her labour (thus his property), while Hall claimed that she was subject to the *Pacific Islanders Labour Act 1880*.

In his cross-summons against Inspector Hall, Wood's argument implied that under the terms of his verbal contract with Nie, he was reclaiming his property in abducting her back from Gootchie. Under this logic, he appeared to believe he was entitled to go to great and even violent lengths to retrieve this property – where violence in this instance was rendered a defence of his legal personhood as master. Conversely, the *Pacific Islanders Labour Act* deemed Nie legally non-existent, positioning her as akin to a ward of the state under the protection of the Inspector of Pacific Islanders.

By 1880, with the passage of the *Pacific Islanders Labour Act*, and the later amended 1884 Act, 'tropical or semi tropical agriculture' was determined not to include 'domestic or household service'. From the first day of September 1880, it would 'not be lawful to employ any person' who engaged in such activity; however, Pacific Island labourers who had been in the colony continuously for five years were exempt from the provisions of the Act.[45] Theodore Wood and his family arrived with Nie in 1880 in 'May or June' as he testified, and according to the 1880 Act 'from the first day of September' Islander workers 'will not after the termination of the coming year, be allowed to be employed in stores or as domestic servants'.[46] Nie may have been qualified as a legitimate domestic servant under the Fijian agreement, but under the new 1880 *Pacific Islanders Labour Act*, by the close of 1881 she would be deemed an illegal imported worker because this Act ruled out domestic or household service. As an Oxford Law graduate and plantation owner, Wood was likely well-acquainted with the laws governing the procurement and transport of Pacific Island labourers to Queensland. Yet, as Wood asserted in court, he believed that Nie was 'not under the Polynesian Act at all'.[47]

Significantly, whether Wood's attempt to reclaim Nie was assault and whether she had consented to go back to Gootchie were not the only questions before the Tiaro court. As the case progressed, it became a matter of jurisdiction and of labour law. Nie's legal status was highly ambiguous, because she fell through the gaps of the colonial jurisdictions of Fiji and Queensland due to her mobile, intercolonial status, and yet at the same time she was potentially subject to several laws in Queensland.[48] Was Nie subject to the *Masters and Servants Act* in Fiji or Queensland, to a private agreement ostensibly brokered in Fiji or later in Queensland, or to Queensland's *Pacific Labourers Act 1880*? For the editor of the *Queenslander*, the case essentially pivoted on her legal subjecthood: 'Finally the case was narrowed down to this point: When

[45] *Pacific Islanders Labour Act Amendment Act 1880* (Qld), items 2, 10.
[46] *Mackay Mercury and South Kennedy Advertiser*, 23 October 1880, 2.
[47] This quote is from Wood's cross-summons: Theodore Wood v H.M. Hall – Entering enclosed lands of J.P. Wood without consent of owner or occupier thereof. Case withdrawn.
[48] Thanks to Audrey Peyper here for this discussion.

the first agreement (made in Fiji) ended, was the woman [Nie] a free agent to make an agreement with anyone?'[49]

## 4.0 CONSENT AND THE POLITICS OF REFUSAL

While the *Queenslander* queried whether Nie was at liberty to make an agreement, the *Star* pressed for the extra charge of abduction as an infringement of her 'rights', thus asserting not only her humanness and human dignity, but her personhood. The newspapers had identified a critical question: did Nie possess full legal personhood? As Vatter and de Leeuw explain, 'Since Locke, the concept of person has been closely linked to the idea of a subjective natural right and, later, to the concept of human rights', yet personhood in law is problematic as it is both a legal fiction and also operates as a 'power dispositive, whose unquestioned adoption prevents human rights from being the kinds of rights possessed by "all human beings simply in virtue of their humanity".' [50] To what extent did a displaced ni-Vanuatuan woman in 1881, in a British colony, possess legal personhood or rights of any kind within the comprehension of the Tiaro Court of Petty Sessions, and therefore, on what basis was she or could she be understood to be a fully consenting liberal subject? Certainly, Nie was not a British subject at this point in time. Indeed, in 1881 the New Hebrides (Vanuatu), her home, was neither a colony of the British nor the French, with the two forming bilateral conventions and agreements signed between 1878 and 1926 to jointly rule the island in order to protect the lives and property of British and French subjects, with a condominium (agreement of joint dominion) in 1906.[51] If Nie were a British subject, she would technically have fallen under British law and protection, yet this was not the case. At this time, native peoples, the ni-Vanuatu, fell out outside of this hybrid Eurocentric legal system, and in the view of the imperial legal schema, she was 'stateless'. In this sense, while the editor of the *Star* may have been appealing to her natural rights, there could be no invocation of her 'rights' as conferred by British subjecthood: although she fell nominally under the British *Pacific Islanders Protection Act 1872* designed, as noted, for Pacific Islanders not within the Queen's dominions..

Full agreement to contract one's labour seemingly implies agency and sovereign personhood – that a person is freely choosing to sign up to a contract. As is well established, liberal contract theory and the liberal agenda of consent encodes a fantasy, or a legal fiction, of a liberal (male white) subject who can be fully sovereign. Thus, as Wendy Brown has argued, consent always masks a position of subordination in liberal discourse.[52] As is well established, liberal contract theory is in itself a cultural practice, and Carole Pateman's work on the contract has asserted that political right

[49] 'Wide Bay' above note 27.
[50] Miguel Vatter and Marc de Leeuw, 'Human Rights, Legal Personhood and the Impersonality of Embodied Life' (2019) *Law, Culture and the Humanities* 1, 4.
[51] Kate Stevens, '"The Law of the New Hebrides is the Protector of their Lawlessness": Justice, Race and Colonial Rivalry in the Early Anglo-French Condominium' (2017) 35(3) *Law and History Review* 595, 620.
[52] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995) 162–165.

and sex right are deeply connected. In her foundational work *The Sexual Contract*, she advances a feminist critique on the nature of the social contract as a tool to control womanhood, establishes how 'the original contract constitutes men's freedom and women's subjection', and elaborates on the way that social contract theories are based upon ideas of liberty and are inherently skewed to favour the sex-right of men.[53] Accordingly, it may well have been that Nie was treated by Wood as a wifely substitute in the sexual domain, part of their 'private' agreement, something that she may have consented to but to which she did not agree. A private verbal contract, which Wood maintained was brokered between them, threatened to place Nie in the space that women too often find themselves in – the unlegislatable 'private' realm.[54] Moreover, at this time, the position of European and non-European women was so delimited that it seriously compromised the possibility of agential consent. As wives were subject to coverture (or *feme covert*) in common law, for example, women were non-legal entities;[55] they did not possess legal personhood. Women's subjection to the marriage contract meant that upon marriage, their legal identity was subsumed to the husband, and they were unable to broker contracts, receive direct inheritance or purchase of land as independent persons without the husband's consent. Likewise, the wife's labour, including sexual labour, became the property of the husband. Were these the terms of subordination that Wood attempted to enforce on Nie, by claiming that she consented through a verbal agreement to continue to provide services until his wife returned from England?

Considering the subordination inherent then in liberal notions of consent, to consent to any form of labour contract, therefore, may be the last resort. Thus, consent remains a complex issue before the law, and the difference in standard between consent and agreement has been explored by feminists in the context of sexual assault and rape law. As Brown suggests, consent is rarely the same as full and voluntary agreement, which is what is assumed in contract law. Consent is, in other words, a lower bar to reach, one in which a subordinate subject gives over to a more powerful one, acquiescing to the latter's terms.[56] This is distinct from full and free agreement, which is presumed to occur as a result of bargaining and negotiation between equal sovereign/self-owning subjects.

Taking a further intersectional approach, the racialised terms of consent's fiction must be taken into account. Audra Simpson's recent interrogation of the liberal agenda of consent, and crucially the politics of Indigenous refusal to consent to the terms and imperatives of the settler state, is instructive here. As Simpson observes, 'Key to liberal governance is the notion of consent … that contracts one, via reasoned consent, into a political order that presumably will protect them and their interests in exchange for abstracting themselves out of their own

[53] Carole Pateman, *The Sexual Contract* (Polity Press, 1988) 16–18; Sophie Watson, 'Reviews: The Sexual Contract by Carole Pateman' (1989) 33(1) *Feminist Review* 105.
[54] On the 'the unlegislatable private realm' I thank Dr Camille Nurka for her helpful discussion.
[55] Alecia Simmons, 'Courtship, Coverture and Marital Cruelty: Historicising Intimate Violence in the Civil Courts' (2019) 45(1) *Australian Feminist Law Journal* 131.
[56] Personal communication with Nan Seuffert, April 2021.

specificity.'[57] In the eyes of the Tiaro Court of Petty Sessions and the Queensland state, Nie was able to give testimony, revealing a measure of legal personhood respected by the court, but simultaneously her legal personhood was highly delimited, as a mobile labourer, and a colonised ni-Vanuatuan woman who was nominally subject to the Polynesian inspector and measures of protective governance within the 1880 *Pacific Labourers Act*. Writing the theme of Indigenous refusal to the settler state, Simpson's work asserts that 'refusal can be a politics in itself' and her work attends to 'the ways in which Indigenous life refused, did not consent to and *still refuses* to be folded into a larger encompassing colonising … settler narrative' and the 'terms of the settler's legal eye'.[58] Nie's determination to walk off Virginia plantation, therefore, as I argue, was a sovereign and embodied act and ultimately a dangerous act of refusal. It was a striking repudiation of the order of the *Masters and Servants Act*, of Wood's fictive verbal contract that purportedly held her, as well a refusal of the legislative and economic terms of the settler state in Queensland, which rested on the exploitation of Pacific labour.

## 5.0 'The Spectre of Slavery': Indenture, Exploitation and Protection

The *Star's* arresting headline of 'A Female Slave in Queensland' is a reminder that the Nie case in 1881 was viewed at the time within the larger context of the ongoing kidnapping and exploitation of Melanesian people in New Guinea, the New Hebrides (Vanuatu) and the Solomon Islands, and the heated debate and legislation over this abuse of the system by a powerful planter class. The spectre of slavery hung heavily over this case along with questions of consent. Only twenty years previously (1861), across the Pacific Ocean, the American Civil War was fought over the issue of slavery. At this time, concerns around unfree labour and of an emergent Pacific slave trade was much at play due to the unscrupulous traffic in Pacific Islanders with the British *Pacific Islanders Protection Act 1872*, or the 'Kidnapping Act'. In her speech to the houses of parliament in February 1872, the Queen indicated the introduction of laws to counteract the 'nefarious practices' in the South Sea Islands that were 'scarcely to be distinguished from Slave Trading'.[59]

Humanitarians in London, Queensland and the Pacific fought hard against the 'new' Pacific slavery that appeared to be prevalent in places such as Queensland, Fiji and New Guinea. Indeed, as the cotton priced crashed during the American Civil War, planters from the United States as well as Britain urgently sought out new places to take their capital, and Queensland and Fiji saw an influx of experienced planters, some of whom were very well accustomed to slave labour. The areas around Brisbane contained former planters from the Southern United States, and West

[57] Audra Simpson, 'Consent's Revenge: An Inquiry into the Politics of Refusal' (Lecture delivered at Anthropology Colloquium Series, Department of Anthropology, Stanford University, 13 March 2017) < https://anthropology.stanford.edu/sites/g/files/sbiybj9346/f/2016-17colloq_simpson.pdf>.
[58] Audra Simpson, *Mohawk Interruptus*: *Political Life across the Borders of the Settler State* (Duke University Press 2014) 22.
[59] United Kingdom, *Parliamentary Debates*, House of Lords, 6 February 1872, vol 209, col 4 (The Queen's Speech).

Indian planters from Jamaica, Demerara, and St Kitts. For instance, 'Robert Muir of Beenleigh came from Louisiana', and Mackay-based John Ewan Davidson had 'learnt his avocation in Demerara, Jamaica, Mauritius, Honolulu and Louisiana before embarking on operations in Queensland'.[60]

Nie may well have come under the jurisdiction of the 1872 British Kidnapping Act, but there was no way to prove she was a slave, although her situation met many of the criteria as she found herself to be without a contract, with no importation papers to Queensland, was transported, and was forced to work indefinitely without her pay. The Kidnapping Act was passed to outlaw blackbirding in the Pacific, yet it did not resolve the political question as to whether the labour trade was slaving, and, in practice, as Reid Mortensen notes, it proved largely unworkable in Australian courts.[61] Likewise, Banivanua Mar has observed of the Pacific labour trade, 'Although it was clear that forced recruiting and vicious assaults had taken place, the boundaries of the legal prohibition of kidnapping had been blurred enough to allow for reasonable doubt.'[62] The law was so compromised by racial inequality that by 1895, the Queensland public was 'unlikely to accept the conviction of a white man for a crime against Islanders'.[63] When the *Star* argued for the additional charge of abduction and invoked the spectre of slavery, it sought to enliven the 1872 Kidnapping Act, and yet this additional charge, it seems, was never at issue before the Tiaro court.

## 6.0 Gendered Violence, Oath and Testimony at Court

Rarely in the archives do we hear the voices of Melanesian women who moved either voluntarily or by force from their islands to the colony of Queensland, and it is difficult to trace their lives, which appear only fleetingly in the records. Such moments in the archive are arresting 'testimonial transactions', in the words of Gillian Whitlock, a crucial part of our postcolonial and cultural history, which when unearthed possess a 'volatile currency'.[64] Such testimonial moments in a colonial court by Pacific woman such as Nie are political and performative acts, in a legal space that was also a cross-cultural cultural contact zone. When Nie declared 'I said, "No"', and that she did not make any 'promise' to stay on with Wood at Virginia, she spoke out in a court that was a highly unfamiliar space, a legal space that, while offering her the opportunity to testify, could at the same time reproduce the 'dynamics of colonisation and dispossession'.[65] The severe trauma experienced by Islander women and the questions around their ability to give testimony in colonial court in the face of abduction and sexual abuse, clear or probable, is rarely addressed. Such moments of recorded testimony and evidence thus require critical and close

[60] Saunders, cited in Gerald Horne, *The White Pacific: US Imperialism and Black Slavery in the South Seas after the Civil War* (University of Hawai'i Press 2007) 5.
[61] Reid Mortensen, 'Slaving in Australian Courts: Blackbirding Cases, 1869–1871' (2000) 4 *Journal of South Pacific Law* 1.
[62] Banivanua Mar above note 11 at 142.
[63] As above.
[64] Whitlock above note 4 at 1.
[65] As above at 9.

postcolonial readings, and we must be alert to the limits of testimony, and the cultural violence inherent in the colonial legal system, where some violence could be normalised and permitted as legal, while other acts would not.

Clearly Nie spoke and understood some English and was deemed to have enough 'religious knowledge' that she was able to take an oath, and to speak for herself in her 'own proper person' in the Tiaro court. This was not always the case. In 1869, the Brisbane court did seek to prosecute offenders. A young woman, Naguinambo, or 'Mary' a thirteen-year-old girl from Tanna (part of the southern islands of Vanuatu), had been taken by force from her father by the defendant Ross Lewin, on board one of the *Spunkie*'s recruiting tours, and forced into the hold with chained captive male Islanders.[66] She was abused by Lewin, who then took her with him to Queensland. Lewin was charged with rape, a capital offence at that time, and a scandalous trial ensued. Reporting on the case in January 1869, the *Brisbane Courier* noted that Naguinambo had been kept by Lewin as a 'concubine' for six to eight months in the colony and was now working on 'one of our largest plantations'.[67] Despite the additional evidence of two male Maré witnesses (from the Loyalty Islands off New Caledonia) who had been on the boat, the case was dismissed as Naguinambo could not give testimony, for, as the *Courier* stated, 'she has remained a heathen and a savage' and 'it was found impossible to devise a form of oath under which she could be examined in our law Courts'.[68] As Naguinambo 'did not know the nature of an oath the case was dismissed'.[69] The *Courier* reported the 'most brutal conduct towards the girl … [yet] she has no standing in the eye of our law, and can make no complaint in her own proper person in the courts'. Interestingly, there was interpreter provision in the *Oaths Act 1867* (Qld), but Naguinambo was not provided with one. Nevertheless, the notion of 'consent' was also invoked, however spuriously. As the *Courier* noted, ultimately, as to the question of whether the act was committed against her consent the Bench ruled there was 'no case to go to a jury'.[70]

Islander women, like Aboriginal women, had very little protection under law, and even less so when they were sexually assaulted in the private white homes where many of them worked. As Larissa Behrendt has asserted, 'consent to sexual relations' was 'perpetually assumed,' and white male colonists presumed 'they could do as they wished with Aboriginal women without fear of interference from British law'.[71] For colonised women, as Berhendt concludes, 'Free and open consent [was] absent

[66] 'The Police Court' *Brisbane Courier* 13 January 1869, 2.
[67] As above.
[68] As above.
[69] As above; Doug Hunt, 'Hunting the Blackbirder: Ross Lewin and the Royal Navy', (2007) 42(1) *The Journal of Pacific History* 43; Clive Moore notes that the *Oaths Act 1867* (Qld) 'denied non-Christians the right to give sworn evidence': see Clive Moore, 'The Pacific Islanders' Fund and the Misappropriation of the Wages of Deceased Pacific Islanders by the Queensland Government' (2015) 61(1) *Australian Journal of Politics and History* 1, 5. Naguinambo would have been declared 'incompetent' under section 37 of the *Oaths Act* (Qld) due to 'defect of religious knowledge or belief or other cause'.
[70] 'The Police Court' above note 66.
[71] Larissa Behrendt, 'Consent in a (Neo)Colonial Society' (2000) 15(33) *Australian Feminist Studies* 353, 365.

within the colonial context, [rather] "consent" was given within constraints and the legacies of colonial sexual exploitation.'[72]

The terms of imported female domestic Islander labour were messy, and they were not covered by laws which were typically crafted around male agricultural labour. Sensitivities around sexual abuse were heightened over the next decade, and by early 1880 legislation did require that women who enlisted must be 'accompanied by their *bone fide* husbands, though this was often disregarded, for Queensland provided a convenient haven for eloping couples'.[73] In 1876 in Fiji, a new Native Ordnance had determined that Fijian women could no longer be contracted out to labour after this date – they had to stay in their villages.[74] Perhaps one reason that Wood had been able to engage Nie in Fiji was that she was not indigenous to Fiji but from the New Hebrides and was therefore 'free' to engage in contract labour. She would have been a relatively cheap domestic labourer, as Melanesians were paid less than Indian servants, and women would likely have been paid less than men. In the midst of this, the traffic and movement of Pacific Islander women between various islands and colonies, without representation – blackbirded and, in other cases, indentured – was clearly rife. But the institution of Polynesian Inspector in Queensland meant that in some cases women such as Nie were represented through the aegis of protective governance.

## 7.0 Conclusion: Court Finding by 'Mutual Consent'

Ultimately, the Tiaro Court of Petty Sessions made a finding 'by mutual consent', but this consent had little to do with Nie or her remarkable testimony. The court decided in favour of Polynesian Inspector Hall on the grounds that 'every Polynesian must serve three years *in Queensland* before being able to act without the knowledge or sanction of the inspector', which meant that Nie had not been in Queensland long enough for her to have been legally able to make a contract independent of the Inspector's office. Wood's cross-summons was withdrawn, and he was subsequently fined £1 16s 4d for assault. Then, 'By mutual consent [Nie] was transferred to another employer, with whom she will have to serve up to three years in this colony, in addition to the two years served in Fiji.'[75]

The 'mutual consent' referred to by the court was not between Nie and Wood, nor between Nie and the Inspector Hall, but between Wood as employer and the Inspector as the government representative. While the court acknowledged that there had been an assault on Nie's person, the question of whether or not she had consented to stay with Wood was irrelevant because her legal personhood was superseded by her subjection to the the office of the Polynesian Inspector. She was certainly not regarded as a 'free agent to make an agreement with anyone' and was promptly

[72] As above.
[73] Saunders above note 14 at 99.
[74] Francis Steel, 'Servant Mobilities between Fiji and New Zealand: The Transcolonial Politics of Domestic Work and Immigration Restriction, c 1870–1920' (2018) 15(3) *History Australia* 519.
[75] 'Theodore Wood v. H. M. Hall – Entering enclosed lands of J. P. Wood without consent of owner or occupier thereof', Case withdrawn; 'Wide Bay' above note 27.

placed under the *Pacific Islanders Labour Act*, and under Hall's authority, for a further three years at another plantation.

Nie's determined action to walk off Virginia plantation, to say 'no' to Wood, to refuse to consent to his terms, and to declare this refusal in the colonial court momentarily confounded the settler legal narrative of both contract and protection and stands as a sovereign act of refusal. What became of Nie? Did she leave her family or children behind at Star Peak, or in Fiji? Did she ever return home to Star Peak? It is likely that she lived out her life in one of Queensland's large plantations. The trail goes cold, and I have not yet found her in the archives. Nie was one of some 4000 Melanesian women who became part of a mobile Australasian network of labour. Displaced, she was apparently alone in Queensland, though may have connected with others from Star Peak and Vanuatu, forming new bonds and family.

In this article, through the case of Nie, I have explored the contours of consent as it was legally imagined within this particular colonial Queensland case, and the value of a feminist and intersectional approach is clear. Although the court case became high profile, and despite the sensational headlines of the 'female slave' in Queensland, in the end neither slavery nor kidnapping laws were enlivened. Instead, in line with Banivanua Mar's observations, Queensland's colonial jurisdiction over Pacific Islanders was formulated in more fine-grained and even quotidian ways, in the small police courts, lower courts such as the Tiaro Court of Petty Sessions, where, as Banivanua Mar notes 'a constant process of reformulation that took place every day'.[76]

Further, a contest between rights and protection can be observed in the case that ensued. While the *Bundaberg Star* had argued for Nie's 'rights', it is apparent that the discourse of rights and the ability to consent by virtue of full legal personhood was highly divergent to that the legal discourse of protection and the delimited personhood availed therein through the *Pacific Islanders Labour Act*. Labour laws were infused with a growing and racialised protective governance system designed to ameliorate violence and abuse of workers, but ultimately served to bolster the plantation economy by permitting its continuity. Rather than possessing 'rights' as a sovereign subject, the trajectory of protective governance ensured that Nie was legally made akin to a 'ward of the state' and was thus pulled into the 'legal embrace' of the settler state, and placed on another plantation.

The Nie case presented the Tiaro court with an immense problem of legal ambiguity and came down to questions of personhood and protective governance embedded in the labour laws themselves. In court, it was decided that the purported verbal and private contract between herself and Wood was not lawful. Indeed, Wood's claim to Nie may have been more straightforward under law if Nie had been his wife; as the husband, he would have subsumed her legal personhood in total, with its associated entitlement to her physical and sexual labour. In this sense, Nie's lack of consent would have been complete. As a Pacific female labourer, however, Nie was thought to have at least delimited bargaining power, which is why the court could pose the salient question of whether she was 'a free agent to make an agreement with anyone'.[77]

[76] Banivanua Mar above note 10.
[77] 'Wide Bay' above note 27.