

alternative law journal

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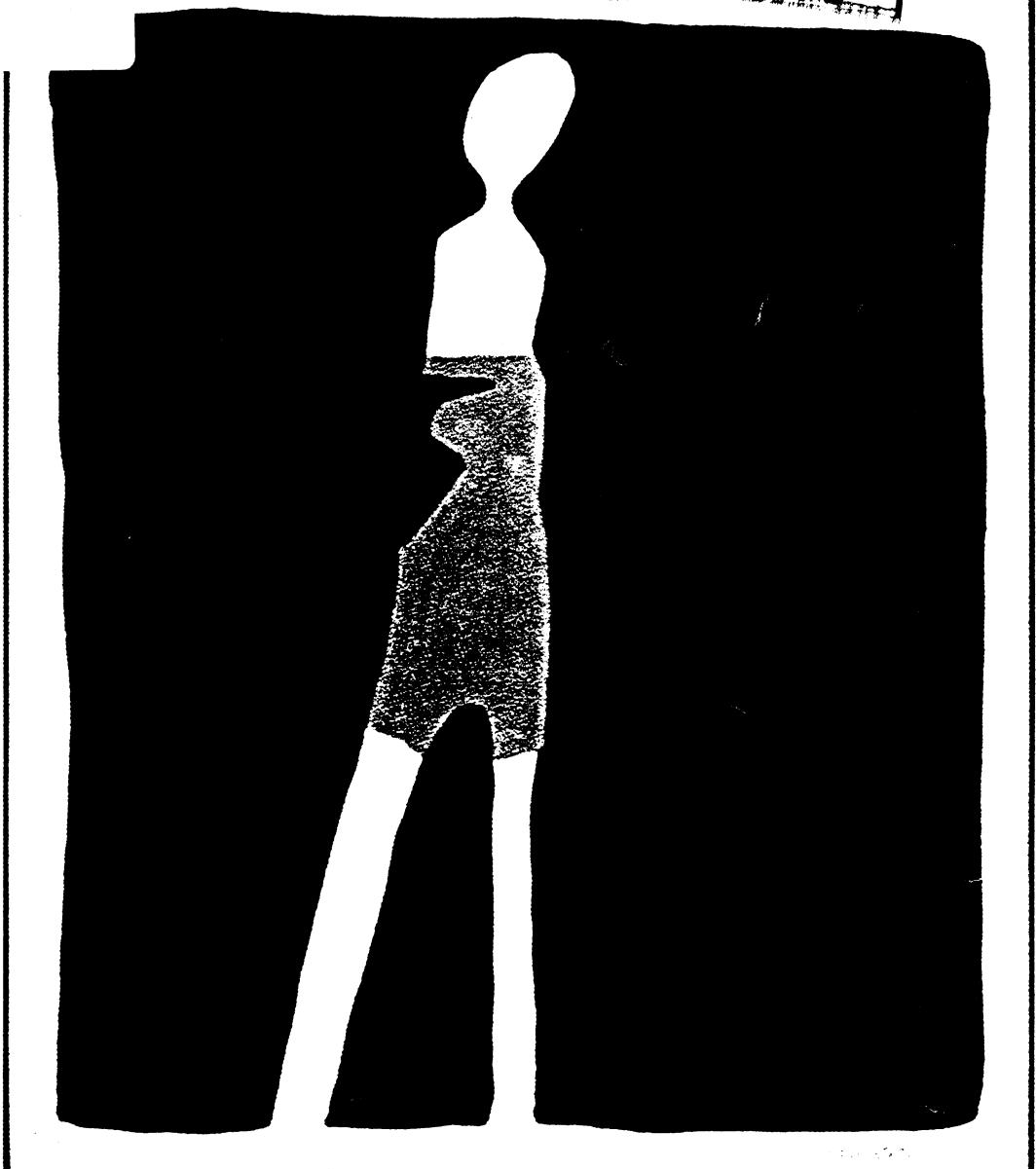
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OPINION

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Aboriginal Law in Australian Courts ‘Black History on White Paper’

(attrib. Doreen Kartinyeri, Ngarrindjeri Woman)

Having survived attempted genocide and ethnocide, Aboriginal and Islander peoples in Australia now have a range of opportunities to assert their inherent community rights and reclaim and protect their cultural heritage. Land rights and native title legislation provides avenues for the reclamation of traditional lands and the exercise of (sometimes severely limited) control over outsider access. Heritage legislation permits the declaration and protection of sites and objects of religious/cultural significance.

But at what cost?

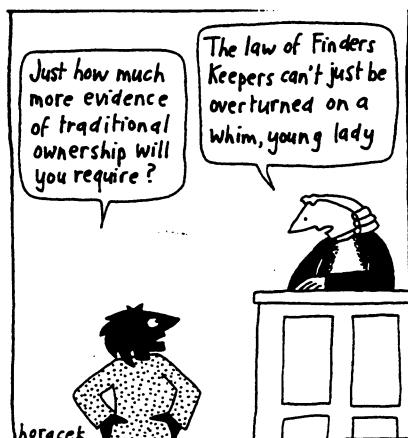
This is the question which inspired the theme for this issue of the journal. This belated offer of protection, recognition and reclamation does not represent an unalloyed good. Indigenous peoples are cast as supplicants; they must submit a claim for the recognition of their heritage. The claim must be formulated as determined by the imposed legal regime and dealt with according to that regime's notions of fairness and due process. The existence of a traditional link between the claimant and the land or site must be established, by them, to the satisfaction of a non-Aboriginal tribunal.

Can the evidence for that link be fully appreciated by the tribunal? Archie Zariski's article questions the ability of one culture to appreciate and evaluate appropriately the traditions of an ‘other’. Andrew Turk's article proposes the use of Geographical Information Systems to convey the richness of meaning in Aboriginal native title claims.

Another concern about evidence of traditional ownership or interest and responsibility is that some or all of it may be restricted information. This issue has recently been raised dramatically and controversially by the Hindmarsh Island Bridge conflict in South Australia, the subject of Maureen Tehan's article. Revealing secrets and sacred knowledge may risk desecration or even destruction of the very sites whose

protection is being sought and may undermine the Law itself. The obligation to reveal it, therefore, is antithetical to the stated aim of protecting traditional cultures. To succeed in a native title or heritage protection claim would be a Pyrrhic victory if the cost is the destruction of the Law of that place.

Thus a difficult choice is posed for traditional custodians: to allow breach of Dreaming/Law by destruction of a sacred site, or to seek to protect it by explaining its special nature and, in so doing, run the risk of breaching that



Dreaming/Law themselves by revealing secret information. This is a decision which is not always taken in favour of seeking legal protection, contrary to the claims of the mining industry and others. Custodians have taken their secret knowledge to the grave rather than risk destruction of the Law by their own hand.

Michael Dodson, in the lead article in this issue, argues that a proper interpretation of the High Court's decision in *Mabo* (No. 2) would not impose full disclosure requirements on native title claimants. In his article on the Commonwealth's heritage legislation, Nathan Hancock proposes a reinterpretation to protect the confidentiality of secret/sacred information.

Mark Harris's article takes us beyond the procedural and evidentiary demands, inviting us to question the very

attribution of meaning by the Australian legal system as contrasted with the indigenous Law. What is the interest that is the subject of native title and heritage disputes (as they too often become)? In the context of land claims the meaning of the land is so different between the two cultures that non-indigenous Australians struggle to express its significance to Aboriginal peoples. We typically rely on such contrasts as: land belongs to Europeans but indigenous peoples belong to the land; that traditional custodians have responsibilities to their land and to sites in particular. We might similarly say that interests opposing land and heritage claims are concerned to exploit the land at stake while the indigenous claimants are concerned to protect the land from desecration. Harris raises questions such as these about significance and meaning in the context of ‘artefacts’, contrasting the meaning given to them by scientists with their meaning to indigenous people. The general theme is also raised in the introduction to McKee and Hartley's article (which also serves as a companion piece to Tehan's, introducing an alternative perspective on the Hindmarsh Island Bridge affair).

What we hoped to do in this issue was to challenge ourselves and our readers to question the prevailing liberal approach to indigenous cultural rights; to recognise the continuing insidious relegation of Aboriginal heritage to supplicant status, reinforcing the power and ultimate victory of the invading system and risking the ultimate destruction of the original peoples.

Meredith Wilkie and Mark Gregory
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Indigenous culture & NATIVE TITLE

Michael Dodson

The recognition of native title is being restricted by use of unrealistic and culturally insensitive criteria.

Native title is about the recognition of indigenous culture; but how much culture and what things do you need to show before you get recognition?

Under some statutory land rights schemes Aboriginal people have been called upon to give very detailed accounts of their spiritual beliefs and their relationship to claimed country. For example, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the *Land Rights Act*), the statutory criteria require claimants to satisfy a definition of ‘traditional owner’ which requires that they prove they are a ‘local descent group’ with ‘common spiritual affiliations’ and ‘primary spiritual responsibility’ for sites in land.¹

This Act was based on a model of land ownership which was assumed and explained by anthropologists and then approximated into statutory language. Although the criteria have been interpreted very liberally by the courts and the process of land claims has to some extent been ‘Aboriginalised’,² there is no doubting the level of detail about Aboriginal culture that the claimants have to reveal for a claim to succeed under the *Land Rights Act* makes the process intrusive.

When the High Court recognised native title and the Commonwealth Government enacted the *Native Title Act 1993* (Cth) (‘the NTA’) in response, the Australian legal and political system had an opportunity to do things differently.

Native title is an opportunity to create a less intrusive system because instead of creating criteria and making the Aboriginal system of law fit into them, native title is a recognition of indigenous law. Native title is given its content by the laws and customs of indigenous peoples and not the other way around.

In this article I examine some aspects of the treatment of indigenous culture in the legal development and administration of native title. Unfortunately, initial indications reveal a trend towards restricting the recognition of native title through unrealistic and culturally insensitive criteria.

How much detail is required to prove a native title claim?

The relevant issue in an exclusive claim for communal native title is: what rights with respect to a territory vest in the group?

In determining a claim by an indigenous group (on the basis of exclusive connection) the issue is the existence of the system of laws and customs. Given a system exists, it will determine the existence of an identifiable group and it will also determine the nature of the group’s connection to the territory. Once the authority of the system is established, the common law draws a circle around the territory in which it operates and declares that the capacity to determine land allocation within that jurisdiction vests in the landholding group alone. The group

Michael Dodson is the Aboriginal and Torres Strait Islander Social Justice Commissioner.

is the owner and *its* system of law the authority about the allocation of rights in the whole area.

In *Mabo (No.2)*,³ the High Court did not require definite findings of fact about the workings of the Meriam people's land tenure as between individuals and subgroups within the broad claimant group. Despite Justice Moynihan's findings that some aspects of Meriam law and custom were too uncertain to be declared, the High Court made a declaration that the Meriam people's communal native title was good against the whole world.

In accord with *Mabo (No.2)*, it should no longer be necessary to prove all the intricacies of indigenous law and custom relating to land to obtain a declaration of native title rights. Of course, claimants will want to put laws and customs in evidence to show the existence of the broad system and its coverage. But evidence of a particular rule will not generally be put forward to get common law recognition for that rule. Instead, it will be presented to gain common law recognition of the system of rules of which that particular rule is part.

Some commentators and litigants have suggested that applicants must prove all the intricacies of the laws and customs regulating the internal property relations of the group to establish communal native title. For example, in argument about directions in the Miriuwung and Gajerrong peoples' claim, the State of Western Australia argued that the applicants must provide evidence of:

- (i) the laws and customs and systems of land tenure from which native title is said to be derived;
- (ii) the composition and structure of land owning groups;
- (iii) variations in the rights, functions and responsibilities of the different groups and members of the groups;
- (iv) cultural aspects including ceremonies, ritual and mythology

...

Only the first of these listed subjects is relevant for a declaration of communal native title against the Crown. Further, the only significance of 'the laws, customs and systems of land tenure' is that these exist and that these specifically connect the tenured group as a whole to the land under claim. The internal workings of the systems are relevant only to the extent that these prove the existence of the system as a whole. Claimants must prove the structure of the claimant group. However, if the 'composition' of the group is taken to mean its component parts or its membership, for reasons detailed below, I reject paragraph two as a criterion. Paragraph three is irrelevant. It goes to the internal operation of the system of laws and customs not the existence of the system. The fourth criterion suggested by the Western Australian Government is offensive. Once the claimants establish that a system of law exists, why must the system be put on trial? Indigenous peoples should not have to endanger our cultural heritage by holding it up for public inspection and possible media ridicule to assert our property rights.

The group holds native title

A similar issue about the detail required for proof of communal native title arises in relation to the definition of the claimant group. In the same way that claimants should only need to prove the existence of a system of laws and customs and not its content, I believe that claimants need only prove the rules for defining the group and not its precise membership.

In *Mabo (No.2)*, the named holders of native title rights over the Murray Islands were the 'Meriam People'. It was

not necessary to prove the identity of each of the Meriam People. The evidence suggested that this designation refers to an identifiable group, and the Court saw it as unnecessary or undesirable to specify the membership of the group any further. Presumably, the Court realised that individual membership of the group would be constantly changing because of birth, death and perhaps marriage and adoption.

Native title is a communal title. Proof of the existence of a community, rather than its exact membership, is the only matter at issue.

The claimant group for native title does not have to conform to a predetermined anthropological construct. It can be a family, a clan, a tribe, a language group, a number of language groups or any combination of these, provided its rules for membership are relatively certain. The claimant group need only show that it is the same group as that which had a connection to the area before the assertion of British sovereignty or that it takes from that group according to indigenous law and customs.

Unfortunately, this is not the interpretation being applied by some members of the judiciary. Justice Olney, for example, issued practice directions in *Towney v Fahey & Ors* (the Peak Hill Claim) which required the applicant to provide:

- (i) name;
- (ii) date of birth;
- (iii) place of birth;
- (iv) place of residence . . .

In some cases the difference between proving the terms of membership of the group and the actual membership may be insignificant. In others, the difference may be critical. Provided the court can identify some mechanism for determining who is in and who is out of the claimant group, lists of individual names are unnecessary to a determination of native title.

Proof of historical connection

Judges and commentators have said that claimants must prove their connection to land existed at the date of the assertion of sovereignty. However, this requirement is affected by inferences that mean it cannot be taken literally. Forensic presumptions that operate in all trials of fact affect this element of the proof of native title.

The New South Wales Supreme Court gave an indication of the requirements for proof of historical continuity of native title in a case where a person charged with illegally taking abalone asserted a native title right to fish as a defence.⁵ In that case there was a gap in evidence between the date to which the appellant could prove his connection to an Aboriginal group and the date of the assertion of sovereignty. The appellant argued that a presumption of continuance operates to fill in the gap. According to the appellant, the presumption arises when the existence of certain facts operates retrospectively as evidence of a former condition.

In native title claims, this inference means that claimants have to prove their connection to land back in time as far as they can with the available material. The material is likely to be the memories of the elders of the group and historical and government records. Unless some evidence is adduced to show that the connection did not exist before the time to which it can be proved, then the court will infer that it did.

Justice Kirby's comments about the inference are significant:

... it is next to impossible to expect that Aboriginal Australians will ever be able to prove, by recorded details, their precise genealogy back to the time before 1788 ... If, therefore, in this case the only problem for the appellant had been that of extending the proved use of the land by his Aboriginal forebears from the 1880s back to the time before 1788, I would have been willing to draw the inference asked. In more traditional Aboriginal communities the inference will be quite easily drawn. But, even in this case, it would have been common sense to draw it.⁶

What seems like common sense to Justice Kirby is not necessarily the universal view. In the same case, Justice Priestley set extraordinarily high standards of proof for claimants. Among other things, Justice Priestley suggested that indigenous claimants must prove their biological descent back before 1788.

This standard, if it is required to be met without the aid of presumptions, is likely to be unattainable for most indigenous peoples. It amounts to a denial of native title rights.

Justice Priestley appears unmoved by his own prognosis that the consequence of the requirements that he identifies is likely to be that:

... the time that has passed since then and European settlement of the country have caused the foundation of native title to disappear in many places; the result is that at the present time it is likely to be difficult, particularly in the more settled parts of the country, for any Aboriginal group to fulfill the rather onerous requirements of proof identified by the High Court in *Mabo* (*No.2*) ...⁷

Here, Justice Priestley claims that it is history that has caused dispossession. This is an old manoeuvre by which decision-makers such as judges and politicians deflect responsibility for their present choices to the immutable facts of the past. Setting an unnecessarily difficult standard of proof and then attributing indigenous peoples' inability to meet it to a loss of laws and customs is unacceptable.

Decision makers cannot pass on the responsibility for failing to accommodate indigenous connection to land to history. It is a present and pressing responsibility that belongs to governments, judges, lawyers, and the rest of us right now. Impossible requirements of proof of native title will prevent the recognition of native title rights where these plainly exist according to our systems of laws and customs. Australia's international obligation is to guarantee indigenous peoples the enjoyment of our culture, not to pretend it does not exist through the application of unrealistic standards of proof.

Abandonment of native title

Justice Brennan posits that native title can be lost where a group no longer observes the laws and customs that foster its connection to land.⁸ However, all the majority judgments in *Mabo* (*No.2*) acknowledge that indigenous laws and customs can change without affecting the continuance of native title.⁹ Justices Deane and Gaudron take this proposition further than Justice Brennan. They suggest that, where the members of an indigenous group have abandoned their traditional laws and customs but have remained on the land, their native title will survive.¹⁰

This contrast between the judgments indicates that a connection or a special relationship to the claim area can be maintained in at least two ways — through observance of traditional law and through physical presence.

Physical connection

The *NTA* does not make it an express requirement that claimants show physical connection to land. Despite this, some people have assumed that native title requires continuous physical presence on land. The imposition of such a requirement is a denial of indigenous culture.

The connection that claimants are required to have at common law should reflect the connection required by indigenous law. It should be proved as a question of fact in each case. The common law should not set arbitrary requirements for continuous connection when native title is supposed to get its source and content from our laws and customs. It is vital that we do not allow the common law to create new barriers to recognition of native title.

Many times in my experience in the Northern Territory I have seen that Aboriginal people can go away (or be taken away) from their country and still maintain the laws that foster their connection with it. One vivid example I remember of connection preserved through long absence from country was in one of the Warlpiri land claims in the early 1980s. One of the witnesses was a woman in her seventies who had survived the Coniston Massacre in 1927. After the massacre she had been taken away and did not return to her country until the preparation for the land claim. The woman was to give evidence about part of the claim area that was inaccessible by vehicle so she was taken in a helicopter to this place she hadn't been for 50 years.

The witness was an old lady, she was blind and partially deaf but when they sat her down and they told her where she was, there was no mistaking her knowledge of country. She sat on the ground facing west and described, in precise detail, the landscape that everyone else could see. She said the names of rocks and trees and told the stories and songs that contain the law for the place. For two hours the lady explained the land and its meaning at every point of the compass. She explained how, even while she was far away from the place, her people had made her learn the songs and the stories so that she could understand and explain that it was her country. The evidence was video taped and played back to the Aboriginal Land Commissioner. The Commissioner was 'glued to the television' as the witness demonstrated her connection to country in a way that was moving and beyond challenge.

Indigenous law will not always require traditional owners to maintain a *physical* connection with their country in order to prove their connection with it. Therefore, the common law must not impose such a requirement. I know of a mob in the Northern Territory who are the traditional owners of a region that includes a small island. These people have powerful dreamings associated with that island but they are forbidden to go there. In their law, they have dominion over the place and its surroundings but they are not permitted to make physical connection with it. A common law requirement for physical connection would clearly go against these people's law.

The requisite connection to land is not a physical connection but a juristic one. Connection in indigenous law can be expressed and maintained through spiritual observance, through memory, through kin and through information given and received from others with a common connection. The imposition of a common law requirement for physical connection would be a repudiation of the principle that native title derives from indigenous law.

Change in laws and customs

Although the judges in *Mabo (No.2)* acknowledge that customs can change, in even postulating the 'abandonment of culture' it seems the law does not have a sophisticated and fair notion of culture and tradition. The law must allow indigenous cultures to create meaning. It must not confine indigenous expression to the pristine and inaccessible past.

Indigenous culture, like every other culture, is dynamic. It changes. It adapts to and incorporates new things. It takes on new forms and explains new events. It reinvents places and things in the image of the cultural system.

By what criteria will the judges assess whether a group's culture and tradition has adapted organically or whether it has changed so radically that it has been abandoned?

The authenticity of a culture cannot be measured by the purity of its cultural products or the quaintness of its technologies. If culture can be measured at all, it must be measured against the living experience of the people who identify with the culture. Culture is a group's whole way of behaving, how they eat, how they share, how they argue, how they think, how they interact with other cultures.

Our cultures are not dead, dying or confined to museums. A culture does not die while someone remembers its stories, while someone asserts their cultural identity, even while someone starts to learn about their culture. To administer native title fairly the courts must face up to the reality of our continuing cultures. Judges must not deny indigenous property rights by positing constrictive and outmoded definitions of culture.

Future Act procedures

It is not just the courts that have a responsibility properly to accommodate indigenous culture when administering native title. The National Native Title Tribunal is the agency created specifically to deal with native title claims and related issues. The Tribunal makes important decisions about access to certain procedures and rights created under the Act.

For example, the NTA provides a right for indigenous claimants and native title holders to negotiate about future Acts on land. This is an important protection for cultural and property rights and it is also an aspect of the exercise of indigenous self-determination. The right to negotiate can be removed under the NTA but only in specified limited circumstances.

One of the criteria for removing the right to negotiate is that the proposed Act must not cause a major disturbance to the land.¹¹ The Tribunal's current construction of this criterion does not accommodate indigenous culture and means that the provisions do not operate in the manner in which they were intended. Deputy President Seaman of the Tribunal said that 'major disturbance' is to be judged by the standards of the broader community and not by reference to the affected indigenous people's point of view.

This is unacceptable.

The concept of native title purports to recognise our laws and customs and it must be consistent with our laws and customs. Likewise the application or withdrawal of rights conferred in the NTA should be done in response to indigenous peoples' understandings. The rights at stake are indigenous rights, defined by the laws and customs of indigenous

people. It is native title land, not vacant Crown land, that is affected.

Deputy President Seaman sought to justify his decision by saying that the areas involved were 'very large open areas in very remote country'.¹² This phrase exemplifies the importance of perspective in assessing the impact of an Act on land. From whose vantage point is land remote? As one observer has noted, for the people in the Tanami region in the western Northern Territory, 'Canberra is a very remote place indeed'.¹³

In administering native title we must be responsive to the fact that indigenous people may not see the world in the same way as everybody else. Native title holders are entitled to have 'major disturbance' assessed in the context of what they understand those words to mean.

A test based on the standards of the broader community undermines Aboriginal culture and ignores crucial characteristics of indigenous relationships with land. It is a Eurocentric and inappropriate approach. It will cause resentment and animosity among indigenous people affected.

Conclusion

Native title provides the promise that indigenous law and custom will be recognised for what it is and not forced to conform with some court or statute-derived prototype. To fulfill this promise, the system for recognising and administering native title must be attuned to indigenous peoples' ways of seeing and doing things.

Even in *Mabo (No.2)*, when the High Court first recognised native title and the promise of a new relationship was born, indigenous conceptions were not fully accommodated. The Court declaration gives the Meriam People exclusive rights to their lands but it does not deal with their rights to the sea. At the time the declaration was seen as a benchmark of the kind of rights to which other indigenous peoples could aspire but, compared to the way Meriam People understand *ged* (land) and *gedira i gur* (the land's sea), it is a compromise.

For Meriam People there is no separation between land and sea in terms of property. The declaration is an imperfect accommodation of Meriam understanding of 'home' because it artificially divides what the Meriam see as continuous space. To declare and protect native title rights in terms that accurately translate indigenous connection to land, the courts and other administrators must be attentive to indigenous realities and innovative in their expression of them.

If native title is seen as the challenge for the law and administrative institutions properly to accommodate indigenous difference, then native title also becomes an opportunity for genuine reconciliation. The native title process could be an opportunity for non-indigenous people to learn about our ways of looking after country in a context where Aboriginal people do not feel threatened or pressured. It could be a process that is empowering for Aboriginal people and it could be structured in a way that allows people to feel proud of the culture and law that they choose to present to a court or tribunal.

References on p.14.

Presenting Aboriginal knowledge

Andrew Turk

Using technology to progress native title claims.



The High Court, in *Mabo (No 2)* (1992) 175 CLR 1 held that although Australia is a settled colony it was not *terra nullius*. Hence the common law doctrine of native title was applicable when British sovereignty was extended over Australia. The Crown could extinguish native title providing the appropriate legislation or executive act embodied a clear and plain intention to do so. The central question is whether the regime of land control established by the act in question, or the disposition/alienation of the particular land, was inconsistent with the continued enjoyment of native title. Hence a major aspect of the determination of a native title claim revolves around whether extinguishment has occurred with respect to the particular area of land under consideration. Information concerning the nature of the occupancy claimed by a group of Aboriginal people will also be necessary to prove that the claimant group is the one with native title rights. A large variety of information types must be analysed and the collated results presented during the claims process. Much of this information will refer to locations in space and hence the efficient and equitable consideration of native title claims requires the use of spatial information in the most effective way possible.

Information needs relating to native title claims may fall into one or more of the following categories:

- information to support common law claims and their determination — in the cases where particular Aboriginal groups decide to take that option;
- information to assist in the negotiation/arbitration of land claims under State legislation and tribunals;
- information needed to facilitate the mediation of a claim under the National Native Title Tribunal (NNTT) system;
- information needs of the National (or State) Tribunal (or court) to facilitate management and mediation of individual cases and the maintenance of appropriate records of past cases;
- information relevant to the negotiations between Aboriginal people and some other group desiring some rights/uses regarding the land in question (for example, minerals exploration). This will probably occur after native title has been approved for a particular piece of land;
- in the event of an agreement being reached for some specific use of a piece of land, an information system could assist in the ongoing management of that use and how it meets any conditions which may be established under an agreement for that use;

information relevant to the effective long-term management of an area of land in terms of land use, environmental management, social issues etc.; and

information regarding potential regional agreements relating to native title and other issues affecting indigenous Australians.

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He acknowledges the contributions made to this research project and the preparation of this article by Kathryn Trees and Meredith Wilkie (Murdoch University), Associate Professor George Benwell (University of Otago), Dr William Mackaness (Edinburgh University) and Dr Werner Kuhn (Technical University Vienna). Some funding assistance was provided by the Australian Research Council.

In each of these situations an information system can be used to facilitate the process. Indeed, a sequence of versions of an information system can operate to fulfil the needs of a claimant Aboriginal group at various stages; for example, an information system developed to support a native title claim may be subsequently adapted to facilitate land use management. The information system can be progressively developed to include different sorts of information (for example, from legal to environmental) while still utilising the results of the earlier stages. Various stake-holders in native title claims have already started using information systems for preparation and assessment of evidence, including geographic information systems (GIS).

Integration of the information from various stake-holders is a potential aspect of claim mediation by the NNTT (or arbitration by Federal or State courts or tribunals). The procedures must ensure a proper separation between shared databases and information which must be kept confidential for cultural reasons as well as for the purpose of negotiation strategy. The required information systems must also be capable of including a wide variety of information formats and be accessible by various types of users from different cultural backgrounds.

Equitable access to information is critical, though difficult to achieve. It may be facilitated through the effective use of meta-data, that is, listings of the information held by various government agencies and procedures for its acquisition. Financial resources are also important since most agencies charge for copies of data. However, the cost of spatial data is likely to be substantially less than other costs associated with land claims procedures. It is also critical that appropriate technical expertise is used so that all potential sources of information are identified and acquisition and collation of the information is managed in an efficient and effective manner.

Maps to present Aboriginal knowledge

Within native title negotiation and arbitration procedures there is usually a requirement (or desire) for Aboriginal groups to display aspects of their knowledge (cultural heritage). Maps can play a significant role in this process. Their design can draw upon both western and Aboriginal mapping traditions and may also be informed by literature regarding the nature of mapping by other indigenous peoples.¹

There are, however, a number of issues regarding the use of maps to present Aboriginal knowledge, including the following:

Technical issues

Technical issues concerning the design and preparation of maps include: how to combine data from different sources; design of appropriate symbols; use of satellite images or aerial photographs; and how quality assessments (map accuracy, completeness, currency of data, etc.) may be made, certified and communicated.

Use of traditional or hybrid designs

There is potential for the use of Aboriginal maps or 'hybrid' maps (combinations of Aboriginal and Western styles). Conventional (Western style) maps may also be based on the interpretation of information contained in traditional Aboriginal maps and other graphics. Non-Aboriginal users may well need considerable assistance in interpreting such maps. This approach also raises questions of the legitimacy of using traditional styles (or even 'hybrid' ones) outside the normal Aboriginal cultural framework.²

Richness of representation

Map makers need to find effective ways to depict traditional concepts, including claim boundaries. There is great potential for the limitation of underlying concepts through impoverished representational form. This may diminish the importance of Aboriginal concepts including articulation of spiritual beliefs. For instance the Tindale maps used only solid and dashed lines to depict language group boundaries of more or less certainty. Davis and Prescott use a definition of boundaries as lines and frontiers as zones.³ This is somewhat more useful but is still unnecessarily constrained by representational form. Ballantyne and Sutherland discuss the use of 'fuzzy' boundaries: because exact positioning of the boundary is not possible and/or not well known; or in order to disguise the exact location of secret/sacred sites.⁴

Cultural sensitivity

The potentially sensitive nature of Aboriginal cultural material necessitates detailed consultations with relevant individuals and groups and may preclude its recording or use in electronic or hard copy form. Michaels discusses areas of sensitivity and suggests approaches to appropriate recording of sensitive information.⁵ He points out that a design may have both public and private versions and that the level of secrecy given to a design may vary for people from different locations (or at different times) and access may be restricted to either men or women. For these reasons it is important to take great care in creating any permanent (hard copy) representation of traditional information. This impacts strongly on the use of traditional Aboriginal mapping techniques and/or the use of images in multimedia presentations. Where such information is stored electronically in an information system, an elaborate set of data protection measures should be implemented to restrict access and to ensure security of the data. The comprehensive technical solutions developed to address these issues in other application domains (for example, banking) need to be applied in a manner which suits the nature of specific Aboriginal organisations. Protection of hard copy outputs is more difficult, especially once the information is tendered as evidence before a court or tribunal.

Content flexibility

How can Aboriginal knowledge be used effectively without compromising the confidentiality of secret/sacred information or inhibiting legitimate negotiation/arbitration strategies? Often Aboriginal groups will wish to provide as little of this sacred information as possible, especially in the context of negotiations. They may, however, decide to release more information to encourage further negotiation in the hope of avoiding legal proceedings, which are not only time consuming and costly, but require the release of more detailed cultural information. Under these circumstances, it is preferable if the content and format of information to be presented can be altered quickly and conveniently.

Power to explain or convince

Use of maps and other graphics may be a powerful way to engage non-Aboriginal participants in negotiation. This may be facilitated by finding ways of integrating multimedia material with traditional map presentations, including animated sequences. In this way cogent graphics can be a strong concrete element in a successful mediation process. Non-Aboriginal stake-holders may be aided in understanding the belief systems which form the basis of native title and thus be encouraged to negotiate more meaningfully.

Admissibility of maps as evidence

Considerable questions arise concerning the admissibility of maps and graphics in legal procedures, especially where the rules of evidence apply. Provision of an audit trail of map information sources and certification of map 'quality' by mapping experts may assist.

Some of these problems may be addressed through the use of GIS.⁶ The Central Land Council in the Northern Territory has utilised GIS technology for a number of purposes for several years and various other Aboriginal bodies (for example, Kimberley Land Council, Western Australia) are currently developing systems for recording of cultural heritage information and the preparation of material for native title claims.

What are geographic information systems?

Computerised geographic information systems (GIS) are combinations of hardware, software, data, procedures and people assembled for the capture, storage, retrieval, analysis and display of spatially and temporally referenced information.⁷ The most important operation is an 'overlay' function which combines different kinds of data at the same location. The software consists of a database to store and retrieve spatial data and a graphical presentation (mapping) package to render the data intelligible to the user.

GIS are used in science, for example to collect, analyse and present environmental data for a particular area. They are also used in administration, for example to maintain property registers or to dispatch emergency vehicles. As mentioned above, GIS are also starting to be used by some Aboriginal organisations for recording of cultural heritage information, for responding to land use proposals (for example, mining exploration licence applications) and for the preparation of native title claims.

GIS were invented in the 1960s when it became apparent that computers could be used to collate spatial data and produce maps. There was much excitement about the potential of computer graphics for cartographic applications, and the first map rendering packages appeared. After several years of experimentation in the 1970s, an increasing number of GIS projects were undertaken in the 1980s and a commercial GIS market became established. The major origins of GIS applications lie in administrative and planning departments of public administrations and in science.

The market for applications of GIS technology is rapidly growing far beyond the original user community of engineers, planners and scientists. While highly educated and specialised technical personnel still represent the majority of GIS users, some social, technical and economic developments in society require that decision makers, politicians, citizens and consumers also have access to GIS. Among these developments are car navigation systems helping drivers find their way in foreign cities or countries, and environmental information laws giving citizens a right to information about the quality of their environment. Based on estimates that in the order of 80% of all decisions in businesses and administrations have spatial aspects, one can expect a further expansion.

Recent research and development has extended the range of analysis functions available in GIS. GIS can incorporate modelling and sophisticated visualisation capabilities, including image analysis and animation. The rich functionality available in current GIS provides wide opportunities for developing multi-dimensional maps for use in mediation and

arbitration of native title claims. All stake-holders should ideally have equitable access to this technology.

GIS and native title

GIS can play a number of key roles in supporting mediation and arbitration of native title claims, including the following:

Type and location of spatial data (meta-data system)

Spatial data sets relevant to native title determinations exist in a large number of government agencies (as well as some corporations and research institutions). To use this information it is first necessary to know the types of information which are potentially available and which agencies are likely to hold the information. The next step is to determine if appropriate information exists for an area of interest and its quality, format, cost, etc. Details of contact people/numbers and ordering procedures are also required. This information about existing data sets is called meta-data. Access to data held by State Government agencies may be best arranged through co-ordinating bodies or specialist agencies, such as the Western Australian Land Information System (WALIS).

Display of spatial information

At a comparatively simple level, GIS can be used to assemble and display point, line and area data. This information can include tenure, land use, tribal and claim boundaries, as well as supporting contextual information such as topography, roads, hydrology and place names (indigenous and non-indigenous).

Representing the distribution of abstract phenomena

At a second and more conceptual level, GIS has the capacity to convey interpretations of the landscape or other abstract phenomena such as the distribution and nature of sacred sites falling within the claim area. While the mechanics of such representations are relatively straightforward, it is appreciated that the availability of information may be restricted and that its interpretation is complex.

Analysis and display of spatial and temporal relationships

The functionality typically found in GIS would fall into three areas: presentation, query and 'what if' scenarios. On the presentation side, the GIS would allow control over access, selection and ordering of information, and its symbolisation. On the query side the system would support a variety of spatial questions of the form 'what and where', such as 'what can be found at this location?', 'where is this feature located on the map?', 'show land ownership abutting this claim', 'list all sacred sites within 100 km of this site'. 'What if' scenarios might display land use options related to potential negotiation outcomes. An example of the display of a temporal relationship might be a series of maps (possibly animated) showing the distribution of Aboriginal inhabitants over the claim area at different times and including related events that affected the demographics of the population (such as migration as a consequence of the granting of a pastoral lease or the introduction of the equal wage).

Recording and explanation of traditional representational forms

GIS also support the storage and management of electronic images. With due respect to cultural considerations,⁸ this allows for the inclusion of images of places, people, paintings, etc as well as legal documents. This may be used to provide easy access to images of Aboriginal representations connected with the claim area. By combining conventional

maps with traditional forms it is possible to use GIS to show the relationship between paintings and designs and their importance with respect to the landscape. Designs often convey the relationships between traditional concepts (Dreamings) and sacred sites and also bear topological links with the landscape. Though not applicable in every case, by making explicit the link between the painting and the terrain, it is possible to convey the sacredness of a site and link its general location to topographic features and cadastral (land tenure) boundaries.

Collection and dissemination of information in the field

Another area of application is the collection and provision of information 'in the field'. GIS on a portable laptop computer, coupled with advances in precise location using global positioning satellites, afford a means of recording phenomena of all types at known locations and a means of conveying the spatial aspects of any decisions to people in remote regions. The need to disseminate the results and to carry consensus to all parties is a critical and vital step in any negotiated settlement. Given that Aboriginal culture is historically oral, the presentation of information in 'meaningful' ways (such as maps and images) at the actual locations may be critical to its understanding and acceptance.

A variety of these uses of GIS could apply to the preparation, submission or negotiation of native title claims by Aboriginal groups. GIS may be used (off-line) to produce hard copy (paper) maps depicting traditional knowledge (or other information) or the maps may be viewed directly on the computer screen by individuals, or by a group via a projection system.

Conclusions

More effective use of spatial information (either as maps or GIS) is important for the efficient and equitable consideration of native title claims. It is also critical that the forms of spatial representation are adequate to express the underlying concepts (for example, the nature of Aboriginal boundaries). For this to be successful it is important that map designs be grounded in the fundamental nature of native title and hence connected with the concepts, traditions and needs of indigenous Australians. Maps need to express the integrated relationship between:

places	not just an arbitrary configuration of physical locations but an assemblage of places connected by meanings associated with traditional belief systems;
people	the specific group/s of people who possess the meaningful relationship with (and are responsible for) those particular places;
procedures	the laws and customs which link the people to the places and sustain their unique relationship (and hence native title);
presentations	the practices and physical manifestations by which the laws and customs and meaning relations between the people and places are expressed (and hence maintained), such as ceremonies and paintings.

At least some of the current constraints on effective presentation of Aboriginal knowledge via maps can be overcome

through the use of GIS. Such an approach offers Aboriginal groups much greater flexibility regarding what information is to be provided and how it is displayed. This could reduce some of the problems related to restrictions on producing hard copy representations of secret/sacred cultural information. Aboriginal groups could assemble complex cultural information in a GIS (with appropriate security measures). During native title negotiations they could decide which information to retrieve (and how to present it) then display this as an ephemeral image only. Once it had performed its role in the negotiation process the image would disappear and the digital file created for its display could be destroyed or stored in a secure manner within the system.

Such an approach requires that Aboriginal groups are able to make sophisticated use of this technology through acquisition of suitable hardware and software and appropriate training programs. This may seem overly optimistic; however, a number of factors indicate that it should be achievable, including:

- significant improvements in the ease-of-use of some current GIS software (for example, ArcView);
- the fact that some Aboriginal people have decided to work in this field and have therefore developed considerable expertise; and
- the enthusiasm with which several Aboriginal organisations have embraced this technology and their willingness to involve non-Aboriginal people (with appropriate technical skills) in the collation of cultural information.

The procedures discussed in this article can help facilitate genuine negotiation by assisting non-Aboriginal stakeholders to understand the basis of native title without infringing the secret/sacred nature of Aboriginal knowledge. The technology can help to represent these concepts in a manner appropriate for all participants without the need for compromise on ethical issues. More research and development is needed to enable this potential use of GIS to be made practical and effective.

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A tale of two cultures

Maureen Tehan

Hindmarsh Island Bridge: protection requires the disclosure of secrets.

In 1989, the proposal to build a bridge joining the island known variously as Hindmarsh or Kumarangk to the mainland created some interest and concern around the island and the town of Goolwa. Who could have predicted that, six years on, the proposal would become the focus of a national debate about regimes for ascertaining, valuing and protecting Aboriginal cultural heritage? Both politically and legally, the *Hindmarsh Island Bridge* case stands as an example of the inability of the Anglo-Australian system to comprehend Aboriginal cultural interests. It also provides clear evidence that the dominant political and legal system has yet to find a language and means of according any significant recognition to indigenous systems of law, regulation and belief which does not operate to appropriate those systems of law, regulation and belief.

This article considers some of the significant issues that the case raises. It is not intended to be an exhaustive analysis of them.

Stories of dominance and colonisation

A dominant narrative emerges from the case — that of the dominant system, of legislative regimes involving determinations about what constitutes Aboriginal sites and the extent of their significance, ministerial discretion, the rules of natural justice and requirements that 'the heritage' be tested according to the rules of the dominant system in order to establish its 'truth'. This narrative operates to construct and define Aboriginal cultural heritage according to its dominant world view, using that view to give it meaning or to disclaim and reject it. A second narrative is that of indigenous people claiming protection for their cultural heritage under these regimes, trying to characterise their system of beliefs in a manner that can be heard and understood within the dominant system notwithstanding its transformation as a result of colonisation and dispossession. These two divergent and irreconcilable narratives provide the basis for both exploring the case and attempting to understand it.

The dominant story can be told 'factually'. In 1989 a small private company with the fetching name of Binalong Pty Ltd, controlled by Thomas and Wendy Chapman, began planning for a major development on Hindmarsh Island which lies at the mouth of the Murray River in South Australia. The development consisted of a marina complex consisting of 320 marina berths, and residential, business and service facilities which would dramatically increase the scale of activity on the island, creating jobs in its construction phase and transforming the small, sleepy island into a high activity boating holiday paradise. The only car access from the mainland to this island paradise was via a single cable-drawn ferry. So an essential element of the development, and a condition of some approvals for the marina, was the building of a bridge from the mainland to the island. The project was supported by the State Labor Government and the bridge was to be constructed

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by the Government with a contribution from Binalong Pty Ltd, and subject to a satisfactory environmental impact statement.

Binalong Pty Ltd indicated a concern about Aboriginal interests affected by the project by 'seeking the services of an anthropological authority, Mr Rod Lucas' who had difficulty in establishing *reliable* genealogies and apparently could not reconcile Taplin's mission genealogies from the 1860s with those of Berndt and Tindale collected almost 100 years later.¹ The Department of Environment and Planning (with some involvement from Binalong Pty Ltd) also commissioned an archaeological report from Dr Vanessa Edmonds for the purpose of locating, recording and assessing Aboriginal sites on Hindmarsh Island. Following these reports the project was given the go ahead.

The marina project proceeded, with the first phase completed by 1993. Approval for the following phases of the marina was subject to the commencement of work on the bridge.

There was some opposition from local residents who were not keen to change the character and amenity of their environment. This opposition in the form of demonstrations resulted in work on the bridge ceasing in October 1993. Indeed the State Liberal Opposition did not support the project and indicated before the December 1993 State Election that it would stop the construction of the bridge.

In early 1994 the newly elected Liberal Government commissioned and received advice from Samuel Jacobs, QC about its obligation to proceed with the bridge. The advice was to the effect that the Government was bound by the agreements made by the previous Government in relation to the construction of the bridge. Failure to proceed would result in a compensation claim of \$20 million. A further report was then prepared by Dr Neale Draper. Even though this report confirmed the existence of Aboriginal sites on both sides close to the proposed bridge, these provided insufficient grounds for the Government to halt the bridge project. Some of the subsequent events were described by Justice O'Loughlin:²

... the matter was beginning to gain momentum. The Federal Court had injunctioned protesters, restraining them from interfering with the bridge works; the South Australian Minister had made a Ministerial statement in the House on 3 May 1994 advising that he had that day issued an authorisation allowing damage to Aboriginal sites to the minimal extent necessary to allow the construction of the bridge; work had recommenced on the site and protesters had been arrested on 11 May.

Late in 1993 the Lower Murray Aboriginal Heritage Committee and the Aboriginal Legal Rights Movement expressed concern about the impact of the proposed bridge on Aboriginal sites in the area in correspondence to the Federal Minister for Aboriginal Affairs. Further correspondence with the Federal Minister did not occur until April 1994, after the South Australian Government finally indicated its view that the bridge construction should proceed. That correspondence sought an emergency declaration under s.9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the *Heritage Act*). The Minister is empowered to make a declaration for the protection of areas provided she or he is satisfied that the area is a significant Aboriginal area and is threatened with injury or desecration. Such a declaration can only be made after receiving and considering a report and any representations attached to it and any other relevant matters.³ The Minister made the emergency declaration (for 30 days)

on 12 May 1994 and extended the declaration for a further 30 days on 9 June 1994. During the period of the emergency declaration, Professor Cheryl Saunders prepared a report for the Minister pursuant to s.10(4) of the *Heritage Act*. On 9 July 1994, the Minister made a declaration for 25 years prohibiting a range of acts in the area including acts done for the purpose of constructing a bridge in any part of the area.

It was not until the correspondence of April 1994 and Professor Saunders' report that the issue of secret and special knowledge of, and interests in, the area by women (referred to in almost all the relevant materials as 'women's business') was raised publicly and, it seems, formed the basis of the Minister's decision.

The Chapmans sought to review the Minister's decision and Professor Saunders' report in the Federal Court. Justice O'Loughlin ultimately found for the Chapmans on two main grounds as detailed below.

The Minister unsuccessfully appealed this decision to the Full Federal Court which confirmed the reasoning of O'Loughlin J.⁴

But there's more to this story, as considerable activity occurred between the two Federal Court decisions. On 16 June 1995 the South Australian Government established a Royal Commission to enquire:

[w]hether the 'women's business', or any aspect of the 'women's business' was a fabrication and if so:

- (a) the circumstances relating to such a fabrication;
- (b) the extent of such fabrication; and
- (c) the purpose of such fabrication.⁵

The justification for the Royal Commission claimed by the Government was some 'allegations that the secret "women's business" is a fabrication' and that '[t]here was significant disagreement within the South Australian [A]boriginal communities regarding the "women's business" and the allegations'.⁶ The immediate event leading to the establishment of the Royal Commission was the appearance on television on 5 June 1995 of Doug Milera who said, 'I think the whole issue of the women's belief was fabricated'⁷ and claimed to have played a part in the fabrication. The television appearance was the culmination of political and media discussion about the possibility of 'fabrication' that first emerged in late 1994 and relied on the views of a number of Ngarrindjeri women that they did not know anything about the 'women's business'.

On the day the Royal Commission was announced, the Commonwealth Minister for Aboriginal Affairs announced that a new inquiry under the *Heritage Act* would be conducted by Justice Jane Mathews once the Full Court of the Federal Court handed down its decision. This inquiry began in January 1996. The Minister also announced a review of the Act to be conducted by Elizabeth Evatt.

The Royal Commission conducted its hearing in the latter part of 1995. Ngarrindjeri people supporting the application to the Commonwealth Minister did not give evidence. The Commission reported on 19 December 1995. It found that:

the whole of the 'women's business' was a fabrication [in order] to prevent the construction of a bridge between Goolwa and Hindmarsh Island.⁸

The second narrative in this case centrally challenges the dominant system. The chronological description of events may not vary markedly, but the process, meaning and significance of those events may. As with the chronology set out

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above, aspects of this narrative rely on publicly available material.

Groups of indigenous people occupied Hindmarsh Island and the Lower Murray area prior to the arrival of European sealers in the region in the early 1800s. The area now known as South Australia was physically colonised in 1836, although, according to the dominant legal system it was claimed by the British upon the acquisition of sovereignty over New South Wales in 1788. As a result, the legal fiction that the Crown acquired radical and beneficial title to all lands in the colony of New South Wales, based on the notion of *terra nullius*, applied to the Lower Murray region and provided the basis for the systematic dispossession of the original inhabitants of that land.

The Royal Commission referred to some aspects of this physical dispossession. Prior to 1836, sealers 'forcibly abducted Aboriginal women from the coastal regions to become wives and labourers'. During this time there were two waves of smallpox which 'had an enormous impact . . . upon the population'. Venereal disease, introduced by the European population, also had a severe impact on the indigenous population. By 1840 Hindmarsh Island had been leased to Europeans and the impact of this advancing European frontier and disease resulted in the decline of the indigenous population. Some Ngarrindjeri remained on Hindmarsh until early this century when they were removed to the Port McLeay Mission at the eastern end of Lake Alexandrina. Port McLeay Mission was established in 1859 by George Taplin. 'Taplin's main intention was . . . to [c]hristianise the Aboriginal people and he therefore saw little place for indigenous behaviour and beliefs in the future development of the people.' Indigenous people were forcibly moved to the mission and although some remained on the Island, ' . . . by 1910 the remaining few were moved to Point McLeay'.⁹

The operation of the *Aborigines Act 1911* (SA) gave the chief protector of Aborigines extensive powers to restrict or force the movement of indigenous people at the mission resulting in an absence from their traditional lands, break-up of families and transformations in traditional practices and traditional knowledge. As a result of changes in the *Aborigines Act* in the 1940s some indigenous people were able to leave the mission resulting in a further dispersal of the Ngarrindjeri people, a trend accelerated with the abolition of these restrictive laws in the 1960s. While many Ngarrindjeri people still live at Point McLeay Mission, now known as Raukkan, many also live elsewhere. The forced movement and subsequent dispersal of Ngarrindjeri people will have had an effect on knowledge retained and passed on. This might also impact on who receives the knowledge and in what form. All these factors have a transformative impact not only on the knowledge itself but also its transmission.

One major point emerging from this narrative is the power exercised by the dominant system over the lives of the Ngarrindjeri. All aspects of their lives became regulated by the mission and the protector with the backing of the legal system. Conversely the Ngarrindjeri had little power to assert themselves in the face of enforced removal from their land, subsequent dispersal and cultural destruction wrought by decisions backed by the power and force of the dominant legal system. When five barrages were constructed joining Hindmarsh Island to various other pieces of land including the mainland between 1935 and 1940 and the approaches for the ferry service in the 1950s, there was no discussion or consultation with Ngarrindjeri. If there was opposition to

these developments around the island, it could not find a voice within the dominant system much less take steps to prevent the development. There simply was no means of doing so.

When the first proposals for the Hindmarsh development were made there was some consultation with Aboriginal people both by the developers Binalong Pty Ltd and the Government through the Aboriginal Heritage branch of the Department of Environment and Planning. These and subsequent consultations concentrated largely, although not exclusively, on archaeological material. Ensuing events suggest these consultations might not have been adequate. Certainly as time went on different views were expressed by Aboriginal people about whether the proposal should proceed, the significance of the area and the basis on which the bridge might or should be opposed. Although the consultations produced some opposition to the construction of the bridge, they did not reveal the 'women's business'. It was not until Professor Saunders conducted her consultations that the women were involved. However, the Ngarrindjeri sought to use the only means currently available to them to prevent construction of the bridge, that being the dominant legal system's heritage protection legislation. When the State legislation failed to provide any protection — the State Minister authorising the destruction of Aboriginal sites necessary for the construction of the bridge — the Ngarrindjeri sought protection under the *Heritage Act*. The failure, to date, of that legislation to provide protection of Ngarrindjeri interests confirms the main thrust of this narrative: the subordination of Aboriginal interests to those of the dominant system and the inability of the dominant legal system to adequately understand and protect those interests because it intersects with them only within its dominant paradigm.

Some major events

It is not possible to explore all the major events in this long-running case. However, a number of significant events emerge from these narratives and require further examination. Some are legal and some go beyond the strictly legal but take on significance because of their relationship with the operation of the dominant legal system.

The Federal Court decisions

A number of parties brought actions in the Federal Court challenging the validity of the Minister's (and later Professor Saunders') decision-making processes. The major parties were the Chapmans and the Minister. Although there were many grounds for the challenge, the Court ultimately found only two problems with the process resulting in the Minister's 25-year protection declaration: the notice advising of Professor Saunders' inquiry was inadequate, and the Minister had not *considered* the women's restricted representations attached to her report as required by s.10(1)(d). Professor Saunders had attached these representations in a sealed envelope, with the rider that they be read by women only.

The notice of the inquiry was said to lack specificity. It did not identify with detail the area of the inquiry, even though this was known to the Minister. In any event the notice was also found deficient because it did not detail 'the perceived desecration . . . that the bridge would have upon the spiritual and cultural beliefs of Aboriginal women . . .' Of course, at this point, Professor Saunders had no detailed knowledge of these matters. The justification for O'Loughlin J's view was that ' . . . [a]n ordinary member of the public should have been able to read the notice in the local press and

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thereby determine from the information that it contained whether the matter was one of interest to him or her'.¹⁰

The second major problem was that the Minister did not *consider* the representations attached to Professor Saunders' report but relied on the advice of a female staff member to inform him of the contents of these representations and, in particular, to advise him that the material in the sealed envelope supported the findings of Professor Saunders. The Court did not find that the Minister must read every word of every document; but there must be 'substantial personal involvement'¹¹ by the Minister. This was especially so in relation to the material in the envelope because of the emphasis he placed on the 'women's business' in making his decision. To some extent the finding of O'Loughlin J on this point might be confined to its facts as he found, on the basis of both written and oral material before him,¹² that the staff member's advice was inadequate to allow the Minister to *consider* the attachments. A fuller briefing of the Minister may have satisfied O'Loughlin J's requirement for substantial personal involvement, although, by implication, such a briefing should involve sufficient detail (and substance) of the beliefs to support the declaration. This in itself could amount to a revelation of what should be secret.

The Minister's failure to *consider* the representations could have been remedied by the Minister reconsidering the representations. The inadequacy of the notice meant that the applicants were denied natural justice and that the Minister lacked jurisdiction to make the declaration.¹³

The Minister appealed this decision unsuccessfully to the Full Court of the Federal Court. For the purpose of this article it is sufficient to say that, in three separate judgments, the Full Court upheld the reasoning of O'Loughlin J.

In relation to both these issues —namely, the adequacy of the notice and the Minister's *consideration* of the representations — there is an emphasis on revealing information or knowledge in order that it might be scrutinised, evaluated, weighed against competing interests and decided on. The framework within which this occurs is the dominant legal system and an examination of decisions suggests that the dominant system can find no alternative means of assessing such claims.

A fundamental assumption underlying this approach is that Aboriginal heritage claims based on relationships to land are capable of transparent evaluation and assessment by the dominant legal system. Such an assumption might be based on one of two notions: either that the difference in these relationships is not so great as to prevent adequate consideration by the dominant legal system or, to the extent that they are different, they should be subjugated to the analysis and practices of the dominant system.

This conclusion can be drawn from the finding that details of the 'women's business' should have been advertised. While O'Loughlin J did suggest that there may be difficulty in providing detail where the information was secret,¹⁴ his Honour was in no doubt that enough detail was necessary so that the general public could know the nature of the significance of an area and the nature of the threat to it.¹⁵ Similarly, his Honour was in no doubt that in this case the Minister should have been made aware of the detail of the 'women's business' in the envelope. O'Loughlin J indicated that while Aboriginal claims to confidentiality can be maintained, a time will necessarily come when there must be some disclosure so that a claim can be tested. Black CJ, on appeal, suggested that Aboriginal groups when making claims need

to understand that there is an 'obligation to consider all representations [as] part of the process'.¹⁶

By inference then it appears that if Aboriginal people seek to claim protection of their cultural heritage under heritage legislation, they impliedly accept the 'rules' of such protection demanded by the dominant system. If this is not accepted, then the protection provided by the system cannot be claimed. Where places of significance are based on beliefs, an integral part of which is secrecy or which is gender specific secrecy, this requirement for disclosure may itself have the effect of diminishing or destroying aspects of the heritage that is sought to be protected. The strict application of the rules and procedures of the dominant system, therefore, may operate to prevent protection of heritage even where legislation is specifically expressed to be for the purpose of such protection as is s.4 of the *Heritage Act*.

The Royal Commission

The Royal Commission¹⁷ was required to consider and report on issues relating to the alleged 'fabrication' of the 'women's business' which formed part of the basis for the Federal Minister's declaration preventing construction of the bridge. The Commission interpreted 'fabrication' as involving 'the deliberate manufacture of secret "women's business" where it did not previously exist'.¹⁸ The Commission conducted its inquiry 'along the lines of a trial'¹⁹ with witnesses giving evidence and legal representatives permitted to question them. The standard of proof applied by the Commission 'was proof on the preponderance of probability with due regard to the importance of the particular issue being determined'.²⁰ These issues were identified as 'important economic consequences follow[ing] the decision to halt the construction of the ... bridge and [that] the findings of this inquiry may affect the reputations of some persons involved'.²¹ The proponents of the 'women's business' did not appear nor were they represented before the Commission. In spite of this, the Commission proceeded to make a number of key findings on the questions before it, the most important of which was that the 'women's business' was fabricated.

It is not possible to provide any comprehensive review of the Royal Commission Report here. However, its findings and conclusions raise some significant issues about the way that the dominant legal system assesses Aboriginal cultural heritage. The Commission's findings on the issue might be briefly summarised: the proposal to build a bridge was widely publicised and 'could scarcely have escaped the attention of persons with an interest in Hindmarsh Island'; in 1990 archaeological and anthropological surveys disclosed no Aboriginal sites 'and no extant mythology'; there was no indication of Aboriginal objections to the bridge until October 1993; after that Aboriginal objections were based on archaeological sites; during the early part of 1994 stories about the spiritual significance of the land and 'women's business' began to emerge; there were some meetings at which men suggested the existence of 'women's business'; the 'women's business' was unknown and unrecognised in the literature, was unknown to other Ngarrindjeri women and unknown to the 12 Ngarrindjeri women who gave evidence to the Commission;²² if the 'women's business' existed some people would have known about it; and the public statement of Doug Milera about fabrication should be accepted, even though he had since retracted the statement.

Not only did the Commission not hear from the proponents of the 'women's business', it placed little emphasis on the absence of that evidence. Significant emphasis was

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placed on the lack of any recorded information about the 'women's business' by ethnographers without any analysis of the limitations of such ethnographic work — for example the influence on Taplin of his christianising zeal or the fact that both Tindale and Berndt worked at a time when there had already been massive cultural disruption — and in the face of inconsistency in other ethnographic information (about genealogies). Inferences were drawn from the absence of earlier opposition to the bridge or widespread knowledge of the 'women's business' without alternative explanations being explored. Emphasis was also placed on the absence of Aboriginal opposition to the building of the barrages and ferry installations in the 1930s and 1950s with no exploration of possible explanations for this. Finally and most importantly, the history of dispossession and dispersal of Ngarrindjeri people was referred to by the Commission but appeared to play no part in its conclusions. There was no consideration of the impact of that history on the transmission and transformation of cultural heritage as a basis for the beliefs entailed in the 'women's business' nor of this history as an explanation for the lack of earlier opposition.

As a forensic exercise firmly based within the dominant legal culture, the Royal Commission may be subject to critical comment. As a process for discovering and evaluating Aboriginal cultural heritage it is an example of the inadequacies of that legal culture in giving a voice to Aboriginal defined 'truths', values and meanings.

Conclusion

Conflicts between protection of Aboriginal heritage and development projects, or even low impact, inconsistent uses of land, will inevitably arise for resolution as they have in the case of the Hindmarsh Island marina development and bridge. How these might be resolved while still maintaining the integrity of Aboriginal cultural values and heritage remains at issue. The different narratives surrounding the *Hindmarsh Island Bridge* case, the manner in which these have been played out in the legal system and the privileging of the dominant narrative suggests that current regimes and processes for the protection of Aboriginal cultural heritage, within Aboriginal terms, are inadequate. It is difficult to foresee how the dominant system can provide protection when its mechanisms for protection ultimately require intrusions into that heritage with little or no place for Aboriginal voices. Perhaps the Evatt Review of the *Heritage Act* might provide some answers.

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‘TRUTH INTEGRITY & a little gossip’

Alan McKee and John Hartley

Magazine coverage of Aboriginality and the law in Australia

What's the 'Alternative' in the *Alternative Law Journal*? Certainly it is an alternative journal about the law; but this article suggests another alternative, one which becomes apparent when inter-disciplinary work is invited. Written from a position within a department of Media Studies, from a perspective which might be labelled Cultural Studies, this consideration of coverage of Aboriginal people and issues in Australian magazines involves several quite distinct understandings of 'law'. As has been made clear by previous writing in the area, the coverage (and invention) of crime stories has formed an important part of the construction of Aboriginality in Australian media.¹ In this sense, Australian criminal law is closely caught up in media representations of Aboriginality. Similarly, introduction of legislation around native title gained much coverage in 1993 and 1994; another example of law relevant to Aboriginality.

But more than these commonsensical examples, those which might instantly appear to be of interest to a law journal (alternative or otherwise), there are other laws. In addressing Aboriginality, in particular, there are at least Two Laws (as Cavadini and Strachan suggest in their 1981 documentary of that title); the term is a meaningful one in anthropological vocabularies. In talking about Aboriginal Australia, law is not only 'Australian legal institutions which have affected [Aboriginal] lives in a wide variety of ways', nor does the application of the term to Aboriginal cultures imply 'Aboriginal modes of action which are analogous to legal institutions'. Rather, the introduction of the term 'law' to Aboriginal cultures, a process effected within the academic disciplines of anthropology and ethnography, has produced quite particular histories for that word. Gathered together in this 'law' are areas of culture quite distinct from those institutions understood to function as white law:

Aboriginal Law is religious in character. At its centre lie songs, myths and rituals which follow ancestral events. The right way to perform a ceremony is a matter of law . . . ancestors are also credited with setting down the proper form of institutions such as marriage, or formal aspects of the relations between brother and sister.²

This anthropologically derived use of the term 'law' is obviously distinct from the contemporary (secular) understandings of settler legal institutions. In this context it makes sense to say: 'A law, if it was anything at all, was surely . . . something to which one might anchor one's spiritual life'.³ It is the way in which anthropological discourses have mapped Aboriginal culture which give Aboriginal 'law' such dimensions.

These different 'laws' — different understandings of 'law' — are closely tied up with representations of Aboriginality in settler culture. To these can be added another. Writing in the area of Cultural Studies suggests models for understanding the dynamics of cultural systems; and in doing so, the term 'law' resurfaces, with yet another set of meanings.

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This article addresses cultural texts — magazine articles — and the way in which they construct ideas of Aboriginality. In discussing the way in which texts contribute to the formation of senses of culture, it is useful to make a distinction between 'law formation' and the 'catalogue of anomalies'.⁴ Taken from the Russian semiotician Yuri Lotman, this distinction marks the difference between those items which seek to assert a sense of community and belonging — a 'we-dom'⁵ — and those which mark the boundaries of a culture, pointing towards those who are excluded from our community (they-dom). Texts involved in the first category, 'law formation', deal with what is known and predictable. They provide accounts of, and themselves function as, ceremonies and rituals. They are the predictable and secure centres of a culture. This is the genre of 'soft' news: of women's and hobby magazines, of reassuring stories at the end of the news bulletin. By contrast, texts in the second category function at the limits of what is known and expected: this 'catalogue of anomalies' involves 'chance events, crimes, disasters . . . anything which is thought of as a violation of some established order'.⁶ This second category contains those stories usually thought of as hard ('real') news: the threats, violence and manly concerns of politics which form the main body of evening news broadcasts.

Soft news

The media provide an account of the interaction of white law institutions with Aboriginality. This media coverage has been well explored in academic writing, in studies of representation which make clear the reliance of news stories on criminality as a dominant trope of Aboriginality.⁷ However, the move to an alternative law, the 'law formation' mentioned above, allows for the interaction of Aboriginality and media to be understood — and perhaps celebrated — in ways which have not previously been possible. The media texts of 'law formation' are those which are unsurprising, reliable and unthreatening: they are weather reports, announcements of marriage, horoscopes, diets and recipes. By focusing only on 'hard' news, such media representations have been effectively ignored by previous writers. They have been dismissed as trivial and unworthy of attention. It is not surprising, then, that many writers find that Aboriginality is often linked to crime: in looking only at hard news, a choice has already been made that these are the sorts of stories which will be found.

This article is based on information produced as part of an Australian Research Council funded project entitled 'The Reporting and Reception of Aboriginal Issues in Australian Media: news values, professional practices and public policies for social equality'. As well as garnering information on the institutional practices of media and journalism educators, and enabling Aboriginal audiences to comment on their representation, the project involves detailed analysis of media texts from three periods of one week each, in the years 1994, 1995 and 1996. During these periods, a wide range of material is sampled: texts from radio, television, newspapers and magazines. The last of these categories has proven particularly instructive. Unlike television,⁸ newspapers⁹ and even radio,¹⁰ magazines have not previously been the focus of any attention with regard to the reporting and representation of Aboriginal people. Yet the different functions served by magazines compared to newspapers make it unsurprising that Aboriginal issues would be covered in different ways in these media. Newspaper stories, 'hard news', dealing with (for example), the discussions of secret/sacred knowledge in relation to the Hindmarsh case focus on the (pre-

cisely) 'newsworthy' events: day to day revelations, disruptions and challenges. By contrast, magazines are not so concerned with this 'catalogue of anomalies'. They offer rather the space for 'law formation' — for articles in which the concern is not those serious, 'hard' news issues which seem to threaten 'our' community but with those which are people-centred, concerned with the structures within our society, with family and with memory. In this way, looking at a different medium (the women's magazine) makes visible quite different stories about Aboriginality — stories which can be characterised as 'law formation'.

Three women of Hindmarsh

An example of the different emphasis which emerges with such a shift of attention can be seen in one magazine's coverage of the issues around Aboriginal secret/sacred information connected with Aboriginal land rights at Hindmarsh Island.

Who Weekly prints an article entitled 'Troubled Waters' (17 July 1995, p.24). Immediately, the different emphasis which will be noted in this magazine is apparent in the felt need to justify such a choice of object. This is not a 'serious' magazine. It is not *The Independent*, or *Time Australia*, or even *The Bulletin*. It is a lifestyle magazine, an entertainment magazine, even (the unforgivable sin for serious academic attention) a women's magazine. As Joke Hermes suggests, such texts are 'easily put down', in every sense of that phrase:

Women's magazines are not a much discussed genre. Their focus on feelings and emotions and issues pertaining to private life rather than to public life, in our society restricts the ranges of places in which they might be discussed.¹¹

The discussion of women's magazines in law journals, for example, has not been much attempted. This *Who Weekly* article takes the form of a series of personal (women's) testimonies: from Doreen Kartinyeri, the Aboriginal woman who is the main proponent of Hindmarsh Island's sacred site status; Wendy Chapman, one of the white couple who are hoping to develop the island as a leisure resort; and Dulcie Wilson, who represents a group of Aboriginal women contesting Kartinyeri's account of the area.

The focus of the article is not the legislation which has made it possible for the development of a resort to be halted on the basis of Aboriginal secret/sacred knowledge; nor is it primarily addressed to the ways in which such knowledge enters governmental processes. The structures and institutions of white law-making and law-administration are not central to this account. Rather, an 'alternative law' centres *Who Weekly's* account of the Hindmarsh situation: the 'law formation' of an Australian community.

The first important point about this article is that it does not present an adversarial binarism¹² in which two sides are set in confrontation, with the expressed aim of discovering 'truth'. 'Troubled Waters' rather presents three points of view. Each is presented with a degree of sympathy by the magazine:

When 19 year old Doreen Kartinyeri glimpsed a map of Adelaide's Hindmarsh Island for the first time one afternoon in December 1964, the young Aborigine with a deep interest in her ancestry was paralysed with excitement: 'I was stunned', recalls Kartinyeri . . . [p.24]

This is the opening paragraph of the article. It is printed underneath a photograph of Kartinyeri, standing before an 'Aboriginal' dot painting, staring at the camera with her arms crossed. The language used is informal, structured as a generically typical introduction to a story in popular journalism. '"I was stunned", recalls Kartinyeri' claims a moment of

powerful emotion, and suggests an interest on the reader's part in that emotion. Kartinyeri's reminiscences and feelings offer a way into the story. 'Though she is now sixty, and her bespectacled eyes are surrounded by wrinkles, she has a clear vision of the day when she first saw the map.'

The article goes on to introduce the couple who are hoping to develop the island from Kartinyeri's point of view: 'Four decades on, Kartinyeri is leading the fight against developers who have big plans for the land'. To begin with, these 'developers' are figures in Kartinyeri's personal narrative, their timescale introduced in terms of her life experiences; while the language of 'leading the fight' makes clear that there is a certain heroism understood to rest with the Aboriginal woman.¹³ However, later in this story, the developers — or rather, and significantly, the female developer — are given a chance to speak for themselves. Wendy Chapman's story is introduced with a similarly sympathetic sentence: 'Meanwhile, Adelaide developers Tom and Wendy Chapman have watched their life's dream ebb away . . .' (p.24). "We have no income, no assets, no nothing", says Wendy Chapman' (p.25). In this language is obvious a sympathy for this woman also; part of the granting of sympathy to her point of view is the invocation of 'dreaming' to describe her situation (it is she who has a 'life's dream') — a use of language which is suggestive in the context of a story about Aboriginal information and rights.

The third position given a voice and a legitimated point of view in this story is the group of Aboriginal woman represented by Dulcie Wilson. "The State government is only listening to one side", Wilson says'. These viewpoints are spoken as a counterpoint to Kartinyeri's throughout the story — "There's no such thing as women's business and no such thing as men's business", says Ngarrindjeri elder Dulcie Wilson' — but the distribution of sympathy between three stances (represented by three women) prevents the article from being structured as a simple binarism: right/wrong. The search for 'truth' seems to be less important than the understanding that each side requires some sympathy. Nobody is simply wrong, nobody is the obvious threat. As is suggested above, it is difficult to see how this story would be read as a part of the 'catalogue of anomalies' whereby the external threat to 'us' is denounced. While, for a predominantly settler-oriented magazine the potency of Aboriginal secret knowledge could easily be presented as a threat (it challenges the Australian dream of home and land ownership — and indeed, it turns out that the Chapmans 'now owe Westpac Banking Corporation \$15.5 million in principal and interest', the nightmare of the mortgage gone wrong), the story refuses this possibility. The Chapmans are equally a threat, against whom an elderly Aboriginal woman is 'leading the fight'. There are no obvious bad guys, the boundary of society is not being simply policed; this is not part of a 'catalogue of anomalies'.

Law formation

Who Weekly's treatment of the Hindmarsh case is involved in 'law formation'. In refusing to take a primary interest in the processes of (white) law, nor even to insist on uncovering the truth of Aboriginal 'law' with regard to the area's sacred status, the article rather turns to those aspects of culture which Yuri Lotman refers to as 'law'. The 'truth' value of each of the positions offered is judged not by external, objective and reproducible 'facts', but by personal reminiscence and experience; and in particular by appeals to the potent categories of childhood and the family.

This is generically suitable for an article in *Who Weekly*. The advertising slogan of the magazine is: 'truth, integrity

and a little gossip'. The term 'post-truth journalism' has been coined to account for journalistic practices where the category of 'truth' is no longer the simple, non-negotiable area of hard, objective, public (and masculine) facts that it once was perceived to be.¹⁴ In *Who Weekly*, the 'little gossip' is not a binary opposite of 'truth', but a necessary component of it. So the 'truth' which is sought in 'Troubled Waters' is not adversarial and publicly pronounced, but discovered in private, domestic and non-confrontational ways: ways which have traditionally been marked as 'feminine'. The authenticity of speakers, the guarantee that they have a right to speak on these issues, comes in the article with an insistence that they belong within private and domestic arenas: childhood and the family. So for Wendy Chapman (and it is she, not her husband, who is here allowed to speak), 'It's plunged the whole family into the darkest years of our lives'. The issue is of Wendy and her children and how the events have affected them.

This tendency, moving away from public rights and wrongs to private experiences, is most obvious in the account given of the two Aboriginal women's points of view. No academic voices are called in to judge between the two women's accounts: rather, each is allowed to present a story whose criterion for judgment of truth value is their personal effect:

'The government took me away and put me in a Salvation Army girl's home at Fullarton . . .' says Kartinyeri, exhaling cigarette smoke in the lounge room of a friend's home . . . 'When I was thirteen I got expelled . . . I knew I had lost my chances at a European education, so I was determined to learn everything I can about my Aboriginal people, which is what I've done.' [p.26]

So it becomes important that Kartinyeri learned the secret/sacred knowledge which is in dispute 'while Terry and Uncle Nat went shooting or running the net or fishing on the beach'.

Similarly, Dulcie Wilson and the Aboriginal women who oppose Kartinyeri's claims are allowed to make an appeal to this space of truth validated by membership of childhood and family. 'Ironically, the leaders of the rival female factions grew up on the same settlement . . . [Kartinyeri's story] is nonsense according to some Ngarrindjeri women who grew up on Point McLeay Mission alongside Kartinyeri' (pp.26, 27). There is no voice, government or 'expert' called on to provide a judgment on these competing claims. Rather, they take the form of personal accounts, in domestic and private terms. The construction of the family as a primary social unit is an important area for 'law formation'. On the page immediately preceding 'Troubled Waters' in *Who Weekly*, for example, a Campari advert is headed, 'Here's to the family': 'There's something about a family business', the advertisement claims, with a black and white photograph of a mother, father and son standing together:

Caph's restaurant and bar . . . is a family concern in all senses of the word . . . Even now, things haven't changed. Like the high ceilings, the leadlight, the bar that serves as a meeting place . . . [p.23]

The family is the site of tradition, of stability and coherence, of 'law formation' at the symbolic centre of a culture. The word itself ('in all senses of the word'), as in 'family values', or 'family entertainment', can stand for precisely these qualities. In 'Troubled Waters', it is in these terms, these domestic and private terms, that the different points of view are to be judged: not in terms of judicial 'truth', but personal authenticity.

In this way, *Who Weekly* offers 'gossip' as the mode in which truth is negotiated. To talk about families, about childhood experiences, aunts, uncles and sitting on the beach together, this is 'to gossip'. The term suggests the exchange

of information; but more than this, it inflects such exchange in particular ways. It is the information of law formation, of the private and personal domestic spaces, which is exchanged in the act of gossip. For gossip is a feminine act — and is trivialised as such: 'Gossip among women has been devalued in much the same way that other cultural forms valued by women are critiqued.'¹⁵ Again, this lack of attention bears no relation to the importance of the form.

The photograph of Dulcie Wilson and 'her supporters' which illustrates the story shows them sitting in a group around a kitchen table. This has various implications for different readings. It may be, for example, that some Aboriginal cultures would find in this social position a validation of their 'witnessed' statements, as opposed to the isolated image and voice of Kartinyeri. By contrast, a traditional Western reading would rather privilege the individual authorial stance of Kartinyeri over the group voice of the other women. Important for this work, however, is the setting at the kitchen table. Dulcie Wilson and her supporters are shown in the traditional sphere of women's talk, of gossip. The kitchen table, situated not only in the feminised space of the domestic interior, but at the very heart of a woman's place — indeed, in the kitchen — this is the site at which the negotiations of 'truth' in *Who Weekly* take place.

In this magazine's coverage of a 'law' issue (Hindmarsh), its generic status as women's magazine and its avowed commitment to 'truth, integrity and a little gossip', allow Aboriginality to be written into law-formation, rather than just 'the law'. Hindmarsh becomes a source of gossip, of family and domestic issues. The public, governmental and institutionally 'legal' aspects of the case take up one paragraph in a three-page story. Other writings of Aboriginality and law are given primacy.

Law affirmation

In looking for examples of texts which are 'law affirming and normalising',¹⁶ we turn to those which are familiar and predictable. They are concerned with 'not one-off exceptional events, but events which are out of time and endlessly repeated'.¹⁷ There can be few more obvious examples of texts which are 'endlessly repeated' in Australian society than those which are concerned with sport. Cyclical and regular, with well-known and predictable seasons, these events do not occur at the edge of society. They are not crime, though they are often violent; they are not wars, although they feature a fight between opposing sides. Sports rather serve social functions both as games and as rituals,¹⁸ working simultaneously to separate people out (the winners from the losers) and to bring people together (the supporting communities in particular, the sport-loving community more generally). The distinction present in the umbrella term 'news and sport' makes clear that these are not the same thing, but also that they are closely connected. The sports segment which follows the news broadcast on each of Australia's commercial television channels provides a series of texts which are involved, once again, in 'law formation': not challenging the edges of who is allowed into our community, but celebrating the very centre of our culture.

Whereas the gossip of *Who Weekly* is law formation in a feminised space, sport provides a primarily masculinised version of the same work. Once again, the largely neglected arena of magazine journalism provides examples of Aboriginality and law being written into 'law formation'. *Inside Sport* (July 1995) offers an article on 'Michael Long's True Colours' (pp.69-77). Dealing with Michael Long's experi-

ence of being racially abused during a game of Australian Rules football, the focus of the article is once again Long's personal feelings about the experience. Although contemporary legislative issues (the introduction of a Racial Vilification Bill) might have been regarded as relevant, in fact this governmental (legal) response to the situation is not mentioned in the course of the extensive interview.

Part of the focus is individualised — the personal reaction of Michael Long to the abuse: 'Even though they say these things, they don't really know how it feels to a person. You react to it', Long suggests (p.73). Once again, it also becomes an issue of family. Not only does Long make clear that 'I wouldn't like my kids to play in the AFL and have to put up with the sort of stuff I have' (p.74), but he turns to personal experience to make clear once again the importance of these issues:

Some people will never understand where I come from, or where my family come from... They were taken away from their families — they didn't have a choice, and didn't have a say. [p.74]

Again, it is the arena of childhood, and personal reminiscence of this state, which informs Long's arguments:

As a kid it doesn't cross your mind what colour the other kids are, so it's probably the way you're brought up. It's probably things you hear at school or in the streets... [p.75]

Or at football matches. It is these spaces of law-formation — the family, and reminiscences of childhood — which are appealed to by Long to explain his personal reaction to racial abuse. However, he also calls upon the function of sport as a central ritual place for the formation of community as he suggests just why he finds it so dangerous:

[Racial taunts] are not part of football... These are the nineties... [Mal Brown] is saying that sort of thing in the media while kids are looking to him as a role model, so what effect is this having on kids? [p.75]

Football, and sport more generally, provide a focus for the formation of community sensibility. Texts representing and celebrating sport function in the process of law-formation. The magazine *Inside Sport* refuses a discussion of the 'law' in regard to racial vilification — there is no discussion, for example, of whether Long feels making such talk illegal is a useful move (although he does refer to it in passing as a 'crime'). Rather, this article of law formation focuses on Michael Long's personal responses, appeals to family and memories of childhood, and an acknowledgment of the place of sport in forming communities.

Conclusion

Traditional work in media studies on Aboriginality and the law has focused on the serious genre of hard news. In doing so, a particular landscape has been mapped; one where the primary point of interaction between Aboriginality and law is that where Aboriginal people encounter the criminal justice system, usually as perpetrators of crime. However, looking at other forms of journalism allows a different account to be written. These non-serious, non-news examples show less interest in the institutions of white law. Rather, another form of the relationship between 'law' and Aboriginality is constructed: one where Aboriginal people are allowed to function in space of 'law formation'. Involved in these central spaces of stabilising communities, this space of Aboriginal interaction with 'law' provides a useful comparison with the academic work which has previously suggested journalism can only allow 'negative' representations of Aboriginality.

References on p.23.

DISCLOSURE

in the public interest?

Nathan Hancock

Is full disclosure of secrets required by current heritage legislation?

If Aboriginal people want the protection of this legislation . . . then they must be prepared to come forward and reveal sufficient about their sites to bring themselves within its umbrella. And, in my opinion, given the extent of protection afforded by the Act to such sites, it is not tenable that Aboriginal people may [withhold sacred and secret information] for the purpose of enabling the Authority to do what, in effect, may amount to holding *in terrorem* persons who have a legitimate interest in the area claimed to be a site.¹

In the context of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the *Heritage Act*), it is clear that the authority for the nature and significance of a sacred site must rest with Aboriginal law. Yet the desire to prove this authority may intrude on the secrecy which often surrounds the meaning of sites in Aboriginal law. So, while the right to possess and dispose of such information may be protected by Aboriginal law, it may be infringed in order to satisfy the legislative scheme and the holders of competing interests. As one claimant said, the process of protection 'amounts to being forced to break our Law to prove to Europeans that our Law still exists'.² Just how important is proof and how far must disclosure extend before claims can be accepted?

In the *Broome Crocodile Farm* case³ and the *Hindmarsh Island Bridge* case⁴ two judges of the Federal Court rejected the implication that traditional Aboriginal 'law' could obstruct the decision-making process and the course of judicial review. It was suggested that, according to the terms of the *Heritage Act*, the public interest in the administration of justice and the requirements of procedural fairness, confidential traditional information had to be disclosed by Aboriginal claimants to the reporter appointed under the Act, to the Minister for Aboriginal and Torres Strait Islander Affairs and ultimately to the people who may be affected by a decision to make a permanent declaration. In the course of hearing the proceedings for judicial review it was suggested that such information had to be disclosed to enable an effective challenge to the Minister's decision.

It seems that while the protection of Aboriginal cultural heritage may be predicated on the existence of Aboriginal law, the significance of this law is being reduced to mere evidentiary status. In these cases the need to respond to assertions that claims are the subject of 'recent invention' or 'conspiracy' has become paramount, at the cost of protecting aspects of the culture which the *Heritage Act* was intended to preserve. In the process, the need for proof has become a need for disclosure, despite the fact that the procedures established under the *Heritage Act* are poorly suited to the task of proof and that the concepts which the process would seek to establish may 'not necessarily fit with categories or concerns in Aboriginal culture'.⁵ It has been said that '[p]eople in the broader community are not interested in the reasons why Aboriginal people wish to protect particular places but only in the impact of protection upon non-Aboriginal interests'.⁶ If this is true, one

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must question the value of exposing such 'evidence' and the current emphasis on proof in the heritage protection scheme.

While there must be broad community acceptance of the process of identification and assessment and an opportunity for people affected to address concerns over the impact of protection, there may be no need for wholesale disclosure of confidential material. Notwithstanding the potential significance of such information, there is scope to protect the confidentiality of secret and sacred material at all stages of the administrative inquiry established by the *Heritage Act*. The decision-making process may not require complete disclosure to the Minister and the content of procedural fairness may not require disclosure to people affected by the Minister's decision. In fact, the public interest in protecting the rights and spiritual beliefs of minorities may require that confidentiality be preserved not only in the conduct of the inquiry but also in the conduct of judicial review proceedings. With a small amount of adjustment and reinterpretation, it may be possible *within the current system* to establish cultural heritage claims without trespassing on the very Aboriginal laws, customs and traditions which the *Heritage Act* was intended to protect.

The statutory context

Section 10 of the *Heritage Act* empowers the Minister for Aboriginal and Torres Strait Islander Affairs to make permanent declarations preventing prescribed activities over land which the Minister is satisfied constitutes a 'significant Aboriginal area' and which the Minister is satisfied is 'under threat of injury or desecration'. In order to make such a declaration, the Minister must first obtain a report the principal object of which is to ascertain the existence of any significant areas and of any threat of injury or desecration. In addition, the report must address the results of a public consultation process, incorporating the representations of people affected by the decision and representations of the general public for the Minister's consideration.

In light of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*), Carr J suggested, in the *Broome Crocodile Farm* case, that the requirement for the Minister to be 'satisfied' of the significance of an area amounted to a requirement that the significance be 'established'. This implies that the Minister cannot rely on his or her opinion and that the significance of areas must be proven. Moreover, there is a requirement that the Minister be personally involved in the decision-making process.⁷ Under the *Heritage Act*, the Minister is required to consider the report and representations and is unable to delegate his or her powers and functions with respect to declarations. This implies that issues of significance must be proven before the Minister. Indeed, in the *Hindmarsh Island Bridge* case O'Loughlin J found it 'essential that the Minister have full details of the claims so that he might appropriately consider their efficacy and the weight that he should give to them' (emphasis added).

The obligation to accord procedural fairness

The most significant limitation on respect for confidentiality is found in the duty to accord procedural fairness. It obliges the Minister to disclose relevant material to the people who may be affected by his or her declaration. As such it is the most immediate and perhaps least justifiable threat to confidentiality in the heritage protection scheme, because it threatens the confidentiality of information between claimants and

the holders of competing interests. Fortunately, there are some recognised limitations on the content of the obligation to accord procedural fairness which may be exploited in the present context in order to protect secret and sacred material from disclosure.

In considering this issue, Carr J in the *Broome Crocodile Farm* case pointed to the need for the Minister to have information and the effect which a declaration would have on the applicants' interests. His Honour suggested that 'the procedure prescribed by the Commonwealth Act is intended to ensure . . . that the Commonwealth Minister is provided with comprehensive information on both sides before a declaration is made' and that '*for that intention to be fulfilled* the material on each side should be disclosed to the other side' (emphasis added). Apart from these statutory considerations, his Honour considered that procedural fairness required the disclosure of confidential information to people directly affected by the declaration.

In contrast, while considering the need to provide the Minister with information, O'Loughlin J emphasised in the *Hindmarsh Island Bridge* case the presence of the statutory public consultation process. In his Honour's view, the procedure prescribed by the *Heritage Act* was intended to provide all with 'an effective opportunity to provide information and express opinions concerning the important issues involved'.⁸ This opportunity was considered to satisfy the need to provide the Minister with 'sufficient information' but also satisfied the requirements of procedural fairness in respect of people affected. This was the case at least where the reporter offered '*some detail* of the existence of the women's business so that meaningful submissions could be made' (emphasis added).

Clearly there is a difference of opinion as to the level of disclosure required, based on the importance of proof and the significance attached to the public consultation process. For Carr J, if comprehensive information is to be obtained, it must be open to challenge. At the same time, people affected must be given an opportunity to respond to the 'case against them'. Both objectives point to complete disclosure of confidential material. For O'Loughlin J, if the Minister is to balance the competing interests fairly, she or he must consult the public and obtain information on all the issues involved. At the same time, those affected must be given an opportunity to put forward their case and assert their interests. These objectives point to a degree of disclosure sufficient to allow people to assess the effects on their interests and to ensure the relevance of the representations provided.

While the presence of a statutory process may be relevant to the implication of a duty to accord procedural fairness,⁹ there may be other considerations which restrict the content of the obligation to accord procedural fairness and the duty to disclose confidential information. In the present context, the desirability of preserving the confidentiality of representations and the secure flow of information may suggest limitations on the duty to disclose. Moreover, the nature of the obligation itself points to far less disclosure than Carr J seems to have contemplated.

The obligation to disclose relevant material

The obligation to accord procedural fairness is described as 'a common law duty to act fairly . . . in the making of administrative decisions which affect rights, interests and legitimate expectations'.¹⁰ Obviously, as a principle of 'fairness', the content of the obligation is flexible, taking account

of what is fair in the circumstances. But it often obliges the decision maker to provide a hearing and an opportunity for individuals to deal with adverse information that is 'credible, relevant and significant to the decision to be made'.¹¹ Clearly, the ultimate decision under the heritage protection scheme has the capacity to affect the rights and interests of land holders and developers and it is obvious that the principles of procedural fairness will apply at some stage of the decision to make a declaration. But there is no clear answer as to the proper content of the obligation in the circumstances.

The obligation to accord procedural fairness is based on the capacity of the decision maker to 'adversely and directly affect the rights, interests, status or legitimate expectations of another in his, her or its individual capacity'.¹² It follows that the obligation to disclose information will not be applied 'to every decision which disadvantages individuals',¹³ and will not extend to every aspect which is adverse to a person's interests. There is thus a notion of directness or *proximity* which may qualify the duty to disclose.¹⁴

On the other hand, there is a duty to disclose information regarding matters *personal* to the individual whose interests are affected by the decision.¹⁵ This consideration is central to an individual's right to information, based on fundamental principles of fairness.¹⁶

The problem of proximity is particularly evident in the context of a decision-making process where the stages of inquiry and final decision are separated. While a report may constitute a decision for the purposes of judicial review,¹⁷ there may be no obligation to disclose information at this stage. It only arises where the report itself adversely affects the reputation etc. of the individual concerned or where the inquirer proposes to hear evidence personal to the individual or which might expose him or her to personal liability.¹⁸

It may be argued that the relevant degree of 'proximity' does not exist in relation to the inquiry under the *Heritage Act* because the identification of cultural heritage does not by itself affect non-Aboriginal interests. While the ultimate decision to make a declaration may have a direct adverse effect, the preliminary determination as to the existence of a 'significant Aboriginal area' is strictly neutral. Its 'real effect', to use the phrase of Wilcox J in *Peko-Wallsend*, may be to adversely affect a person's chances of a favourable decision but it may not be one to which the obligation attaches. It is difficult to comprehend how information relating to the significance of an area in Aboriginal tradition may by itself have a direct adverse effect on the holders of legal and commercial interests in land. It certainly does not involve considerations personal to these individuals and therefore does not expose them to the sort of liability contemplated above.¹⁹

In addition to the problem of proximity, there may be other considerations based on the nature of the procedural fairness which may limit the obligation to disclose. It may be the case that fairness requires the decision maker to maintain confidentiality by withholding information from individuals, notwithstanding the effect that the ultimate decision might have on their interests.²⁰ It is not always necessary to offer applicants an opportunity to 'deal with' confidential material — there may be no denial of procedural fairness if such information is withheld.²¹

A stronger argument may be made according to the effective administration of justice. It has been said that the principle of procedural fairness is 'only a means to an end' and that if 'the observance of a principle of this sort does not serve

the ends of justice, it must be dismissed'.²² And it is accepted that, in some circumstances, the content of the obligation to accord procedural fairness 'may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred'.²³ Such an approach has been applied to eliminate the duty to disclose confidential information in other proceedings,²⁴ and may be thought to apply readily in the current context. Indeed, the approach has special application where 'the knowledge that the court will treat the information in strict confidence greatly increases the probability that it will be forthcoming'.²⁵ It is an approach which is particularly relevant to those inquiries under the *Heritage Act* where claimants 'prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed'.²⁶

Having examined the nature of the duty to disclose information and the importance attached to confidentiality, it is necessary to question the approach taken by Carr J in the *Broome Crocodile Farm* case. The discussion suggests that the boundaries of procedural fairness are being stretched to accommodate the objective of proof. Perhaps the bottom line is that a duty to disclose confidential material will not be implied merely to provide individuals with an opportunity to test their 'underlying assumptions' and make further submissions to a decision maker.²⁷ So, while the objective of obtaining comprehensive information may be facilitated by full disclosure, it is not justifiable in this context on the basis of ensuring procedural fairness.

The decision-making process and the desire to preserve confidentiality are most vulnerable in an application for judicial review. It is in this context that the desire for proof is most visible, as applicants have an opportunity to challenge the evidential bases of the decision-making process. Yet it may not be the most appropriate forum for this to be done. In such an application, the court's discretion to order discovery and inspection and the application of public interest immunity may be used to prevent the unnecessary disclosure of confidential information. Moreover, disclosure may be shown to be unnecessary according to the very nature of the grounds of judicial review available.

Public interest immunity

The court's capacity to save claimants from disclosing secret and sacred material is limited indeed. There may be scope to protect such information against discovery and inspection where that would involve a 'breach of confidence',²⁸ but generally there is no obligation of confidentiality which can 'stand in the way of the imperative necessity of revealing the truth in the witness box'.²⁹ Although there is a limited range of evidential privileges which serve to protect certain types of communication, none apply directly to traditional Aboriginal laws and practices and although it has been suggested that new privileges be created for this purpose,³⁰ the categories appear to be closed. In the context of judicial review this 'imperative necessity' might seem to pose a serious threat to the confidentiality of secret and sacred material.

There is one category of 'privilege' which may serve to protect such material from disclosure in the course of judicial review. The public interest immunity attaches to certain categories of information and serves to protect such information on the basis that the confidentiality of such information is required by public interest.

By virtue of the immunity, it is open to the court to exclude counsel from inspection of sensitive material, at least until it

is clear that the documents will assist that party in the conduct of their case.³¹ In certain cases it may be appropriate for the court itself to avoid viewing such material until it is satisfied that it will become important to the facts in issue,³² and then it may decide only to inspect the material *in camera*.³³

More importantly, while the categories of privilege are probably closed, the categories of public interest are somewhat open. In *Aboriginal Sacred Sites Protection Authority v Maurice Woodward* J suggested that 'the proper protection of minority rights is very much in the public interest, as is respect for deeply held spiritual beliefs' and that a fresh class of public interest be recognised 'covering secret and sacred Aboriginal information and beliefs'. So, while confidentiality alone may be insufficient to attract the protection of the 'immunity',³⁴ it is accepted that it may be sufficient if it derives from Aboriginal tradition.

The matter of public interest immunity places the need for proof squarely in conflict with the need to protect the confidentiality of secret and sacred material. The immunity provides considerable scope for the protection of this material, both in respect of judicial review proceedings and as a template for the issues discussed above regarding the decision-making process. It is significant therefore that the matter was discussed in both of the recent cases before the Federal Court.

In an interlocutory judgment,³⁵ Carr J took account of the public interest in the administration of justice, and the question of discrimination and equal opportunity in the context of gender specific material. His Honour found that these considerations outweighed the public interest in maintaining confidentiality in judicial review proceedings. In the process, his Honour had anticipated that the documents in question would be 'redolent with detailed descriptions of initiation ceremonies and the like' and expressed disappointment that the material fell 'far short of what [he] was expecting'. His Honour seemed to take the view that secret and sacred material was significant only for its probative value, rejecting the implication that its status in Aboriginal 'law' could challenge the public interest in favour of proof. The truth, he said, 'is that it is Australian law for all Australians regardless of their colour'.

In the *Hindmarsh Island Bridge* case O'Loughlin J was prepared to accept that 'Aboriginal law insists on certain subjects being kept secret' and that a case could be made for the claim to be upheld. In the circumstances, not having seen the secret material, his Honour considered it 'important to avoid speculating as to what they might say' but assumed that it might contain a narrative of the significance of the area in Aboriginal tradition. In the end, his Honour considered that 'as the law presently stands, a time will necessarily come when there must be *some disclosure* [to the reporter or Minister] so that the claim can be tested' (emphasis added). In so doing, his Honour seemed to place equal weight on the nature and probative value of the material, in contrast to the view taken by Carr J.

While these statements relate to different stages in the course of decision making and judicial review, there is a common thread which can be drawn based on the importance of confidential information to the Minister's decision and the role of administrative law in factual review. It is a question as to the degree of information required before the 'particular significance' of an area can safely be determined. For Carr J, the public interest in the administration of justice is served only by complete disclosure. For O'Loughlin J, the public

interest is served by disclosure sufficient for the claim to be tested. Like the discussion of procedural fairness, the answer depends in large part on the significance which is attached to the public consultation process as a mechanism of proving the authority of claims. However, there are also wider considerations regarding the nature of the process which may determine the issue. Ultimately, if the Minister's decision is challenged, it is a question of what the administration of justice requires in the circumstances.

The focus of the grounds of judicial review at common law and in the *ADJR Act* is not on the factual bases of decision making, but on the procedure followed by the decision maker. A judicial review court is reluctant to intervene in factual determinations and while evidence is required before a decision can be said to be valid, the standard of proof is set at a threshold level. Thus, the probative evidence rule of procedural fairness, the no evidence ground in the *ADJR Act* and the notion of reasonableness³⁶ require that a decision be based on the existence of *some* evidence which is capable of sustaining it, rather than on the balance of the evidence itself.

In substance, the court is not required to examine the evidence before the reporter or the Minister, but rather to be satisfied that a modicum of rationally probative evidence exists and has been used in order to reach a decision as to the 'particular significance' of the area in question. It may only be necessary to disclose the existence of *some* information which could reasonably form the basis of the Minister's determination in relation to the significance of an area or its connection with Aboriginal tradition. In this respect it may be questioned whether, in light of the *ADJR Act* and the requirement that significance be *established*, there can ever be an implication that claims must be *proven*.

Conclusion

It is open to conclude that the desire to prove the authority of Aboriginal law and the veracity of claimants is inconsistent with the process established under the *Heritage Act* and the grounds of review provided under the *ADJR Act*. While the public interest in the administration of justice may require that relevant information be disclosed by claimants to the reporter, and perhaps to the Minister, it does not require disclosure beyond that which is necessary to have the claims tested in the process of public consultation. While procedural fairness may require that affected people be given some form of hearing before the Minister's decision is made, it does not require the disclosure of confidential material relevant only to the establishment of a connection between Aboriginal tradition and the claim area.

Clearly, the authority for the nature and significance of an Aboriginal site must rest with Aboriginal 'law', but the process established by the *Heritage Act* and reviewed by the *ADJR Act* is ill suited to the role of contesting and proving these claims. As O'Loughlin J recognised, it is a role more suited to 'an independent committee of inquiry, with the power of subpoena, the power to administer oaths and the like' than the position of the reporter or the Minister under the *Heritage Act*. While the desire for proof may be fulfilled by the establishment of royal commissions, the pursuit of these avenues could hardly be said to be consistent with the objectives of broad community acceptance for the process of protection and respect for Aboriginal cultural heritage or, indeed, the purposes of the *Heritage Act* itself.

If the desire for proof is to remain, it will be necessary to alter or adjust the decision-making process, both to improve

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the broad community acceptance of the claims and the procedure under the Act and to ensure that respect is given to the confidentiality which may be required under Aboriginal law. What is needed is an inquiry process which both establishes the existence of Aboriginal customs, traditions and observances, and respects the confidentiality which they disclose. If this cannot be done, the significance of this material will be reduced to mere evidentiary status.

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The truth in judging: testimony

(Fifty bare-arsed Highlanders)

Archie Zariski

The dilemmas of inter-cultural testimony.



In the following article, the author offers an account of the difficulty of assessing and valuing testimony when testimony is assessed in a cross-cultural context. The problems experienced by Hume in an Anglo-Celtic colonial setting and Coady's work offer an introduction to contemporary Australian problems with ideas of language, culture, outlook and proof. This article introduces Anglo-Celtic readers to these difficulties with an example drawn from their own cultural antecedents. The theme of how to understand 'otherness' under-scores other articles in this issue. [eds]

(As I enter upon this white space with these words I worry, and wonder how this will be judged. But here is my testimony.)

'In search of insight into the subject of this issue I have read a book of which I want to tell you. The author has attempted to survey in broadest terms the status of testimony within the field of the philosophy of knowledge (epistemology) and to relate his findings to the law. His purpose in doing so is to demonstrate and justify the important role of testimony in everyday and legal affairs, a project which might seem beneficial to recognising aboriginal heritages. However, while initially attractive, the arguments this philosopher makes in favour of testimony seem to me to constitute a trap precisely for those concerned with inter-cultural conflict and communication. If testimony is ultimately justified by virtue of its necessary contribution to the coherence and cohesiveness of a Western worldview then giving testimony will be perilous for those who do not necessarily share such a world.'

Now, how will you be convinced of this testimony? Will details add to its credibility? (The book referred to is a philosophical monograph titled *Testimony*, written by C.A.J. Coady and published by Oxford University Press in 1992.) What if I have recourse to the authority of position and status? (The book's author is Boyce Gibson Professor of Philosophy at the University of Melbourne and Director of that University's Centre for Philosophy and Public Issues; the originator of this text is Senior Lecturer in Law at Murdoch University.) Will passing the test of a more mechanical interrogation suffice? (Yes, this has been spell-checked and I have endeavoured to punctuate and paragraph appropriately.) Does it conform to the genre expected here? (Analysis, synthesis and opinion appear to be present.)

At this point let it be suggested that, if anything, it is the overall effect (or perhaps style if you will) which supports such credibility as this testimony has. Behind the words printed above (which are therefore 'transparent' in more than one way), you may see the working of the Western mind, that rational ego-maintaining agent clothed here in academic and rhetorical prose. This is a creature which you have been raised to venerate or you would not be reading this now. It is the familiar face of the 'common(sense) man' of the law who both gives and receives credible testimony. But it is the face of the same not of the other, the outsider, or the alien. This testimony comes not from

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them but from us. It is a narrative from within a culture trying to look beyond its familiar stories.

Let us retrace together some of the matters already so smoothly and confidently proposed in this cool forum of logic and argumentation.

First a remark about the title. There is indeed ambiguity in it and welcomed as such. What I am concerned with here is not only what it may mean for us to seek the truth in court but also what the Western mind understands as the justice of that process, particularly as it entails evaluating the words of others. As a first approximation to an answer I would say the process of judging testimony follows a distinct program involving these steps: first comes self-knowledge and flowing from that, knowledge of the other. Put another way, the 'light of reason' sparked within the individual illuminates the surrounding world and gives truth to it. Let me now tell you how I have arrived at that description and of the consequences (if I am correct) as I see them for those who are judged. (As for the subtext of the Highlanders, they are hypothetical witnesses to contemporary culture and ancient tradition; but more of them later.)

The worth of testimony

Professor Coady has sought to redeem and justify our attention to the words of others as a source of knowledge equal in dignity to our direct perceptions (for instance, of objects and locations) and the work of our memories. In pursuing that aim he has canvassed various theories of the value of testimony with particular attention to what he calls the 'reductionist' argument. This approach, which Coady considers to be the 'received view' (p.79) has been most prominently formulated by the 18th century Scots philosopher David Hume who is known for his sceptical empiricism. Hume said this of testimony: 'The reason why we place any credit in witnesses and historians, is not derived from any *connexion*, which we perceive *a priori*, between testimony and reality, but because we are accustomed to find a conformity between them'.¹ Paralleling the method of inductive logic in science, this argument suggests that because we have in the past found most of what others have told us to have been true we are justified in relying on future testimony for additional truths. For example, in the epistemic arena of the court this principle is negatively applied in the view that any demonstrated error in a witness's statement should nullify the balance of their evidence. Since their credibility has been shaken, the empirical conclusion of general testimonial truthfulness has been shown to be unwarranted in their case.

Before passing on to consider Coady's proposal for a better view of the truth in judging testimony let us stay awhile longer with Hume, for there is a strong case to be made that his form of empiricism still animates our thinking about the courts. The modern successes of the natural sciences and technology have contributed to the glorification of the scientific method and the inductive logic on which much of it is at least often assumed to be based. It is no wonder therefore that today many should consider the trial as a human experiment designed to apply similar procedures. We are encouraged to think of the truth of events as emerging from disparate testimonial (and other) sources by means of an inference of what links the evidence in a plausible way. Further, it is often the case that theories of probability are associated with this inductive approach to proof in court. In this area also, Hume (a lawyer) had something to say. Speaking of how we judge the existence of causes he analogised to his method of calcu-

lating chances, which was to subtract the evidence favouring one conclusion from that favouring another, the result to be determined by the tipping of the scales.² One commentator has described the working of Hume's method of discovering the causes of events as follows:

For example, in a legal context, if there are three equally reliable witnesses, two of whom testify that a certain event occurred at a certain time and place whilst the other testifies that it did not, then the force of the probable argument for the conclusion that the event did occur could be said to arise from our subtracting the disproving testimony from the proving testimony.³

Here we may see the basis of the law of corroboration, and perhaps it attracts as an open-minded, possibly even 'democratic', attitude to judging testimony: the majority of witnesses for or against a proposition wins the point. However, before becoming too enthusiastic let us see how Hume himself practised his precepts, which brings us back to the Highlanders. Far from a needless historical digression, I believe this story is an important part of the legacy of Hume which should not be forgotten and perhaps has greater importance for the question of testimony than his more frequently cited philosophical works.

From 1760 to 1763 there appeared in print in England certain epic poems (*Fingal* and *Temora*) said to be translations by one James Macpherson. These were described as English versions of Gaelic verse authored by an ancient bard, Ossian, which had been preserved by way of oral tradition for many centuries in the Highlands of Scotland.⁴ The poems were widely acclaimed and translated into several other European languages, and Ossian was hailed as another Homer. True to his sceptical empiricism, Hume called for proof through witnesses of the acknowledgment in the Scottish Highlands of these works as an ancient legacy. He counselled his friend, Blair, who had already written a dissertation on the poems, to go amongst the Highlanders in search of corroborating evidence:

But the chief point in which it will be necessary for you to exert yourself, will be to get positive testimony from many different hands, that such poems are vulgarly recited in the Highlands, and have there been long the entertainment of the people . . .

Let the clergymen have the translation in their hands, and let them write back to you, and inform you, that they heard such a one (naming him) living in such a place, rehearse the original of such a passage, from such a page to such a page of the English translation, which appeared exact and faithful.⁵

Eventually the tide of opinion turned against the authenticity of these poems and Macpherson was considered to have perpetrated a hoax. Some commentators linked the fraud with a supposed defect in the Scottish character, a point which evidently affected Hume deeply. Cultural dynamics and self-esteem came into play and he authored an essay which attacked the value of any testimony which might have been produced. After reciting various arguments from 'common sense' and 'reasonableness' which demonstrated the falsity of the claims made by Macpherson he declared:

. . . no wonder they crowded to give testimony in favour of their authenticity. Most of them, no doubt, were sincere in the delusion . . . On such occasions, the greatest cloud of witnesses makes no manner of evidence.

But as finite added to finite never approaches a hair's breadth nearer to infinite; so a fact, incredible in itself, acquires not the smallest accession of probability by the accumulation of testimony.⁶

Hume is also reported to have said to a visitor that he (Hume) 'disbelieved not so much for want of testimony, as from the nature of the thing according to his apprehension. He said if fifty bare-a-d highlanders should say that *Fingal* was an ancient Poem, he would not believe them.'

What has become of Hume's empirical method of judging truth from testimony? It seems it has been abandoned as useless because of the 'incredibility' of the fact as discerned by Hume's 'apprehension'. My reading of this episode is that as a learned man and a Scot, Hume felt it necessary to protect his own credibility by taking the turn he did. The great sceptic could not let himself or others think he had been duped by his own method. I would say his 'inner testimony' to himself appearing as 'common sense' outweighed the testimony of others who misguidedly believed in Ossian. Here we can see the core of the scientific method revealed: the cartesian framework of proof and probability rests on the prior testimony of the autonomous rational individual to herself. What affronts that primary testimony cannot be acknowledged as truth. The truth in (of) judging in the Western tradition then is the maintenance of the judge of fact as the first witness, a witness to the rationality of the independent intentional agent. Whoever does not corroborate that vision is other: unintelligible, unacknowledged and unbelieved.

The consequence of this view of judging, if it is a correct description, for inter-cultural relations conducted within the confines of Western courts should be obvious. A troubling possibility arises that Western ideas of how truth is to be gleaned from testimony are not robust enough to do justice to witnesses who may not share the same traditions of thought.

A charitable view of testimony

Coady has criticised Hume's approach and advanced his own 'solution' to the problem of justifying and evaluating testimony in the Western tradition. This contemporary philosopher is clearly dedicated to paying due respect to the reports of others: for instance he commends reception of the evidence of Aboriginal witnesses and of anthropologists in the *Milirrpum* case.⁸ It remains to be seen, however, whether his formulation of an alternative approach to judging testimony escapes the dangers presented by the presuppositions of Western thought sketched above. I don't think Coady's attempt succeeds and will explain why.

To be sure, Coady attacks the 'egocentric premiss' involved in the idea of the autonomous inquiring individual of traditional Western empiricism. He does this because he recognises that one of the consequences of such mode of thought is to downgrade testimony as a source of knowledge by comparison with personal perception, memory and inferential reasoning. He affirms:

That the perceptions of others are as good if not better on occasion than my own and their transmission to me as valuable if not more valuable on occasion than my own investigations are conclusions perfectly compatible with their being the outcome of my epistemological investigation. The question 'How can I share in knowledge?' is one only an individual can ask but this does not show that its answer must give priority to individual resources. [pp.150-1]

A clue to the difficulty I see with Coady's 'solution' is that it is found in his chapter titled 'Language and Mind'. Here he links the necessity and value of testimony to the existence of 'shared outlooks' echoed in language and cites Wittgen-

stein's declaration that, 'If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments'.⁹ If such a degree of consensus already exists it is hard to see that any fundamental disagreements can arise requiring resolution by testimony. On the other hand, if language and outlook is not shared then it seems likely that testimony will not be valued as determinative of an issue.

Where a common outlook (or language) is not obviously present, the principle of 'charity' which Coady then invokes in support of recognising the meaning of alien acts or utterances begins to seem more like a justification for colonisation of one world by another. We are led back to the position that meaning must be agreed upon before dispute can arise and then only within the horizon of intelligibility recognised by that sense which is 'common'. In such a situation I suggest it becomes too easy to 'identify a belief an agent has in terms which need not be entirely acceptable to him', as Coady puts it (p.163). And, I would add, too easy to judge that testimony in reliance on such divergent interpretation.

Coady does seem to appreciate the difficulty caused by the principle of charity when he says, 'If we require the outlooks of others to be too like our own we lose part of the capacity to learn from them; if we insist on their dramatic dissimilarity we lose our capacity to understand them at all' (p.167). Nevertheless, he relies on the charitable impulse in formulating his version of a justification of testimony based on the ideas of 'cohesion' and 'coherence'. Although it is sometimes difficult to distinguish between these two guiding principles when reading Coady, in my view they stand in a similar relation to knowledge as means are to ends and this is a key to their weakness. Both are 'facts' observed by Coady: the first, cohesion, being the beneficial complementarity of all of our sources of knowledge (including testimony); the second, coherence, being the regulating ideal of comprehensive theoretical explanation. It is these principles which argue for the value of listening to others' testimony.

Let us notice certain aspects of Coady's approach and raise first the question whether they might claim to be universal precepts for all humankind. Certainly this justification of testimony is oriented to 'achievement' of a certain type, specifically the erection of a theoretical structure explanatory of reality for the purpose of material success. In part, Coady derives the principles of cohesion and coherence from the observation of universal human needs ('nourishment and reproduction . . . some degree of co-operation and safety . . . the appreciation of some kinds of beauty' (p.167)) which can be achieved through cognitive means and thus he says generate a certain basic commonality of thought. Just as Coady acknowledges the possibility of disagreement on some fundamental theses, particularly between communities 'with very different levels of technological sophistication' (p.168), it seems clear that he would consider the beliefs of the more technologically sophisticated as resulting from a greater degree of cohesion in their formation and coherence in their structure. Measured by such criteria of achievement it is difficult to see how one may avoid judging the 'unsophisticated' other as lacking the requisite degree of coherence to be believed in her testimony. Rather than taking evidence, the charitable operation of listening then becomes more like a malign 'education' of the witness. But let Coady speak for himself:

It can be seen that the cohesion I began speaking of is built into the linguistic resources with which each of us structures and identifies much of the world which we encounter from day to day. It also seems a plain matter of fact that this cohesion, on the whole, is all the stronger and its contribution to cognitive and practical success all the greater in complex, technological societies like our own. [p.171]

In sum, the charitable impulse which leads Coady to adopt the principles of cohesion and coherence as justification for taking testimony seriously seems to have led us astray. We have not yet, it seems, escaped the strictures of Western rationality as the test of coherent and believable reports. The other must give her testimony oriented toward that practical success for which we congratulate our Western selves. Otherwise she will either not make sense or we will consider her as lacking in credibility.

From testimony to teaching

Is there another solution to these dilemmas posed by inter-cultural testimony? I think there may be, but it will require a reworking of the epistemic structure of legal factual inquiry, a reconstruction of the trial process. First, let me give a theoretical outline of what I believe is necessary.

Some way must be found to circumvent the influence of a uniquely Western approach to gaining knowledge from others: we must attack the problem at its heart — the interrogatory structure of adversarial trial in the common law tradition. The process of question and answer as it occurs in legal fact finding begins, as I have suggested earlier, with those who judge as the first witnesses. In taking their oaths they affirm their autonomous rationality to themselves and proclaim it to the world. They answer first the cartesian question at the centre of modern Western thought ('How do I know I exist?'), and by their answer they become exemplars of purposeful, instrumental thought, the foundation of Western rationality. In affirming themselves as autonomous rational agents they gain the status to inquire into the value of what they are told by others. Interrogation of witnesses then proceeds with such communications having as it were a 'carrier wave' which supports meaningful exchange between questioner and responder. This constant signal is the propagation of that foundational instrumental rationality which authorises those who judge in their task. If that underlying signal is disrupted, as it may be in an exchange partly originating from within an alien culture, then meaning may be lost and there is no hope for justice.

From this I conclude that the process of gaining knowledge across cultures must incorporate less questioning and more 'telling' by the other. Rather than risk the distortion or worse, failure, of the exchange of meaning and insight which may accompany interrogation as a tool of Western rational inquiry, we ought to consider letting others speak more for themselves. In principle we must be prepared to listen more and ask less.

Learning at trial

How might we restructure the trial process to bring about this theoretical vision? For inspiration in making such a goal a practical reality I have looked to the example of another 18th century Scot, William Murray, Lord Mansfield, Chief Justice of the Court of King's Bench of England. It has long been thought that Mansfield did much to change the commercial law of England and that his use of special juries played an important role in that work. The discovery in 1967 and

subsequent analysis and publication of Mansfield's trial notebooks has now shed more light on those special juries.¹⁰

The legal problem facing Mansfield and his predecessor, Lord Holt, was to discover 'mercantile custom'. Common law actions could be brought on the basis of such customs provided they were shown to have existed 'from time immemorial' and to be limited in their scope of application to particular persons or places.¹¹ Both Holt and Mansfield used special juries to assist them in judging the customs of merchants and it seems they treated them as part jurors, part witnesses, and in part as experts. Here is Mansfield's note of the result of one such jury trial:

The special jury (among whom there were many knowing and considerable merchants), found the defendant's rule of estimation to be right and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present; and formed their judgement from their own notions and experience, without much assistance from anything that passed.¹²

With Mansfield in particular it appears special jurors were also considered as respected friends. It is reported that one such merchant who was often included in Mansfield's special juries appeared in court annually on the occasion of the judge's birthday to offer him a bouquet.¹³

One commentator has painted a picture of Mansfield's special juries which seems particularly attractive as a model to be followed in undertaking the task of judging inter-cultural issues:

Mansfield resolved this dilemma by treating mercantile custom as custom in the sense that social scientists understand that term. It consisted of the folkways of a particular community, a set of practices that remained relatively constant over time, but whose informality permitted them to change in response to changing circumstances. Mansfield's special merchant jury resembled the anthropologist's informants; they answered questions that arose in the course of an ongoing inquiry into their recondite and complex culture. This approach provided Mansfield with a balanced, effective way to use the information that his jurors supplied — it was neither law nor a circumvention of the law . . .¹⁴

It will be apparent by now that I believe the problem of judging the evidence of witnesses across cultures might be ameliorated by use of an institution such as the special jury as Mansfield understood it. Special juries, drawn from members of the culture concerning which the issue arises, may be treated as combining the roles of witnesses, jurors, experts and respected equals. They should be given the freedom to talk amongst themselves and in the presence of the court (with translators if necessary of course) and not bound to the framework of the usual interrogatory process. An expert 'assessor' from within the culture sitting with the judge might also be necessary to help interpret to the court the story told by such special juries.

It is my belief that decisions reached after listening to such telling of the truth of other lives are likely to be more just than those based on the testimony of individuals in the witness box.

(As I quit this white space I worry, and wonder whether I have done justice to others. But now you have my testimony you judge yourself.)

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'SCIENTIFIC & CULTURAL VANDALISM'

Mark Harris

The Academy's failure to accept the validity of the return of Aboriginal cultural heritage material.

This article examines the recent controversy surrounding the return of Aboriginal cultural heritage materials to the Tasmanian Palawa community in the light of the discursive practices deployed by members of the academy, notably archaeologists from La Trobe University. It is argued that the deficiencies of the current cultural heritage legislation arise more from the failure of non-indigenous Australia to 'locate' Aboriginal peoples within the drafting and implementation of the legislation than the process of constructing Aboriginal people according to certain limited stereotypes. While there is increasing evidence of academics disavowing the eurocentric practices of earlier anthropologists, archaeologists and historians, it is argued that the controversy surrounding the Tasmanian Aboriginal cultural artefacts demonstrated the inability of those within the academy to acknowledge Aboriginal voices and to engage to any degree in what Marcia Langton has termed 'intersubjectivity'.¹

The dispute

The dispute between the Tasmanian Aboriginal Land Council (TALC) and the archaeology department of La Trobe University arose when a member of the department sought to renew permits for the possession of cultural artefacts that had been removed from four cave sites in the Southern Forests region in Tasmania in the period between 1987 and 1991. The artefacts numbered more than 400,000 pieces and included food remains, stone and bone tools, animal faeces and bits of shell. There was not any skeletal material in the artefacts removed as part of the Southern Forests Collection. Several of the permits which granted Professor Tim Murray and Professor Jim Allen the right to remove the artefacts from Tasmania had expired and, despite certain misgivings on the part of Professor Allen that the TALC 'was going to be hard line', he sought to renew the permits.² The basis of Professor Allen's concerns was the fact that the Tasmanian Government had promised to return control of cultural heritage materials to the Tasmanian Palawa community. The application for renewal was rejected in mid-1994 and there seemed a strong likelihood that the cultural artefacts would be returned to TALC.

In the ensuing months negotiations continued between the La Trobe academics and TALC, although there seems to have been no attempt to convene a meeting between representatives of the two parties. The La Trobe archaeology department viewed the threat of TALC forcibly removing the artefacts with sufficient gravity to prompt the closure of the department on Friday, 30 June 1995. Defending the decision to send the department's students home, the head of the School of Archaeology, Professor Tim Murray, noted that 'we had heard they were looking for a truck to take the stuff back'. In response the TALC chairman, Mr Roy Sainty, observed that the department was a 'dinosaur' in its refusal to return cultural artefacts.³

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The decision

On 24 July 1995 the dispute between TALC and the La Trobe University archaeology department was heard in the Federal Court in Melbourne. It was argued by counsel for La Trobe University that the dispute and the 'sense of urgency' had been manufactured by TALC and that the Tasmanian Government had been at fault in failing to implement a new system of permits, when there had been an extension of the right to possession until such time as the new system was introduced.⁴ It was argued by counsel representing TALC that the archaeologists had been in unlawful possession of the artefacts and that they had therefore been conducting unauthorised research. Olney J found on the facts that the four permits issued to Professor Allen had expired, the earliest on 31 May 1991 and the most recent on 30 January 1993 (*Roy Sainty & TALC v Allen & Murray & La Trobe University*, unreported, Federal Court, 28 July 1995, No VG643/1995). The permit issued to Professor Murray on 27 March 1990 had also expired on 12 March 1991.

Among the four permits issued to Professor Allen, the most recent had not authorised the removal of the relics from Tasmania. It was also found that the issue of the permits had been conditional on the materials being returned to the senior archaeologist of the Department of Parks, Wildlife and Heritage upon their expiry. In the light of the published writings and statements attributable to Murray and Allen, Olney J expressed 'grave doubts as to their willingness to return the relics until they have concluded their research' (at 5). While Olney J did not consider it to be appropriate for the materials to be removed from Victoria, he did require that they be held at the Museum of Victoria until such time as the Minister for National Parks and Wildlife made a decision about the custody of the artefacts. On 3 August 1995, the Minister, John Cleary, requested the Federal Court to return all artefacts to the Senior Cultural Heritage Officer in the Parks and Wildlife Service and they were subsequently returned to Tasmania and stored in a government store in a Hobart industrial suburb.⁵

The decision by the Minister to request the return of the artefacts prompted Professor Allen to accuse him and the Tasmanian Government of 'scientific and cultural vandalism' and to challenge the wasting of money in returning the heritage material to the Tasmanian Aboriginal Land Council.⁶ In response, Mr Cleary noted that Professor Allen had been holding the material illegally since his permits had expired and that he had only 'himself to blame for this regrettable state of affairs', for his failure to liaise with the Aboriginal community and involve them in the research.⁷ The Tasmanian Government resolved in November that the artefacts should be returned to the local Aboriginal custodians. Professor Murray expressed concern at this juncture at the prospect that TALC intended to scatter the materials in the area from which they were originally removed and emphasised that his department would still 'welcome a chance to complete our analysis'.

Representations of 'Aboriginalism'

The dispute involving the Tasmanian Palawa cultural heritage materials was notable for a number of reasons. The first issue for consideration is that of 'ownership' of cultural heritage materials. While the TALC decision was ostensibly about the interests of Aboriginal cultural heritage being privileged over the scientific research of archaeologists, the central issue of 'ownership' of the materials was not seriously raised. The second point for consideration concerned the

definition of 'relics' and the extent to which the legislation takes account of Aboriginal perceptions or voices. The TALC case was significant because it did not involve human skeletal remains or sacred items and therefore challenged non-indigenous conceptions of what constitutes 'cultural heritage materials'. The final issue that emerged concerned whether such cultural heritage materials were the common property of all humankind or were the 'cultural heritage' of Tasmanian Palawas. Closely linked to a consideration of this issue was the question of whether archaeologists (and other academics) had a right of access to the material. Put more succinctly, the question was one of 'who owns the past?'.⁸

These questions can only be addressed meaningfully if we accept that implicit within the argument, consideration and resolution of the TALC case were modes of discourse which represented Aboriginal people in a certain way — the discourse of 'Aboriginalism'.⁹ In the same manner that Said's *Orientalism* detailed the manner in which the Orient was an Occidental construction,¹⁰ so too can the production of knowledge about Aborigines be seen as resulting in the images of 'Aboriginalism'. The knowledge production which generates 'Aboriginalism' can be traced to the Foucaultian notion of discourse, which is the 'practices which systematically form the objects of which they speak',¹¹ concerned with revealing 'the level of "things said": the condition of their emergence, the forms of their accumulation and connection, the rules of their transformation, the discontinuities that articulate them'.¹² Muecke has identified some of the European discourses of Aboriginalism as being the 'Anthropological, the Racist and the Romantic'.¹³

Adapting Said's formulation of 'Orientalism' it can be argued that Aboriginalism is manifested in a number of ways. First, it is in the work done by those who research or write about Aboriginal people. Second, 'Aboriginalism' is established through distinctions made between Aborigines and non-Aborigines. Finally it can be seen in the establishment of corporate institutions for dealing with Aboriginal people.¹³

The construction of 'Aboriginalism' has occurred in every aspect of Australian life since the commencement of white invasion. In every academic discipline the representations of Aboriginal peoples have occurred without any reference to the voices of Aboriginal people. The construction of Aboriginal people as the 'Other' is done in their absence and confirms a relationship of power that is manifested in domination and subordination between, respectively, non-Aborigines and Aborigines. In the course of constructing Aboriginal people a process of binary opposition is deployed. Everything that the Aboriginal person is, defines what the non-Aboriginal is not. Invariably the representations made about Aborigines are that they are savage, imbecilic, child-like, lazy, or untrustworthy. So the Aboriginal is, as with Said's Oriental, 'contained and represented by dominating frameworks'.¹⁴ The texts and images in the Aboriginalist tradition are therefore productive of essentialist representations of Aborigines. All Aborigines are reduced to the image constructed by the non-Aboriginal authors and there is no space for Aboriginal voices to contest the legitimacy of the representation. Within the hegemony of Aboriginalist discourses there is no latitude allowing, to borrow from Spivak, for the subaltern to speak.

This article is not intended merely to identify cultural heritage legislation as a manifestation of colonialist 'Aboriginalism'. Rather it seeks to question the 'location' of Aboriginal people within the legislation and to challenge the

notion that academics have divested themselves of the attitudes and approaches which characterised earlier 'Aboriginalist' writings.

Who defines and who 'owns' cultural heritage material?

The resolution of the dispute concerning the Tasmanian Aboriginal cultural heritage materials on one level could be seen to be a positive result for that State's Palawa community. In the case before the Federal Court, Olney J criticised the conduct and motives of the respondents while the Minister for Parks and Wildlife resolved that the materials should be returned to the local Palawa community. Cultural heritage legislation generally remains limited, however, by the fact that it is a 'European construction'.¹⁵

To argue, as was noted above, that the cultural heritage legislation in Tasmania is constructed by the discourse of Aboriginalism appears at one level to be justifiable. The legislation was drafted and implemented with little if any involvement by Aboriginal people. It is the legislation which dispenses rights over artefacts to Aboriginal people. While the cultural heritage legislation creates the framework for the control of Aboriginal artefacts it does not, however, create the artefacts. They exist of themselves and are not produced solely as a result of the discourse of Aboriginalism. In terms of the construction of Aboriginalism, it might also be argued that there is a tendency to replicate the same tendencies towards essentialism that are being criticised. To merely argue that cultural heritage legislation constructs a binary opposition of Aboriginal/non-Aboriginal does not take account of the fact that the *TALC* decision appears to have acknowledged Aboriginal voices in the ultimate destination of the artefacts.

A more useful critique of the cultural heritage legislation might be gained by reference to the theories of Homi Bhabha, who focuses on the space between the 'Colonialist Self' and the 'Colonized Other'.¹⁶ It is this moment of indeterminacy and insufficiency which can, in the words of Perrin,¹⁷ be 'prised open in order to dislodge the certainties of a colonial encounter between those with power and those without'. Just as Perrin seeks to 'locate' indigenous peoples within the framework of the 'Declaration on the Rights of Indigenous Peoples', so it might be argued that there are similar anxieties in the assertion of identity in the Tasmanian cultural heritage legislation.

In the *TALC* case it was not questioned by either party that the 'property in the relics is vested in the Crown' and that the Minister had the right to determine the question of control of the materials (per Olney J, at 3). These powers are vested in the Minister in the right of the Crown pursuant to the *Aboriginal Relics Act 1975* (Tas.), s.11. The administration of the Act also required that the five-member Aboriginal Relics Advisory Council should include *one* Aboriginal person chosen from a list submitted by an organisation which the Minister deems to represent persons of Aboriginal descent (s.4(2)(b)). In both of these requirements the assertion of Aboriginal identity is made contingent on the exercise of the non-indigenous Minister's power. The cultural heritage legislation can therefore be seen as an example of what Said has termed 'positional superiority', where the non-indigene is put in a series of possible relations with the 'Other' without ever relinquishing the upper hand.¹⁸

The other piece of cultural heritage legislation in Tasmania, the *National Parks and Wildlife Act 1970* (Tas.), contains

similar provisions for the recognition of Aboriginal cultural heritage matters which also privilege the non-indigenous voices. 'Aboriginal relics', for example, are deemed to be under the control of the Secretary of the Department of Parks, Wildlife and Heritage. Significantly this legislation requires that the Governor should try to secure the services of an archaeologist as a member of the National Parks and Wildlife Advisory Council but there is no requirement for there to be a representative from the Aboriginal community on the Council (s.10(3)(i)). So the nature of Aboriginal cultural heritage materials is defined by reference to the parameters set by white legislators and there can be, as in the case of the two pieces of Tasmanian legislation, significant divergence in the definitions used. In the dispute concerning the Tasmanian cultural heritage materials the definition of 'relics' assumed significance as certain sectors of the media questioned the veracity of material that is 'neither human nor sacred but simply cultural'.¹⁹ While the artefacts in the *TALC* dispute were covered by the Tasmanian legislation, it is evident that many sections of non-indigenous Australia have difficulties in comprehending the more holistic view of cultural heritage of Aborigines.²⁰ It should be stressed also that the emphasis upon control and ownership of Aboriginal cultural heritage materials being vested in the Minister or the Crown is not limited to Tasmania.

Who 'owns' the past?

The exclusion of Aboriginal voices from the discourse about Aboriginal people has meant that, until recently, the past and history were constructed solely in Western or European terms. As Swain has observed, '[u]ntil the 1960s, Aborigines were almost totally non-existent in history'.²¹ The conspiratorial shunning of Aboriginal voices by the disciplines of history and anthropology was the subject of the Boyer lectures by eminent anthropologist W. Stanner. This occlusion of Aboriginal voices has not been confined, however, to the disciplines of history and anthropology. In 1983 one of the respondents in the *TALC* case observed that archaeologists argue that '... the past only exists in the sense that it is created by people in the present, whether from historical documents, oral traditions or archaeological evidence'.²² Professor Allen then asked rhetorically whether the denial by Aboriginal people to archaeologists of access to sites could constitute a form of censorship. In the course of the dispute over the Tasmanian cultural heritage materials similar allegations were again raised. The differing conceptions of the importance of the cultural heritage materials were exemplified in the media treatment of the prospect of repatriation to Aboriginal communities of the cultural heritage material.

The media coverage of the La Trobe University archaeologist's views consistently focused on the prospect that the Palawa community might choose to deal with the cultural heritage material in a manner that would 'destroy' its scientific potential. One newspaper article, for example, referred to the possibility of the material being returned to its place of origin as the La Trobe archaeologist's 'nightmare' and noted that 'an alarmed Jim Allen' recalled that another prehistoric Tasmanian collection had been returned to its place of origin by its Aboriginal keepers by being 'thrown in a lake'.²³ The prospect of such an occurrence was also emotively equated by another academic, Professor Rhys Jones, with 'the burning of the books'.²⁴ The *TALC* did not deny the possibility that the cultural materials might be dealt with in such a manner and its spokesperson, Ms Karen Brown, noted that, 'We don't believe that if the Aboriginal

community decide to rebury it that that's actually destroying the material . . . in our eyes it's enhancing its cultural significance'.²⁵

The manner in which the media chose to deal with the 'distress' of the archaeologists at the possible fate of the cultural heritage material only serves to emphasise a point made by a Koorie historian and land rights campaigner, Wayne Atkinson, as early as 1985, when he observed that:

In today's scientific terms this [heritage] is regarded as archaeological evidence but really it is the tangible evidence of our ancestors' occupation of this continent . . . They are in fact Aboriginal sites, not archaeological sites. The term archaeological site is a convenient way of categorising sites in a European framework in which scientific significance assumes the main importance.²⁶

Clearly scientific interests have been privileged above the rights or concerns of the Aboriginal community. This was also evidenced in the treatment by the ABC television science program *Quantum* of the dispute (14 November 1995). The report noted that the debate over the future of the Tasmanian artefacts 'has overshadowed the history the archaeological record was revealing. A story of how Ice Age man made a living in the harshest environment', and that the 'story was being pieced together by a team of archaeologists from Melbourne's La Trobe University'. The underlying premise of the *Quantum* story was clearly that only archaeologists have the credentials to 'tell the story of the past' and the dispute over the fate of the cultural artefacts simply served to 'overshadow' the higher purpose of scientific research.

It might certainly be argued that the archaeologists and the media here are engaging in another discourse of Aboriginalism. The binary opposition that emerges is clearly that of the scientific archaeologists compared with the 'unscientific' or emotive Aborigines. A more sinister aspect to the constructions of Aboriginalism that can be detected in this discourse is the inference that Tasmanian Palawas do not have a superior claim to the cultural material to that of non-indigenous Australians. Professor Jim Allen, for example, argued that:

I have a legitimate claim on this material in the same way as the Tasmanian Aborigines have a legitimate claim on this material. How ownership can devolve down to one group of people who have a political view about this material doesn't strike me as being logical.²⁷

An even more extreme articulation of the opposition to Aboriginal control of cultural heritage materials came from Professor Gough of the department of history at the University of Adelaide. The dispute between TALC and the La Trobe anthropologists, according to Professor Gough, was symptomatic of the creation of a new official religion from Aboriginal heritage legislation. The basis of indigenous claims to cultural heritage materials was ridiculed by Professor Gough, who argued that 'indigenous representatives own the remote past' and can 'forbid access to it by scientists'. Professor Gough also condemned the 'ritual abuse of the discipline of archaeology as a form of colonial exploitation' and observed that there would be astronomical odds against 'any present-day Aborigines in southern Australia having a close genetic affinity with the people who inhabited their regions 20,000 years earlier'.²⁸

The Gough diatribe is illuminating because of the emphatic manner in which it seeks to diminish the connections between contemporary Tasmanian Palawas and the cultural heritage materials. The identity of Tasmanian Palawas is being questioned and, consistent with the Aboriginalist dis-

courses of the past, Professor Gough attempts to deny Aboriginal people a voice in the representations that are made. While the address by Professor Gough can easily be consigned to the realms of colonialist writings there remains an element of uncertainty in the public pronouncements and writings of Professors Allen and Murray. As recently as 1992 Tim Murray seemed to advocate a closer relationship between Aborigines and archaeologists that might benefit the Palawa community in the task of hermeneutics. Murray urged that:

. . . the tremendous dynamism of prehistoric Aboriginal societies can link with the demonstrated flexibility and resilience of Aboriginal people in the historic period to restore a cultural context other than the timeless Aboriginal person operating in timeless Aboriginal institutions.²⁹

By the time that the *TALC* case had been resolved, Murray and Allen had shifted in their position and sought to validate their pre-eminent scientific claims to the materials. Allen maintained on the *Sunday* program, for example, that, 'I'm trying to extract out of it the story of the human past in the deep human past, which is involved in it and I think it's a story that doesn't simply belong to Aborigines, it belongs to all human beings'. Murray, on the other hand, warned that there was a tendency amongst Aboriginal activists to justify their exclusion of archaeologists through the practice of 'essentialism'.³⁰ The links which Murray had earlier spoken of forging between the 'timeless' Aboriginal presence and the contemporary Palawa community were suddenly questioned. In the same way that it might be argued that cultural heritage legislation cannot 'locate' the indigenous presence, so too do the La Trobe archaeologists seem confused as to whether their discourse should exclude or accommodate an indigenous presence.³¹

'A post-Mabo archaeology of Australia will be polyvocal . . .'³²

Since the decision in *Mabo* (No. 2) was handed down on 3 June 1992 there has been an insistence from commentators in every academic discipline that this represents a new beginning for Australian society. The reality is certainly significantly less than that. Despite the fact that the *Native Title Act 1993* (Cth) purported to give legislative effect to the key tenets of the *Mabo* decision, there has yet to be a determination by the National Native Title Tribunal in favour of native title claimants. In fact the Federal Court's finding in the *Waanyi* case (*North Ganalanja Corp. & Bidanguu Aboriginal Corp. on behalf of the Waanyi v Queensland & Century Zinc* Federal Court, unreported, 1 November 1995, No. QG 34/1995) that the existence of a pastoral lease would be sufficient to extinguish native title can be seen as further evidence of the intention of the courts to read down and limit the scope of the *Mabo* decision. Similarly, recent cases involving native title rights to hunting and fishing have evidenced a very narrow reading of usufructuary rights in Australia. The dichotomy between what the *Mabo* decision promised and the reality that emerged has also been commented on by Henry Reynolds, who argues that the recognition of a native title right to property is inseparable from a continuation of the right to sovereignty.³³ In a similar vein it would seem apparent that cultural heritage matters should come within the ambit of native title rights. The insistence on some form of demarcation between cultural heritage issues and the custodianship over land must be viewed as an artificial, non-indigenous construction.³⁴ While Tim Murray might argue that the post-Mabo archaeology in Australia will

be 'polyvocal', it seems clear from the *TALC* case that the only voices of Aboriginal peoples will be those which the archaeologists will agree to. The stories being told in a post-Mabo Australia will remain those of non-indigenous Australians.

Conclusion

While the respondents in the *TALC* case were archaeologists, it was not intended that this article should seek merely to focus on one particular group of white 'experts'. The same tendencies to construct representations and to 'locate' Aboriginal people as different are evident in the discursive fields of anthropologists, historians and lawyers. Insofar as the *TALC* decision can provide lessons for the future, it is clear that the current review of the operation of the Commonwealth cultural heritage legislation under Elizabeth Evatt is long overdue. Similarly, the meeting of the Archaeologists Association of Australia in December 1995 could realistically be expected to take cognisance of Aboriginal rights to control, limit or exclude research in cultural heritage materials.³⁵ It can only be hoped that the recommendations from both forums take heed of the need for Aboriginal people to control cultural heritage materials in a meaningful way. In 1983 Rosalind Langford observed that; 'We say that it is our past, our culture and heritage and forms part of our present life. As such it is ours to control and it is ours to share on our terms . . .'³⁶ These views of Langford are even more pertinent today.

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'With a FEROCITY unimagined'

Lawrence McNamara

Thinking about mental illness and discrimination law

Fuck!

Fuck!

I fucking hate this.

'Tim'

Tim is in his twenties and has schizophrenia. In the next room he sobbed, screaming intermittently, in anger and despair, to no one. The voices which — there is no other word — tormented him had left him alone. At least for a short time.

I write for Tim, who struggles on; and for Sarah, who struggled to the end.

This article critically examines the role of anti-discrimination laws in combating the ubiquitous discrimination encountered by sufferers of mental illness in Australia. Crucial to this discussion is the notion that what it means to be mentally ill has not only a legal definition, but also social meaning that is best discovered through the eyes of the sufferers themselves. This social meaning is in part created by the discriminatory practices and attitudes which pervade our society.

My core argument is that discrimination against people with mental illness is entrenched and embedded in Australian society and that our anti-discrimination laws, while not flawless, are an important preventive and pro-active tool in a project of eliminating that discrimination. These laws have the dual roles of legal means of redress and the focus of constructive action in social practice. Moreover, the significance and impact of these laws is increased if we view them in broader terms than conventional 'objective' legal analysis might suggest. A critical and interdisciplinary approach to discrimination in both method and substance can offer new insights and, of itself, form a part of an emancipatory project.

Foundations of anti-discrimination laws

The normative premises which underpin discrimination laws lie in human rights. Though contentious in detail, there are basic rights to minimum standards of housing, health care and employment, for instance, which are (or should be) beyond debate. Expressions of these rights can be found in United Nations conventions such as the International Covenant on Civil and Political Rights and the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. It is not necessary that these principles be binding on Australia for them to be implemented in legislative form, or to use them as a background against which we may critique mental illness discrimination in Australia. Despite arguments which concern competing claims to rights, the unquestionable reality is that people with mental illness are so powerless and so far behind the benchmark that suggestions that they are impinging on the rights of 'mainstream'

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society are untenable. This is borne out on almost every page of the report of the National Inquiry by the Human Rights and Equal Opportunity Commission (HREOC) into the Human Rights of People with Mental Illness: *Human Rights and Mental Illness* (the Inquiry; the Report).¹ The Report is a landmark document for its comprehensive coverage of the issues and the scope of its inquiries. Almost 1000 pages, it is a revelatory — if sometimes harrowing — description of the state of the mentally ill in Australia in the 1990s.

What is it to be mentally ill?

Legally

Definition in Australian discrimination statutes is minimal. The *Disability Discrimination Act 1990* (Cth) (s.4) and the *Anti-Discrimination Act 1977* (NSW) (s.4) include as a disability 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour'. Thus, while mental illness is not used as a term, the Acts clearly encompass psychiatric disability.

Under the *Mental Health Act 1990* (NSW) which is concerned with the 'care, treatment and control of persons who are mentally ill or mentally disordered':

mental illness means a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions;
- (b) hallucinations;
- (c) serious disorder of thought form;
- (d) a severe disturbance of mood;
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d). [ss.3-4, Schedule 1]

Controversy has centred around the extent to which psychiatrists have controlled the determination of who is mentally ill. While they are the people who administer the *Mental Health Act* with regard to voluntary and involuntary admission, they have effectively been the legal determiners as well; the courts have consistently deferred to the medical profession.² The outcome has been a legal definition which relies on psychiatric criteria, but is intended 'to limit the ambit of psychiatric opinion in the civil commitment process'.³ This has two main advantages. First, it eliminates the inherent prejudice in 'commonsense' determinations of mental illness which have been known to dominate the courts intermittently — this is crucial given the prejudice surrounding mental illness. Lawton J in *W v L* [1974] 1 QB 711 expressed this as follows:

... ordinary words of the English language should be construed in the way that ordinary sensible people would construe them ... [T]he right test [is] what would the ordinary sensible person have said about the patient's condition in this case ... ? In my judgment such a person would have said: 'Well, the fellow is obviously mentally ill'. [at 719]

This has been described as 'the man-must-be-mad test'.⁴ The second advantage in limiting the legal definition is that it makes the courts and the psychiatric profession more expressly accountable by specifying consistent symptomatic criteria. In sum, the legal definitions rely on the identification of manifest symptoms which correspond to psychiatric criteria for the presence of mental illness. Importantly, illnesses are not all the same, though a significant taxonomic divide

may be drawn between psychotic illnesses (including schizophrenia) and non-psychotic illnesses (including depression).

Socially

Tim found it difficult to leave the house, even to go to the shop to buy cigarettes. The owner was 'out to get him', talking about him to other customers, following him on occasion. The other customers were talking about him too. Watching certain television programs became an obsession as he watched for signs that the actors were giving him.

'Rachel' was visited by a social worker as part of a follow-up after hospitalisation. The visitor inquired as to how she was. Rachel replied — with insight into her illness and no small amount of humour — 'My shoes have started talking to me again, but my slippers are much more interesting'. The humour was not lost on either party. The serious side cannot be forgotten; Rachel was in hospital after eating gravel in her driveway. [Personal communication to author]

A debate central to all work on mental illness is the sociology versus psychology conflict. That is, to what extent is mental illness a social construct and to what extent a biochemical reality? From the 19th century it was accepted that madness was a medical phenomenon, though approaches diverged across psychology and psychiatry, through psychoanalysis and physiology. The 1960s, however, saw a reaction in the 'anti-psychiatry movement' which focused on the normative bases of mental illness as a concept: deviance from social norms, perception, behaviour, learning and labelling were the sources of mental illness. Bottomley cites Thomas Szasz as a key figure:

Mental illness, he argued, is a normative abstraction; his aim was to show that the phenomena which we call mental illness should be looked at afresh and, once removed from the category of illness, they should be regarded instead as individual struggles with 'problems with living'. [p.286]

Scull, like Bottomley, is ultimately unconvinced and focuses on the lived experience of mental illness:

Whatever the outcome of the controversy, it surely cannot alter the social reality that there exists a substantial number of people — be they victims of endogenous disease processes or of 'problems in living' — who lack basic social capacities and who manifest extreme helplessness and dependency.⁵

The Report emphasises the importance of the social dimension of mental illness, but clearly considers mental illness as a medical phenomenon. It is filled with evidence which supports this position. Consumers document their experiences and the social, medical and legal context in which they occur. In its entirety, the Report offers a concrete perspective on what it is to be mentally ill.

Discrimination

People with mental illness experience stigma and discrimination in almost every aspect of their lives. [Report finding, p.925]

The stigma of mental illness and the ubiquity of discrimination actually make discrimination a part of what it is to be mentally ill. It is almost a defining condition of mental illness and is indicative of the power of the social context. Stigma is a theme in all the literature; it pervades the evidence that is quoted throughout the Report and gives rise to constant public perceptions of violence and dangerousness which have no justification.⁶ The opposite is more likely:

The sporadic violence of so-called 'mentally ill killers' as depicted in stories and dramas is more a device of fiction than a



fact of life. Patients with serious psychological disorders are more likely to be withdrawn, apathetic and fearful.⁷

According to the Report, one of the most debilitating aspects is not the illness itself, but the social stigma it attracts: 'It erodes confidence, damages self-esteem, and contributes to an overwhelming sense of isolation and fear' (p.443).

The horrendous consequences of my illness have been [a result of] public attitudes of ignorance, fear, discrimination and neglect and professional indifference. [Report, consumer evidence, p.443]

The Report documented two aspects to discrimination which are most suffered by people with mental illness. The first is within the community, especially in housing and employment. The second is in the health care system, in hospitals and community care where mental illness is a low priority.

Accommodation

Persons discharged from psychiatric hospitals . . . have been declared mentally fit by their doctors, but mentally ill and probably dangerous by their neighbours. [Report, p.342, Submission by P. O'Brien]

Living with a mental illness — or recovering from it — is difficult even in the best circumstances. Without a decent place to live it is virtually impossible. [Report, p.337]

The policy of deinstitutionalisation and community care relies on the assumption that people will have somewhere to live, and this is simply not borne out in fact. This is partly because of insufficient funding for community care and accommodation, and partly the result of discrimination and poverty. People are denied housing because of their illness or history, or supported accommodation and community housing is blocked by residential opposition. They may not fit into the categories for which other accommodation is provided (for example, intellectual disability). The Report devotes a separate chapter — perhaps the saddest chapter of all — to boarding house accommodation, and is scathing in its criticism. Hygiene, diet, privacy, theft, health, rent practices: in 14 pages there is barely a positive word (pp.386-99).

Employment

The major social mechanism which individuals in our society use to maintain themselves both independently and financially is employment. This is also the major social mechanism through which we define who we are — that is, where we belong and how we contribute in society. [Report, p.404, Submission by M. Mead]

People with mental illness find it extremely difficult to obtain work. This is partly due to disadvantages which stem from the nature of psychiatric disabilities. This can include the nature of treatment: for instance, medication can have

dramatic side effects which restrict co-ordination or concentration. However, discrimination which derives from social stigma and public perceptions is the major reason for the difficulty. HREOC concluded that the reluctance to hire individuals with disabilities is largely based on ignorance: employers make assumptions about the disability rather than an assessment of the person's capacity.

Health care

We are unwanted and neglected . . . You want to be loved when you are sick. [Report, consumer evidence, p.444]

Much of the human rights debate has centred around concerns of substantive and procedural justice in processes of civil detention of 'involuntary patients'. There is without doubt discrimination in terms of the civil and political rights that the mentally ill enjoy as opposed to the rest of society.

The Report documents all manner of inadequacies in care, including crisis response and difficulties in gaining voluntary admission to a psychiatric hospital. Forced admission and transport to hospital are frequently shocking:

He just sat there and they physically had to pick him up. Now, why should he be degraded like this? Us, four police cars outside, five police officers into the home, him screaming, 'Mum, help me! Dad! Help me!' Now, why should they be degraded and we be degraded like that, really? . . . [It happens] because that person is allowed to deteriorate to such an extent that this has got to happen . . . [I]t is really bad — absolutely — it is disgusting. [Report, carer evidence, p.232]

The hazards of treatment are endless: being watched for signs of insanity; the neglect of physical well-being in psychiatric hospitals; inadequate emergency procedures at general hospitals; the effects and side effects — wanted and unwanted — of psychotropic drugs (mind-affecting and mood-altering); lack of information about and consent to medication; mistreatment by hospital staff of all levels; a lack of privacy, safety and security in hospitals; risk of assault and sexual assault from both staff and patients in hospital;⁸ the poor planning of discharge and post-hospital arrangements.

The Report concludes:

The evidence presented to the Inquiry concerning the alienation, indignity and frequent violence experienced by psychiatric inpatients indicates that we still lack a system of institutional care which adequately protects the rights of the mentally ill. There are [also] fundamental and widespread inadequacies in the 'community care' available . . . These deficiencies are incompatible with the rights . . . to appropriate care, treatment and rehabilitation and in some instances compound the ignorance and stigma still commonly associated with mental illness. [pp.287, 328]

Families and carers

It is heartbreaking. You watch your son in a crisis and there is nothing you can do. Often, he won't or can't help himself. I can't help him. Do we have the CAT team [Crisis Assessment Team] and the police come out? I just couldn't do that. It would devastate him . . . But we had to tell our other children where the phone number for the CAT team was kept in case it was needed. What else could we do? It is heartbreaking. It is just heartbreaking. [Personal comment to author]

The impact of the inadequate health care system is not felt only by the consumer. Families are forced into providing (perhaps inadequate) care, with high financial and emotional cost. On top of this they are caring — as the Report so often notes — for their loved ones. To reach out to the health care system is to declare the existence of a mental illness and take on the stigma that goes with it; they find themselves in a social context where hospitalising a family member is to do perhaps still more damage to the person they care about. Evidence given to the Inquiry expresses the emotional impact:

Each person with schizophrenia has a family, a mother, a father, perhaps a spouse, brother, sister or child. Schizophrenia ransacks their lives with a ferocity unimagined outside the family circle. Because they love someone whose illness shows itself not as a tumour, not as a heart gone bad or blood sugar gone wrong, but as bizarre and unpredictable behaviour, these families are robbed of peace . . . and of the humblest but most necessary of pleasures: something to look forward to. [Report, carer evidence, p.468, Submission by M. Leggatt and R. Webster]

These families often cannot publicly seek help, either because the disclosure of mental illness or its degree, will attract stigma to the person for whom they care, or to themselves: "“Guess who’s got a mad sister?” the kids scream" (Report, carer evidence, p.472).

Anti-discrimination laws

What can our statutory mechanisms do about the discrimination that is suffered by people with mental illness, and those affected by it? As discussed above, the legislation clearly protects people with psychiatric disabilities through the definitions of ‘disability’. The *Disability Discrimination Act 1990* (Cth) prohibits unlawful discrimination in the provision of accommodation (s.25), employment (s.15) and goods and services (s.24), which would include the provision of health care and psychiatric services (s.4). Direct and indirect discrimination are covered by ss.5-6. The *Anti-Discrimination Act 1977* (NSW) has similar provisions under Part 4A.

Case law is scarce in this area. It appears there is only one relevant discrimination case: *X v McHugh, Auditor-General for the State of Tasmania* (1994) EOC 92-623. In that case the plaintiff suffered from schizophrenia and was dismissed by his employer because of the manifestation of his disability. That is, his performance was argued to be unsatisfactory because of his illness. Under the Commonwealth Act this was held to be unlawful discrimination. The case addresses psychiatric disability as one type of disability covered under the Act, but does not go into any consideration of the specific nature of mental illness or the issues to which it gives rise as a category. The decision indicates that people with mental illness have clear and enforceable rights under anti-discrimination laws. In spite of this, there are two key barriers which obstruct them from making use of their rights.

First, there are the practical difficulties of making a complaint and proving it. Consumers are generally powerless and, as the Report emphasises, have enough trouble coping with day-to-day life, let alone mounting a discrimination complaint. Second, discrimination is embedded in social practices. While the Inquiry recommended that providers of goods and services ‘must be made aware of their legal obligations to people with psychiatric disabilities under Federal disability discrimination legislation’ (p.925), it does not alter the reality of the powerlessness of consumers and their almost total neglect by mainstream society which is derived from unjustified fear and ignorance.

Discrimination is structural in its nature. This is especially so with regard to the impact of mental illness on carers and families, and the standards of health care which are available for people with mental illness. The lack of understanding of mental illness in the general hospital system and the classification of disabilities into different categories (physical, intellectual, psychiatric) work against the just provision of services to the mentally ill. Discrimination is a part of our social concepts of work, family and citizenship. What it is to work and be a worker is tied up with our concept of the workplace and the socially constitutive role of work in our identities. The places we live — in a family home, in a shared household, alone and independently — are essential to our collective and individual sense of self. Supported accommodation in the community is a novel and feared idea: ‘they should be put on a one-way bus and taken to some place where they belong’.⁹ What it means to take part in our society is dependent on what we are — on what we are as a citizen. This identity is constructed by our interaction with others in work and social life, and this is determined to a large extent in the case of mentally ill people not by themselves but by others. Their power to control and shape their own identity is limited by a social context which leaves them powerless. Discrimination laws as mechanisms of redress for wrongs done to the individual have limited scope in such a context.

The next step is to address this social dimension, which has been a crucial part of the defining, experiential and discriminatory aspects of mental illness. Discrimination laws do have a role beyond their function of redress for the individual. We must challenge the norms of law and legal scholarship and expand the conventional boundaries of legal analysis in order to bring out the realisation of human rights which is the foundation of this article.

Expanding the boundaries of law

It is a basic tenet of this article that as active human beings we constitute our social world, within the limits of social structures.¹⁰ There are compelling arguments of history and theory which lend weight to the proposition that we can alter those structures as well. The processes of acting and being acted upon are continuous and interactive. We construct the meanings and mores which govern our interaction; since the Enlightenment, the ‘givens’ have become fewer and fewer as ‘meta-narratives’ of religion and science (or, more accurately, scientism) have collapsed as we seek to include in the realm of social actors those who have been unjustifiably excluded. I argue that anti-discrimination laws which give rights to people with mental illness are not merely mechanisms for the achievement of equality, but should be conceived as a part of the way in which we are changing our world. This has implications for the way we view more generally the law and legal scholarship.

The discrimination which is currently embedded in social practice is a structure, but we act within it and as we are conscious of it we can also act upon it. Discrimination law is also a structure, a formal set of rules within which we interact. These rules are points of reference which have meaning, and it is we — as active, moral agents — who can give meaning to these rules. My point is that the very creation of express standards and mechanisms is a part of the way in which we combat discrimination as a social practice.

This approach pushes at the perimeters of conventional perspectives on law. Such an approach challenges and denies the objectivity of legalism, and not only claims that law is

not an independent structure, but celebrates its interconnectedness with our social world. The law is not merely a structure, it is an agent; by this I mean that as an institution, it turns back on our social structures and on individuals to challenge and question the values with which we have infused it. Hence, we need to see law not only as constituting (that is, a part of society), but constitutive (that is, as creative of society).

Legal scholarship must be critical in its substance, and also in its method. Law as an institution is a structure and practice over which we can — and must — take control; it is one way that, as a society, we define ourselves.¹¹ As a whole and in its parts it obtains meaning from the narratives in which it is located.¹² Our sense of rights, of justice and of discrimination is highly contextual and contestable. We are now operating at the margins of legal scholarship, and at the margins of society. To this end, this article has attempted to imbue the law with a social meaning in its approach to the expression of mental illness, through the statements of the mentally ill and their carers. The definitions of the statutes and case law are insufficient. We need also to draw our meanings from experience, especially the experiences of those for whom mental illness has a meaning that views discriminatory practices in a different light from mainstream society.

With us is Stephen Bottomley, who draws on the critical legal studies school in analysing the concept of mental illness in New South Wales.¹³ He highlights the social nature of mental illness, especially with regard to 'commonsense' approaches to defining the term. In structure-agency terms, he looks at the impact of psychiatry and its place in society as both structured and structuring:

Mental illness is an inter-subjective construct . . . Social relations . . . become 'animated by psychiatric themes' . . . 'Commonsense' understandings about what behaviours, attributes, etc. should be grouped under the heading 'mental illness' are not *a priori* concepts, but are the product of the psychiatrically affected perceptions which percolate through to individuals in everyday life. [pp.296-7]

Quite simply, mental illness does not exist 'out there'. It is not something we can look for, and then discover and observe. It is within our interactive social world and we engage with it, consciously or unconsciously, in many dimensions of our lives. We must draw it into our consciousness and place it in our world: at the moment, it is *people* with mental illness who exist 'out there'. And that — as HREOC observed time and again — is nothing less than scandalous.

Conclusion

... I am a champion. I have to support myself every day in ways so many have never dreamt.¹⁴

Discrimination laws are a useful avenue for redress for those 'aggrieved people' who can gain access to the system. People with mental illness are at the margins of our society and least likely and least able to obtain (or frequently even cope with) such access. Our consciousness of the significance of discrimination and the ways in which it permeates our society is the first and most fundamental step forward. We must understand mental illness as it exists for the mentally ill. We must obtain insights not only into the disease, but into their perspective on the world, and in doing so we gain an insight into our own place in the social world. We must look to expand our conceptions of law and legality if

we are to give meaning to our laws which will not exclude those they were designed to protect.

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LAW REFORM

The Development of an Authenticity Trade Mark for Indigenous Artists

The promotion and protection of Australian indigenous art, on a sound legal basis, has been publicly discussed by indigenous people over the last 20 years.¹ In 1981 the topic was the subject of a federal government inquiry.² The idea of an authenticity label was first discussed at a conference of artists and arts advisers at Nguiu in 1982,³ and initial specific proposals for a certified trade mark were examined by the Aboriginal Arts Management Association in 1992.⁴

In 1994 an Issues Paper, 'Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples', was jointly released by the federal Ministers for Justice, for Communications and the Arts, and for Aboriginal and Torres Strait Islander Affairs.⁵ A number of submissions were made in response to that paper, and in September 1995 the Federal Government announced that, amongst other matters, proposals for an authentication mark for indigenous artists were being examined in consultation with Aboriginal and Torres Strait Islander groups.⁶ This work is being carried out by the National Indigenous Arts Advocacy Association (NIAAA), and this article discusses some of the issues informing the work and the potential outcomes.

What is it?

An authenticity trade mark would not be a measure for what is 'real' in modern indigenous Australian culture as modern art. An authenticity trade mark would, however, be recognition of the authenticity, the undisputed origin or authorship of a particular work. The proposed indigenous authenticity trade mark is about promoting the buying and selling of indigenous cultural products and services. The prime aim of the trade mark is to inform consumers that certain products are made by indigenous people who claim identity, belonging, knowledge and responsibility for those products.

The ultimate benefit of the authenticity trade mark will be for indigenous artists and communities, enabling them to define and influence distribution of

their art works, with an expected improvement in returns on sales. Consumers will recognise products made by Aborigines and Torres Strait Islanders who will be enabled to define themselves and their own art traditions, styles, contemporary stories and histories.

An authenticity trade mark, which certifies in Australian law inherent qualities in indigenous culture, involves a substantial recognition of points of view and negotiation of terms based on an understanding of mutual benefit. In order for there to be mutual and ultimate benefit the authenticity trade mark must be wholly reflective of indigenous people and their definitions of terms.

1960 to 1980

One of the defining moral principles to emerge from the experience of the 1970s and early 1980s was the recognition of the large-scale financial exploitation of indigenous artists.

Publications such as *Art in Arnhem Land* had introduced an Australian art public to the beauty and complexity inherent in Aborigines' art and artefacts. The authors argued that the dynamic in Aboriginal society and in the production of artefacts was a continuing inner life consisting of ritual, symbolism and faith.⁷ At the same time, the distribution of artefacts through mission retail outlets in capital and regional cities created a source of regular income for certain communities and regular access to supplies for consumers.

By 1965 subjective analysis emphasised Aborigines as artists in a cross-cultural sense; their work being seen as based on their own effort and ingenuity. Production was seen as influenced and systematically encouraged by the distribution and return of a regular income.⁸ Ronald Berndt also acknowledged that the impetus for production was affected by market forces.⁹

At this time, research work with artists and community arts centres revealed the following clear evidence of the characteristics of an unstable economic base:

- in the period from 1977 to 1987 the community arts centres were seriously under-capitalised;
- the effect of under-capitalisation was that an exorbitantly high proportion of artists' returns on sales were required to be reinvested in the centres to keep the centres going;
- objective descriptions about ethnographic, traditional, and craft and tourist art caused great disparity in prices and recognition;
- as a result of these classifications women's art works were virtually ignored by distributors and galleries;
- distribution was characterised by pyramid commissions — to the detriment of artists and community arts centres;
- distribution was confused by combining sales, promotion, and education utilising stocks of art works;
- loss of collections, often of museum-quality stock, resulted from this confusion between sales and promotion; and
- at the end of the period, the rate of exchange for art pieces skyrocketed but the distribution structure prevented distribution of equitable returns.¹⁰

Aboriginal artists spoke out publicly about the need for appropriate promotion and protection of their culture¹¹ and the need for due recognition of all forms of indigenous art as art work of global significance deserving complex discussion and analysis.

Research in the 1990s

The moral question which developed from previous research and observation was: how do we arrive at a position of exchange and mutual benefit between indigenous cultures and Australian law? This question was critical to the process of inquiry into authenticity.

Grounded theory, as a research model, encouraged the development of hypotheses and theories. Further, a methodology based on the principles of mutual definitions and exchange was easily able to be developed from the

research principles of identifying diverse perceptions; analysing which of those are shared perceptions and then, through further comparative analysis, identifying the convergent perceptions. At each stage it is possible to propose new hypotheses and, at the last stage, to propose new theories.

Methodology in practice

The work to develop an authenticity label has entailed thorough consultation with indigenous communities across Australia to elicit diverse perceptions. In order to find a common language, samples of comparative labels, trade marks, community organisations' common seals and promotional publications were distributed. People communicated their experiences and previous encounters of defining cultural economy, identity and market.

Shared perceptions were established by inviting people to share their stories with other people and communities across Australia on the condition of a mutual sharing and return of information. At the end of the initial period of research, overwhelmingly, the shared perceptions centred on the meanings and priorities of community art practice.

'Convergent perceptions' may be described as those which were held in common from the shared perceptions. The process of future consultations was discussed and defined by communities on the condition of discussing the shared story with a full community meeting on the basis of their authority to approve and ratify from the shared perceptions.

The initial hypothesis to emerge formed a new moral issue for researchers in addressing indigenous art and the market. Definitions of terms for authenticity must be acceptable and appropriate across indigenous and Australian law, societies, and culture.

Defining authenticity

The research revealed a need for a complete reworking of the definitions used to describe authenticity in terms of indigenous art and culture. 'Authenticity' comes from late Latin, *authenticus* meaning 'coming from the author' which was from Greek *auto*, self and *hentes*, a doer, one who acts (independently). For indigenous artists, questions as to the responsibility for identifying the source of a work; who is identified as author; and how people express the origin of their work, inevitably arise and this is different from the Western concepts of self as author. Nev-

ertheless, authenticity is valued extremely highly by consumers who are looking for authentic indigenous art products as a reflection of their experience, understanding of, and respect for an indigenous sense of Australia as 'country'.

Indigenous people in communities around Alice Springs, the Top End and the Kimberley defined their identity, their belonging to stories and country, as the key parts in their meaning of authenticity. At a conference early in 1995, Murris in Queensland defined their sense of belonging as being part of a group with defining historical experiences. In addition, Kooris from the Murray Riverine, Gippsland, Central Highlands and Western Victoria identified their sense of heritage and access to distribution as crucial issues in identifying and defining authenticity. Other Koori artists ascribed responsibility in creation, depiction, and the publication and distribution of art works as another part of what they defined as authenticity.

In the next few months, indigenous people in Queensland, southern Western Australia, South Australia and Tasmania, and a large range of regional areas in New South Wales, will be visited by NIAAA.

Community art practice

Authenticity can only be supported if community art practice is nurtured. 'Nurturing' means supporting communities with knowledge and expertise; recognising authority where that is appropriate; and supporting the exchange of good practice.

Yet, in the last three years there has been a 20 to 30 percent decline in funding for arts centres. The current emphasis in indigenous arts on administrative training and sales profits, without equal emphasis on nurturing investment, runs the risk of creating the same unstable economic base of the 1980s. An arts industry at a community level has people, skills, equipment, and knowledge of its country and materials as its source of wealth. These all require investment to nurture community art practice.

The growth area of Aboriginal participation and employment in the arts industry is in the area of artistic development and conservation, ahead of administration. Artistic development is a continual educational process about both techniques and materials, in terms of both artistic practice, conservation of materials, and gallery exhibitions. Very importantly, archival and conservation requirements must be steadily and

slowly developed in accordance with community wishes.

In addition, artists' access to advice on administrative and legal process and legal issues is important in providing confidence in the authenticity trade mark.

Attachment of trade mark

The attachment of the label bearing the registered trade mark is critical. The responsibility for deciding who has this authority could be an Art Mark Association made up of respected Aboriginal and Torres Strait Island elders. People and community art organisations wanting this authority would apply to the Association.

In return for using the trade mark on their own community labels, community arts organisations and regional areas would benefit from the display, and the national and international promotion, of the trade mark.

The trade mark attached to a label would not necessarily mean the overall protection of Aboriginal and Islander definitions of cultural integrity. Special legislation would be needed if rock art, unpublished clan designs, performance pieces, and intellectual copyright are to be respected. Copyright, folklore, performance, and language are all areas of importance to NIAAA members. Education about copyright and sales issues will be promoted through exhibitions NIAAA is planning in an alliance with schools and institutions.

It is expected that there will be a negotiation of terms to create a partnership between Australian law and indigenous definitions of indigenous culture. The Australian Industry Property Office, the federal Attorney-General's Department and the Aboriginal and Torres Strait Islander Commission will be negotiating with NIAAA and its solicitors about the acceptance of terms. The authenticity trade mark will be based on both indigenous definitions of culture and a guarantee of inherent quality in an individual art work certified under Australian law. The government bodies have a critical role to play both in securing this partnership between the Australian Government and Australia's indigenous people and in supporting the enforcement of the status and standing of an authenticity trade mark.

Kathryn Wells
Kathryn Wells is the Research and Strategy Consultant to NIAAA for the Authenticity Project.

References on p.41.

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

CONGRATULATIONS

Girlie was delighted to hear that Regina Graycar — prominent feminist jurist and co-author of feminist legal studies 'bible' *The Hidden Gender of Law* — has been promoted to full professor at the University of NSW.

Crossing to Canberra, *Girlie* also commends Attorney-General Michael Lavarch on his fine choice of Justice Michael Kirby as the latest appointment to the High Court. Justice Kirby's credentials for the job not only include his reputation as a distinguished international jurist and human rights reformer, he is also an *Alt.LJ* reader and supporter of *Sit Down Girlie*. (What a guy!) While many of us are still concerned that the ladies' robing room at High Court headquarters is sorely under-used and must be dreadfully lonely for Justice Gaudron, we are looking forward to reading more of Justice Kirby's 'elegant judgments' and the fruits of his progressive and considered ideas on judge-made law.

STILL FIGHTING FOR EQUAL PAY

Despite the hard-fought battles for equal pay in the 1970s, women are still being paid less than men for performing work of the same value — and the quiet war against systemic discrimination goes on. A fresh skirmish is afoot with president-elect, Ms Jenny George holding the ACTU's battle standard firmly aloft. In December the ACTU announced that it would be asking the Industrial Relations Commission (IRC) to grant equal remuneration orders against three companies which are making over-award payments of between \$12 and \$115 less to women compared with men, for similar work (*Financial Review*, 7 December 1995).

In 1994, amendments to the *Industrial Relations Act* gave the IRC new powers to make orders for equal remuneration. This arguably allows the IRC to combat gender discrimination by going beyond minimum award pay rates, where gender-based differences have largely been removed, to tackle fringe-benefits, overtime payments and other components of remuneration packages. The ACTU applications will

test the amendments and the willingness of the IRC to exercise its discretion in relation to equal remuneration orders.

The companies involved in this action — Melbourne greeting card manufacturer, John Sands, and two small Sydney manufacturers, HPM Industries and Utilux — have rejected the discrimination claim and say the different rates of pay 'could be justified objectively'. Sexism in the seventies is 'objectivity' in the nineties? An interesting backlash.

WOMEN AND THE LAW CHAIR FOR SYDNEY UNI

Finally . . . *Girlie* is not only being told to sit down, she is being offered something to sit on. Dunhill Madden Butler gets the prize for sponsoring Australia's first Chair in Women and the Law at Sydney University. The *Financial Review* (6 December 1995) reported that their sponsorship would enable the law school to appoint 'a suitably outstanding candidate of international stature, whose responsibilities would include advising governments and courts on women and the law issues'. Mr John Churchill, Dunhill Madden Butler's managing partner, is quoted as saying that the firm's decision to sponsor the Chair 'reinforces its commitment to improving the status of women in the profession'.

Mr Churchill and his colleagues obviously have a different attitude from that of a certain other senior commercial lawyer (see *Girlie*, August 1995) to what is 'going on' in law schools these days. Rather than viewing the development of feminist legal theory as threatening and divisive, Dunhill Madden Butler consider that their support is a valuable investment for the future of the legal system and the profession.

Well, Dunhill's is setting the pace. There are plenty more law schools, and plenty of 'outstanding candidates', we just need some more comfy Chairs, (preferably with good back support).

CONFIDENTIALITY OF RAPE COUNSELLING FILES

Girlie's (periodic) prize for Prominent Person with Principles (who sticks to them, gets on national telly and is really modest about it) goes to Di Lucas from the Canberra Rape Crisis Centre. On 14 December 1995 Di was gaoled for contempt by a NSW magistrate when she refused to comply with a subpoena to produce her notes of counselling sessions with a victim/survivor of rape. The alleged rapist's lawyers were seeking to use the notes as part of the defence case in the pending trial. Di was released four hours later after agreeing to allow the relevant files to be held by the court in a locked briefcase, to which only she knows the combination, until the matter is decided.



On ABC national television (7.30 Report, 14 December 1995) Di maintained that she was not the only rape counsellor or woman who would have done what she did to protect the privacy of rape victims. That is undoubtedly true, but Di we commend you and your actions. On 14 December most people were too busy Chrissie shopping and gearing up for the office party to remember they had principles, much less go to gaol for them.

The case highlights the undefined status of counselling and other medical files as potential evidence in rape trials. Defence lawyers have argued that notes detailing victims' responses to an alleged rape, including feelings of self-blame and confusion should be allowed before the court in order to bolster an accused's case. This approach exploits a counselling-assisted process of healing following a rape and risks the viability of counselling centres around the country — victims cannot trust in the confidentiality of the counselling relationship if what they say behind closed doors can become part of the court file.

Coincidentally, the issue of confidentiality in the context of rape crisis counselling had been the topic of intense discussion at a session of the National Conference on Sexual Assault

and the Law held in Melbourne only two weeks before Di got the national media interested in the issue. Conference participants heard that defence demands for access to counselling files have been on the increase in Australia and other jurisdictions. The keynote speaker for the conference, Prof. Elizabeth Sheehy, a Canadian legal academic, reported that the practice was now routine in Canada. Counselling services there had responded by shredding files and demanding legal protection for the privacy of their clients. In Australia we are waiting on a clear statement from the NSW court deciding Di's case, or some principled people in the Parliament to commemorate her brave act with some swift legislative intervention.

SEXUAL ASSAULT CONFERENCE A SUCCESS

The First National Conference on Sexual Assault and the Law — *Legalising Justice For All Women*, held in Melbourne in November, was hailed as a success by both organisers and participants. The organising committee of national representatives wanted the conference to represent the diversity of women's experience of sexual assault and the law, and from all accounts this was achieved with good measure.

When pressured for a short-list of her personal highlights of the conference (apart from the closing session which signalled that it was almost time for her to have her life back), co-convenor Melanie Heenan cited:

the inspirational papers delivered by Canadian key-note speaker Prof. Liz Sheehy and Koori academic Marie Andrews, (who has a special gift for delivering a serious message and making you laugh at the same time);

the courageous and emotionally compelling voices of the women who spoke on the panel of victims/survivors (they received a standing ovation and brought many of the audience to tears);

the heart-warming performances by *Somebody's Daughter* and the *Macedonian Women's Choir*; and

the energy in the workshops on how the law can improve victim/survivors' experiences of the criminal justice system.

The conference proceedings will be published later in 1996. Watch this space for details on how to order a copy.

THE STOLEN GENERATION

Girlie is pleased to advise that a Human Rights and Equal Opportunity Commission Inquiry into the Separation of Aboriginal and Torres Strait Islander Children commenced in Hobart on 4 December 1995 and moved on 29 January to Melbourne. It then proceeds to travel around the country. The Inquiry hearings are being conducted by three commissioners, Sir Ronald Wilson, Michael Dodson and an Aboriginal woman from each State and Territory. They will spend their time collecting written and oral submissions and prepare a report by December 1996. The Inquiry's aims are to inquire into the separation of indigenous children from their families; to reflect on the past relationship between indigenous and non-indigenous Australians; and to reveal the impact of government policies on the lives of the people who were removed from their families. In reaching these aims the Commission will depend heavily on the voices of the mothers, fathers, children and relatives telling their stories of personal loss and the impact on their lives, families and communities. The final report will cover what should now be done to rectify the damage caused by the separations and consider the justice of compensating those affected. It will also report on the present situation for indigenous children and, in particular, examine the welfare and justice systems in light of the principle of self-determination.

An Advisory Committee has been established which consists of indigenous people already working in this field, in the hope that this will ensure that the Inquiry will be conducted with an indigenous voice at its heart.

Here is an example of a once official attitude towards the policy of separation:

Every administration has trouble with half-caste girls. I know of 200-300 girls, however, in Western Australia who have gone into domestic service and the majority are doing very well. Our policy is to send them out into the white community, and if the girl comes back pregnant our rule is to keep her for two years. The child is then taken away from the mother and sometimes never sees her again. Thus these children grow up as whites, knowing nothing of their own environment. At the expiration of the period of two years the mother goes back into service. So that it really doesn't matter if she has half a dozen children.

[From *Telling Our Story*, Aboriginal Legal Service of Western Australia (Inc.), 1995, p.73.]

Girlie wishes the Inquiry well and hopes that it paves the way for compensation for all who suffered and continue to suffer because of protectionist welfare policies.

Anne Athemer
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A collection of all the
'Sit Down Girlie'
columns is available
for

\$6.00

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4. Wells, Kathryn, *Authenticity. Promotion and Protection of Aboriginal and Torres Strait Islander Art*, Aboriginal Arts Management Association, 1993.
5. See Hawkins, Catherine, 'Stopping the Rip-offs', (1995) 20(1) *Alt.LJ*, pp.7-10.
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THE MEDIA

The Age: lies, damned lies and statistics

DANNY SANDOR 'exposes' an engineered crisis.

At best, it was breathtakingly ignorant. At worst, it was a patently dishonest media 'beat-up'. Victorians woke up on Monday, 19 September 1995 to find that they were living in a 'gangland' where 'youth crime booms'. It was the front page story in Melbourne's *Age* newspaper. The story was dubbed an 'Exclusive'. Paul Conroy, the Law Reporter, was credited with the article but headlines and the final content are the province of sub-editors.

The product was a classic illustration of the media as a manufacturer of moral panic about young people,¹ and prompted a slightly different version of this article which was rejected for the regular 'Opinion' page of the *Age*. The episode therefore serves as a case study of the media's penchant for fashioning statistics to suit its ends and only publishing certain responses. This brief also critiques some well-intentioned professional responses that, probably unintentionally, did young people a disservice by accepting a selective set of statistics as a valid starting point.

The article

The lead paragraph of the *Age* story announced so-called 'new figures' about young people appearing before the Children's Court. It said that the statistics revealed a 'big jump in violent major crime and a huge increase in the number of children appearing in court'. The use of weapons and violence was said now to be 'more likely' when children commit 'major crimes'. The article was specific enough to inform that '[p]ractitioners believe that the increase in the number of offenders has placed Victoria's juvenile justice system under enormous pressure.' However, the sources of those beliefs remained anonymous.

Having started the article with such a heart-stopper introduction, much of the remainder attempted to divert the blame from young people themselves to resourcing of juvenile justice in Victoria. The hook was the recent resignation of Greg Levine from the position of Senior Magistrate of the Children's Court of Victoria. The reasons for Greg Levine's resignation had been the subject of wide speculation and the *Age* had been running the story for a couple of days. Greg Levine had placed on public record his dissatisfaction with current resourcing arrangements for the system and, in particular, the Court itself. The *Age* possibly thought it was doing something beneficial by attaching Greg Levine's concern about resources to figures that might be imaginatively linked to a sudden crisis.



You could work out from the article that of the rise in the number of children charged between 1990 and 1994 (3426), nearly half (1677) were constituted by those menaces to community safety who do not wear bicycle helmets or commit what are loosely termed 'transit offences'. Transit offences include failure to produce a valid ticket on request or failure to produce a valid concession entitlement. To have an idea of this index of children's booming dangerousness, readers should consider the difference over this time period for matters found proven — not merely charged — in relation to failure to produce a valid ticket on request: 1990, 197 children; 1994, 1287 children.

Interestingly, the more than six-fold rise coincided with certain State Government policies about a crackdown on fare evasion but also the staffing — or lack thereof — of public transport ticket outlets and a recent furore about fines being imposed in circumstances where purchase of a fare is impossible. That issue had been a running theme on the Peter Couchman ABC Radio program, the same program where, on the day of the headline, Peter Couchman uncritically accepted the validity of the article and its conclusions in an interview with Alan Kohler of the *Age* during their regular segment.

The responses

The Youth Affairs Council of Victoria, the peak non-government body representing young people and those who work with them, attempted to make a public reply to the article. It issued a press release the following day attacking the coverage as 'alarmist' and 'scaremongering'. The Council highlighted the greater amount and also greater relative increase in adult offenders for the categories reported in the *Age*. It questioned why figures available since early June had been branded 'new' in September and drew attention to the very small rise for children involved in the offences of causing serious injury intentionally (17 in 1990; 21 in 1994) or recklessly (9 in 1990; 13 in 1994). That offence category was contained in the same statistical report available from the State Government's Department of Justice but, conveniently for the headline, it was not included in the *Age* article.

There was no mention of the Council's criticisms on Tuesday in the *Age* or the other Victorian dailies so the press release was reissued with some additional comments. Wednesday's editions were silent on the subject save for the Letters to the Editor column of the *Age* — not quite a balance to the prominence of a front-page headline.

Jill Toohey from the Professional Development Centre of Monash University hurdled a critical analysis of the statistics to forge an explanation of the assumed truth of 'a disturbingly significant' increase in youth crime. Her explanation took aim at State Government educational policy. One might well agree that they are culprits of many things but they are not, hopefully, responsible for the selective reporting of statistics.

Professor Glen Bowes who is Director of the Centre for Adolescent Health was on the right track. His letter began from the footing that the headline was not borne out by the

figures and explained the increase with reference to the psychosocial context in which teenagers live. He viewed the 'worrying' increase in offending as a symptom of young people's 'growing wave of alienation and disillusionment'. I agree with his prescription of a 'real commitment to the next generation' but I am troubled by his diagnosis of the statistical signs.

Steve James from the Melbourne University Department of Criminology pointed to an obvious reason for increases in charge rates, namely changes in police practice with respect to the cautioning of children. Children who are cautioned do not appear at Court for the offence. If policing policy reduces the number of those cautioned, and it has by 13% according to Steve James who was drawing on Victoria Police statistics, it follows that more go through to Court, even if they are not found guilty. The statistics of who 'appears' at Children's Court, on which the *Age* article relied, are going to increase as a result. Add that to the almost 250% rise in transit offences reported in the *Age* article, and I think we can come out from behind the barricades.

The *Age* should, however, be given credit where it is due. The centrepiece table to represent increases in young people's offending was accurate to the extent that it actually dealt with proven offences, not merely appearances at court. Yes, the number of young people found to have offended did rise in the listed categories between 1990 and 1994. Did it justify the headline 'Gangland Victoria'? Not according to Professor Bowes nor Steve James who wrote:

But I like the evidence used to justify the wonderful title of 'Gangland Victoria': 'Senior police believe the increases may be due partly to a proliferation of gangs'. Now that's research! [emphasis in the original]

The editorial

Peddling the truth of its own fabrication, the *Age* then ran a pious editorial calling for 'more consultation' on the issue, saying there was 'a clear need for the Government to inquire into the reasons' behind the purported crime leap. Well, the Government needed to look no further than the unprofessional coverage of the statistics to solve the engineered crisis.

The editorial call 'to shore up or replace services that have been reduced or closed' was valid in its own right. There are many ways in which the availability, range and capacity of services to young people in Victoria warrant improvement in order to address young people's vulnerability to law breaking. Dramatic vilification of young people is a disreputable justification for mustering resources that are required anyway and distorting the statistical picture escalates unwarranted community fears — at a profit to the newspaper.

An editorial line that oozes with concern does not remedy a flawed representation of the data. Having created an unwarranted public perception of law and order under siege, the architects are kidding themselves if they think that their editorial call for resources will be the enduring memory of the issue for their readership. It is difficult to believe they care.

A different statistical conclusion

In case you still think children are the dangerous ones, have a look at *Table 1* juxtaposing the change over the same period in adult statistics for the offences listed by the *Age*. In each category, more adults are found guilty than children; not terribly surprising given the relative populations. Most damning of the *Age* article is that for four of the six categories cited in its article, the rate of adult increase is greater than for children.

What each category encompasses and how someone comes to be a statistic would take a whole separate article.² But one thing is clear: if 'assault in company' is the measure of gangland violence then adults outstrip children. Next headline — 'Grown-Up Gangs'? I don't think so.

Danny Sandor is a member of the Juvenile Justice Working Group of the Youth Affairs Council of Victoria.

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Table 1. COMPARISON OF PROVEN OFFENCES
Children's Court statistics as reported in the *Age* (19.9.95)
compared with Magistrates' Court statistics for adults (17
years and over) for 1990 and 1994

OFFENCE	ADULTS			CHILDREN		
	1990	1994	% inc.	1990	1994	% inc.
Intentionally cause injury	757	1627	115	89	169	90
Indecent assault	128	219	71	10	20	100
Robbery	39	108	177	40	63	58
Unlawful assault	796	1448	82	96	129	34
Assault in company	108	363	236	25	60	140
Assault police	1070	1173	10	29	42	45

Source of figures for 1990 and 1994: Children's Court Statistics and Magistrates' Courts Sentencing Statistics, Department of Justice Victoria (formerly Attorney-General's Department) 1990 and 1994.

PRISONS

Preventing HIV

MATTHEW GROVES reports on a trial program for the introduction of condoms into New South Wales prisons

In 1994 a group of 50 prisoners in several NSW prisons instituted an action which aimed to force the NSW Department of Corrective Services to reverse its long standing policy against the supply of condoms in prisons. The prisoners sought to challenge the Department's policy under various heads of public law. They also sought relief in negligence, making the argument that the Department's refusal to supply them with condoms constituted a breach of the duty of care it owed to the prisoners held in its custody. The claims in public law were rejected by Dunford J who held that the prisoners could not challenge a policy which had been formulated by the Commissioner for Corrective Services in conjunction with the relevant Minister. The

claims in tort law were allowed to proceed on the proviso that, if individual prisoners could demonstrate that a breach of the duty of care owed to them by the Department placed them at risk of contracting HIV or hepatitis, then they could be entitled to some form of relief, possibly even an injunction. However, Dunford J refused to allow all 50 claims to proceed, ordering instead that the prisoners select four people whose cases contained the important elements which were common to all the claims. This decision, which was confirmed by the New South Wales Court of Appeal,¹ seemed to indicate that prisoners were powerless to change an unsatisfactory policy which placed their lives at risk. The only recourse left open to the prisoners, test cases in negligence, are likely to be slow and expensive.

Government considers reform

The new NSW Government has signalled its willingness to consider reform in this area. On 14 July 1995, the Minister for Corrective Services, Bob Debus, announced that the Department of Corrective Services had commenced negotiations with unions representing prison guards and medical staff with a view to implementing a trial of the distribution of condoms in NSW prisons. The announcement was the first step of the new government to honour an election policy supporting the introduction of condoms into prisons. In a very brief statement the Minister emphasised the widespread support from the medical profession for condom distribution as part of any strategy to control HIV in prisons. The Department was also expected to release a discussion paper to provide greater detail on the proposed trial. The Minister, however, decided in early December 1995 to proceed with the trial without having reached any agreement with the prison officers' union.

The proposal represents a significant advance in the development of a responsible policy for the prevention and management of HIV/AIDS and hepatitis in NSW prisons. It also represents some welcome movement in an area of prison administration that has been stalled. In 1988, the NSW Government made what appeared to be an enlightened decision and introduced, as part of a package of disparate amendments to the *Prisons Act 1952* (NSW), a provision (s.50(1)(j3)) which created a power to make regulations for the use and distribution of condoms in prisons. The provision has remained unproclaimed for several years and in the past the NSW Government has refused to allow the supply or distribution of condoms in prisons. The political reasons for this were obvious: prisons are electorally unpopular. The conservative parties which had governed NSW for several years until early 1995 had opposed liberal reforms in many areas of prison administration.² The introduction of condoms to prisons would have been antithetical to this agenda. Prison officers have also opposed the introduction of condoms into prisons. Their main reason has been that condoms could be used by prisoners to secrete prohibited substances within bodily orifices. Officers have also adopted moral objections to condoms by arguing that they encourage 'undesirable' behaviour amongst inmates.³

The first Australian conference on HIV/AIDS and prisons in 1990, which drew together a wide range of health and



corrections personnel, issued a communique on this topic. The communique recognised that sexual intercourse was a fact of life in prisons which, almost always, occurred without any form of protection against sexually transmitted disease. The communique concluded that the use of condoms would substantially lower the risk of HIV and other infections from this activity. In a thoughtful paper delivered at the same conference Justice Kirby also endorsed the introduction of condoms into prisons as part of a wide ranging AIDS policy.⁴ The idea is also consistent with the Commonwealth Government's National HIV/AIDS Strategy.

Intravenous drug use

The other main area involving the control of the spread of HIV, which clearly needs reform, is intravenous drug use. The Minister's announcement that the trial introduction of condoms would proceed included a strong rejection of any possibility that an equivalent program involving needles was under consideration. It is submitted that the current position regarding syringes in NSW prisons needs reform. Section 37A of the *Prisons Act 1952* (NSW) creates a statutory prohibition against the introduction of syringes into prisons, except with the authorisation of a medical practitioner or the governor of the prison. Prisoners are also prohibited from possessing any illicit drugs or devices to assist in the smoking or injection of drugs, and from administering such drugs to themselves or any other prisoner: *Prisons (General) Regulation 1995* (NSW), reg.168. The problem presented by these provisions is that the value of any program to distribute condoms can easily be undercut by the widespread use and sharing of unclean needles.

Bleach, which can be used to sterilise syringes, is freely available in NSW prisons. This is clearly important in lowering the possibility that the NSW gaol system will experience the widespread transmission of HIV through needle sharing that has occurred in other prisons. However, this would be bolstered if some kind of needle exchange or medical supervision was made available to IV drug users. Another important move would be to extend methadone programs, which are not currently available in all NSW prisons, to all prisoners. These are sensitive issues but perhaps a successful trial of condoms might point the minds of prison administrators to a reconsideration of other taboos.

Matthew Groves is a doctoral student and assistant lecturer at the Law Faculty, Monash University.

References

1. The decision at first instance is reported as *Prisoners A to XX inclusive v NSW* (1994) 75 A Crim R 205.
2. See for example Brown, D., 'Putting the Value Back Into Punishment' (1990) 15 LSB 239 and 'How not to Run a Prison' [1990] Aust Soc 28.
3. *Sydney Morning Herald*, 14 June 1990, p.3. See also Lake, S., 'HIV in Gaol' (1992) 17 Alt.LJ 20.
4. Both the communique and Justice Kirby's paper are contained in (1991) 2(3) *Criminology Australia*.

Bad Aboriginal Art Tradition, Media and Technological Horizons

by Eric Michaels; Allen & Unwin, 1994; 181 pp; \$29.95 softcover.

Bad Aboriginal Art is a collection of essays written between 1986 and 1988 and finally published in 1994 — six years after the author's death. These essays are a partial account of Michaels' three years researching the impact of television on the remote Warlpiri community at Yuendumu on the edge of the Tanami Desert in central Australia. The community was founded as a Baptist mission in 1943 and has been self-governing since 1978. It has a population of 500 to 1000 people depending on the season. Michaels is particularly concerned with issues raised by Warlpiri uses of technology, specifically television and video, and the production and marketing of Warlpiri artworks. His discussions of these issues draw on an eclectic range of interests including anthropology, art criticism, cultural studies, ethnographic film making, and audience and reception studies.

Reading Eric Michaels *Bad Aboriginal Art* makes me think of two separate, but related, incidents that occurred in 1991 and 1992. The first involved a visit to a northwest community at which we arrived just days after the death of an elder. Community members spent the week in mourning before the burial, which involved both traditional and Christian customs. We spent the appointed day in the community hall aware that our very presence was an intrusion. About 3 p.m. a line of men and boys, all wearing formal suits, paraded from the elder's house up the hill to the community cemetery. As we sat in the hall we saw part of this procession. It struck me as surreal; yet it had a specific history. One woman with us picked up a camera and began to walk outside.

The second incident was a visit to Roebourne in October 1992. On this occasion we were driving through the town looking at newly erected fences. They were approximately two feet high, extended across the width of each house, and were freshly painted in apple green. The fences were truly something to look at. They were the picket fences from many a 'feel-good' sitcom. They

demarcated the public space of the verge from the private space of homes. These fences had been recently erected by a local mining company as their contribution to the community. In front of most fences were piles of uncollected rubbish, behind them were tables and chairs brought out from the houses so that people could sit in the cool afternoon and evening air. In most yards people could be seen sitting and drinking, having obviously very little else to do.

At various times when I have spoken to people about these incidents, I have been asked for photographs. This is, of course, not an unusual request. Taking photographs of places we visit is most often taken for granted. A photograph of the picket fences without any context would, however, have been meaningless. And a photograph of the fences framed by Aboriginal people drinking and piles of rubbish would presumably elicit a number of responses, few of them focusing on the contributions of mining companies to Aboriginal communities. Likewise, photographs of a procession of Aboriginal people, all in formal suits, is most likely to act as a catalyst for stories about the exotic other rather than accounts of colonial history or even cultural adaptation.

In *Bad Aboriginal Art* Michaels discusses some of the ways non-Aboriginal representations of Aboriginal peoples contribute to contemporary notions of 'primitivism' and 'exoticism'. Further, from what he says, the taking of photographs in each of the above cases would be an appropriation of Aboriginal images, a violation of privacy and would thus constitute a moral offence. Just what constitutes a 'moral offence' is central to this work. He also challenges the photographer/tourist/reader to think seriously about acts of representation and the power of representation to construct people in particular ways. The first essay in the collection — 'A Primer of Restrictions on Picture-Taking in Traditional Areas of Aboriginal Australia' — provides a discussion of appropriation, respect for

privacy, the secret/sacred domain, the truth of photos, and a co-operative, collaborative approach to production.

Michaels foregrounds the relationships that exist between Aborigines and all other Australians. He insists that these relationships must be constantly negotiated and re-negotiated and that negotiations must be 'based on cultural rather than material calculations'. Here he is speaking specifically about Aboriginal art practices as opposed to 'fine art', that is, about 'problems of production, circulation and exchange'. Yet what he says is immediately relevant in many situations — examples such as Native Title negotiations and understandings of social justice immediately come to mind. Aboriginal concepts of guardianship and exchange, mobility and place, are counterposed with principles of property ownership as enshrined in English law, to raise questions about topics such as the efficacy of Aboriginal land claims strategies in Australian courts.

Dick Hebdige provides a useful and comprehensive foreword to the work, in which he outlines some of Michaels' academic and personal history. He also makes the point that much of the power of Michaels' work is his ability to 'establish the parameters within which text, author, reader(s), and Warlpiri "respondents" engage and interact'. Certainly, the need for negotiation between peoples of equal standing is central to Michaels' agenda so that he deconstructs the centre/periphery, primitive/developed, and pre- and post-literate oppositions that are, so often, a part of everyday currency providing a comprehensive critical agenda for crosscultural communications. Michaels challenges the validity of these binaries by discussing Warlpiri use of technology and engagement in the global market as a contemporary concern. He does not merely denounce a belief in or use of such hierarchies as being 'left-over' from a colonial past as does some analysis of Aboriginal culture and some naive post-colonial theory.

In her introduction, Marcia Langton situates Michaels's work 'in the middle of a local revolution' that empowers Aboriginal people to represent them-

selves. She explains that self-representation is central to self-determination and cultural maintenance. Further, it is the politics of self-representation that Michaels foregrounds in his essays (see specifically 'For a Cultural Future: Francis Jupurrurla Makes TV at Yendumu').

Bad Aboriginal Art is a valuable contribution to anyone interested in Aboriginal and non-Aboriginal relationships.

KATHRYN TREES

Kathryn Trees teaches Humanities at Murdoch University, Perth.

Women, Male Violence and the Law

edited by Julie Stubbs; Institute of Criminology; 1994; distributed by Federation Press; 262 pp; \$29.95.

This book is a collection of essays by various lawyers, social scientists, educators and policy-makers. The essays examine the responses of international, Australian and New Zealand law to violence against women. The book does not aim to set out the existing law about male violence. Rather, it seeks to examine various topical legal issues about domestic violence. The contributions deal with a broad range of issues from the reluctance of international law to regulate or prohibit violence in the home, to judicial constructions of the family which trivialise violence, to governmental failure to fund culturally appropriate legal services for Aboriginal women.

The reader is advised in the Introduction that the aim of the book is to explore both the transformative possibilities and the limitations of the law in the context of domestic violence. The reader is asked to contemplate whether the law is a limited and insufficient tool with which to achieve justice for women. On one level therefore, the success or failure of the book can be measured by the extent to which it provides an answer to this question. However, both the Introduction and the book as a whole are inconclusive about the transformative possibilities of law. Stubbs is wary of placing too much faith in law reform, pointing out that the outcomes of legislative and policy changes are neither straightforward nor predictable. However, the Introduction does suggest that, given the privileged status of the law, feminists cannot afford not to engage with our legal institutions. To dismiss the law as irrevocably gendered is to permit legal and social power to be constructed and distributed in a way that continues to disadvantage women.

The Introduction advises that the book constitutes a necessarily partial account which does not canvass violence in lesbian and gay relationships, the effects of violence on children, the

experiences of NESB women and violence in the context of immigration. The editor is aware of the dangers of universalising the experiences of women at the cost of the different lives of women outside the dominant culture. It is pointed out that the reforms over recent decades which provide a measure of legal protection against violence in the home are only readily available to members of dominant social groups. Accordingly, white, financially privileged, well-educated women in large urban areas are able to mobilise the law. In contrast, Aboriginal women, rural women, NESB women and other women outside the dominant cultural groups are the least protected by these reforms.

The chapter by Charlesworth and Chinkin examines international law and why it has been so reluctant to respond to the worldwide problem of violence against women. They suggest that the reason for this reluctance lies in the public/private dichotomy whereby international law has traditionally refused to regulate a state's private or domestic affairs. This consequence of the public/private dichotomy is ironic given that this very same dichotomy allows states themselves to ignore violence in the home.

Charlesworth and Chinkin report that the 1993 United Nations Declaration on the Elimination of Violence Against Women is a significant step forward in the context of the traditional reluctance of international law to regulate behaviour in the 'private sphere'. Although the 1993 declaration is an important development, it fails to state that violence against women is a violation of human rights. Charlesworth and Chinkin see the declaration as a good basis for further developments to protect women. They highlight the danger of compartmentalising women's rights, relegating it to an under-resourced sphere of international law. This would

allow mainstream human rights bodies to ignore the specific concerns of women. They argue that international law must make states accountable for sustaining a legal environment where violence against women is acceptable. This may require a radical rethinking of the sources and processes of international law.

In their chapter Busch and Robertson describe the Hamilton Abuse Intervention Pilot Project which was established in New Zealand in 1991. The programme sought to intervene in the criminal justice system where there was a report to police of domestic violence. It aimed to ensure women's safety and the prosecution and rehabilitation of abusers. Protocols were developed to minimise the discretion available to individual decision-makers. For example, the police did not have a discretion to grant bail or not to charge offenders. The programme aimed to develop a co-operative approach, with consistency and information sharing between different agencies such as police, courts, refuges and corrections personnel. This process of information sharing and networking fostered a consistent, systemic approach to violence. Unfortunately, this chapter was mainly descriptive. It would be valuable to read an in-depth evaluation of the strengths and weaknesses of the programme.

Pam Greer writes of the various programmes in New South Wales where Aboriginal and Torres Strait Islander women have been consulted about the problem of domestic violence in their communities. She writes that, despite over a decade of such consultations, there is still a desperate unmet need for culturally appropriate services for Aboriginal women. Greer reports that Aboriginal women are over-represented in the statistics of women killed by their partners. She criticises government agencies such as the DSS, housing agencies and community services departments for failing to meet the specific needs of Torres Strait Islander and Aboriginal women. She sees a desperate need for an Aboriginal Women's Legal Service. Her chapter is a condemnation of the failure to establish and fund culturally appropriate services for Aboriginal and Torres Strait Islander women.

Nan Seuffert describes a research project where she sought to employ specifically feminist methods of research to integrate women's experiences into the theory and practice of being a lawyer.

She also looks at feminist epistemology in order to design and implement feminist research. Seuffert scrutinises the power hierarchy between the researcher and the researched and looks at ways to minimise this power imbalance. She seeks to incorporate the lived experiences of women into feminist theory and suggests that this theory should, in turn, be used to develop feminist methods of practising law. Her research subjects, survivors of domestic violence, indicated that their lawyers had no understanding of the dynamics of a violent relationship. They spoke of communication difficulties and a huge gap in understanding between lawyer and client. Accordingly, Seuffert recommends that lawyers and law students be educated about the dynamics of violence and the range of abuses used to exert power and control over women. She seeks to incorporate the experiences of survivors of domestic violence into legal education, so that lawyers are able to provide a more sensitive and appropriate service.

The next chapter by Ruth Busch explores judicial attitudes towards domestic violence in New Zealand. Busch interviews judges and examines cases where women applied for protection orders and men were charged with breaches of such orders. She discovers a 'gap' between the experiences of survivors and judicial attitudes. She concludes that judges tend to prioritise reconciling the family over the safety of women. By their use of language, judges tend to minimise and trivialise the extent of violence in relationships. They seek to uphold an idealised construction of the family which either minimises or ignores the context of serious violence and injury. Judges frequently describe the behaviour of the victim as provocative or blameworthy. On this analysis, the victim brings the harm onto herself by her behaviour. Busch concludes that by their use of an idealised construction of the family, and their failure to acknowledge violence in the home as a serious wrong, judges fail to give priority to the safety of women.

Hilary Astor examines mediation in family law cases. Like many other feminists, she strongly believes that mediation is an inadequate and unsuitable medium where there is a history of violence between the parties. She argues that the background of violence and the resulting power imbalance is likely to produce inequitable results in the mediated outcome. Nevertheless, it is apparent that many violent relationships are

being mediated in the Family Court. Because mediation is perceived as being cheaper and speedier than litigation, it has found favour with governments, court administrators and with the parties who wish to avoid the expense of litigation. Astor suggests that mediators do not currently have highly developed rules to exclude violent relationships. She examines whether the mediator, who is meant to remain neutral, can enforce procedures to redress the power imbalance in violent relationships. Despite her views, Astor believes that violent relationships will continue to be mediated in the family court setting.

Elizabeth Sheehy looks at the Canadian cases following *R v Lavellee* (1990) 55 CCC 3d 97 (SCC), the case where battered women's syndrome evidence was first admitted in Canada. Sheehy examines whether this groundbreaking case has resulted in justice for women charged with killing a violent spouse. She advises that to August 1993, there were ten such cases. In eight out of the ten cases, battered women's syndrome (BWS) was argued only in mitigation of sentence. Accordingly, the precedent of *R v Lavellee* was not being used to overcome the gendered nature of the traditional defence of self-defence. The accused was acquitted of murder in only one of the ten cases. Interestingly, Sheehy found that in six of the cases where the women pleaded guilty, there were grounds for arguing self-defence. It would seem therefore, that many defence lawyers are unaware of the transformative possibilities of *Lavellee*. Sheehy concludes that the cases after *Lavellee* have not achieved a greater degree of justice for women who kill a violent spouse. She also finds that BWS evidence is of little assistance to Aboriginal women who kill, as they have rarely sought the previous intervention of social workers or the criminal justice system. Sheehy calls for a wholesale review of the cases where women are serving sentences for killing their spouse.

In the final chapter, Tolmie and Stubbs look at the Australian cases where BWS evidence had been adduced in court. Like Sheehy, they find that BWS has not been successful in defeating the gender bias that is apparent in the criminal law. They suggest that in the first Australian case to admit BWS evidence, *Runjanjic v Kontinnen* (1991) 53 A Crim R 362, the comments of King CJ stripped the evidence of its feminist agenda. He found that such evidence was admissible because se-

vere domestic violence is so *special and unusual* that expert evidence is required because it is beyond the ken of the average juror. The Australian cases have resulted in two acquittals on murder charges. However, the more likely outcome is a conviction and a non-custodial sentence. As in Canada, BWS evidence is most frequently used in support of a conviction of manslaughter or in mitigation of sentence.

Tolmie and Stubbs say we should be cautious about proclaiming the success of BWS evidence as it tends to reinforce gender stereotypes. Tolmie and Stubbs also look at the particular problems Aboriginal women face because of the dual problems of race and gender. They argue that the context in which an Aboriginal or Torres Strait Islander woman has acted must be located. This may be overlooked by the use of syndrome evidence. As an alternative to adducing evidence of BWS, they argue that the woman's actions should be located in the social, political, cultural and domestic context of the violent relationship.

I found *Women, Male Violence and the Law* an interesting and thought-provoking collection of essays. It would have benefited from an afterword or a closing chapter which drew together the many different threads of the various contributions. Without such a chapter, the book tends to be a disparate collection of essays on different aspects of the problem of violence against women. It is disappointing that the book does not answer the question posed in the introduction about whether the law can achieve substantive justice for women. Nevertheless, it is a useful text for people interested in achieving change and reform in the area of violence against women.

HELEN BROWN

Helen Brown teaches law at La Trobe University, Melbourne.

Justice and Identity: Antipodean Practices

edited by Margaret Wilson and Anna Yeatman; Allen & Unwin 1995; 223 pp; \$29.95.

Is New Zealand a divided nation, polarised over issues of race, government and sovereignty, or is it one of the most interesting examples of a pluralist legal system in the post-colonial landscape, where imported and indigenous laws are recognised and co-exist?

The New Zealand Government's proposed settlement of Maori land claims has enlivened old tensions and generated new dilemmas, focusing attention on the compatibility of the traditional concepts of Anglocentric legal order with indigenous peoples' claims on justice. In *Justice and Identity*, Wilson and Yeatman have brought together a number of authors to provide intellectual insight into the issues of race, sovereignty and justice in New Zealand.

This collection of essays developed out of a seminar series at the University of Waikato in 1993, which examined 'Justice, Biculturalism and the Politics of Difference', in response to the New Zealand Government's policy of institutionalised biculturalism. 'Biculturalism' in New Zealand is said to represent a kind of accommodation by the dominant white settlers to the Maori claims for justice, much as we speak of the 'reconciliation' process between Aborigines and non-Aborigines in Australia.

This policy of biculturalism made government departments and agencies more amenable to the political and so-

cial requirements of the Treaty of Waitangi, and the needs of the Maori peoples. In view of the University's commitment to the concept of partnership as an expression of the requirements of the Treaty, the School of Law and the Department of Women's Studies established a forum to respond meaningfully to the new claims on justice, and the dynamics of change, within the academic environment.

This book, flowing out of that forum, examines contemporary meanings of justice in relation to notions of biculturalism, democracy and the politics of identity and difference. It addresses these issues in the context of post-colonial assertion of rights by indigenous peoples, with particular emphasis on recent New Zealand experience.

The collection draws together challenging and innovative contributions ranging from strictly theoretical analyses, through to more personal reports which explore developments in history, and institutional culture and practices in New Zealand. The debate over the Australian High Court's Murray Islands decision, and Indian theories of post-colonial criticism are also addressed, giving some wider perspective to the New Zealand experience.

The editors are Margaret Wilson, a former President of the New Zealand Labour Party and Professor at Waikato Law School, and Anna Yeatman, a Pro-

fessor of Sociology and Founding Professor of Women's Studies at Waikato. At the core of the essays is the nature and effect of the Treaty of Waitangi, the 19th century agreement between the Maori Chiefs and the British Crown.

This sets the scene for New Zealand's unique bicultural, political and social development, and the context for the exploration of current ideas of sovereignty, governance, democracy, law and identity.

The constitutional recognition and status of the Treaty is discussed by Margaret Wilson, who argues that legal recognition of the constitutional status of the Treaty is necessary in order for Maori peoples to achieve reparative, social and political justice. She presents an excellent overview of the constitutional importance of the Treaty and the Maori claims to sovereignty. This is complemented by former Chief Judge Durie's examination of recognition of the Treaty and the role of indigenous laws within a dominant Anglocentric constitutional and legal system.

Anna Yeatman discusses questions of contemporary politics of justice and the concept of a 'sovereign self'. Iris Young and Andrew Sharp, both political philosophers, examine theoretical issues of deliberative democracy and biculturalism, respectively. Denise Henare and Brenda Tahi write of bicultural practices within government and the search for new solutions in order to meet Treaty obligations.

Robert Mahuta gives an excellent account of the Tainui tribe's struggle to reclaim lands confiscated in the 1860s, and the history and influence of the Tainui Maori Trust Board, which administers economic, social and tribal development programs.

The collection reflects the underlying difficulty for indigenous peoples in seeking to rely on judicial determinations in order to achieve justice and sovereignty; as Durie puts it, 'ultimate justice for indigenous people depends on political power-sharing through constitutional reform'.

This book is wide ranging and academic in its content. It will be of particular value to those interested in issues of post-colonial reconciliation with indigenous peoples, and more generally, the politics of law, and concepts of democracy and governance.

MELISSA CASTAN

Melissa Castan teaches law at Monash University.



Reform

Reform is a comprehensive bulletin of law reform news, views and information, published twice yearly by the Australian Law Reform Commission. **Reform** covers current and recent work of the Commission as well as issues and trends in national and international law reform.

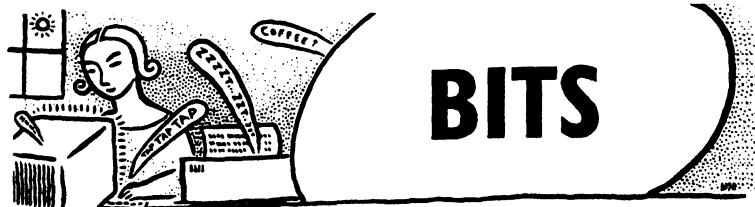
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BITS

Australian Labour Law: Cases and Materials

by Ronald C. McCallum and Marilyn J. Pittard; 3rd edn, Butterworths 1995; 1024 pp; \$98.00 paperback.

The third edition of this now classic industrial law text takes account of the significant amendments made by the *Industrial Relations Act 1988* (Cth). These include the enterprise bargaining provisions, the new right to strike in certain circumstances and the controversial unfair dismissal protections.

As well as providing extracts from and commentary on the standard cases, legislation and articles, *Australian Labour Law* makes some attempt to put employment law in its social context. The book contains short sections on women and labour law, unfair dismissal and job security, and Kooris, women, equal pay and comparable worth.

The authors state in the Preface that the primary function of the book is as a source book for the teaching of labour law in universities. \$98.00, is however, out of reach of most students which is a shame given that it could be of great assistance to undergraduates. ● FW

Legal Studies for Units 3 & 4

by Peter Alderson and Jeanne Strong; McGraw Hill, 1995; 2nd edn; \$36.95.

As a former student of VCE legal studies (who thoroughly enjoyed the course) I think the second edition of *Legal Studies for Units 3 & 4* will be a very useful resource for Year 12. The text is the product of teacher and student responses to the first edition, and reflects changes to the law since the first edition was published. The revised edition has several new features, including revision questions, a glossary at the end of each chapter, extracts from newspaper articles with structured questions, and a greater amount of illustrative material including flow dia-

grams and summary tables. These changes ensure greater clarity and are helpful.

While the text deals with the mechanics of the law, it also provides lots of room for issues-based activities, which is a good way to keep Year 12 students interested. The second edition places strong emphasis on policy, our relationship to the law and how to go about using it. Students are encouraged to evaluate various aspects of the legal system and there is plenty of scope for critical discussion. The development of students' analytical skills is also encouraged through case studies of current and recent legal issues such as the High Court's *Mabo* decision. The authors use an interactive approach, asking students to collect additional resource materials to assist their analysis of the legal issues.

The aims of the text, in keeping with the VCE Legal Studies study design, have been successfully met. The text provides students with a basic overview of the legal system in Australia, concentrating on the role of parliament and the courts in law making, and how the law operates in practice. The authors have gone to great lengths to ensure student comprehension, providing point-form summaries in non-legal jargon and helpful exercises on every page. Students are invited to question the law and to view it as fluid and capable of change. The authors stress the concept of law as 'an expression of the will of the people' which needs constant reassessment to reflect changing community attitudes.

A section devoted to how students should go about completing their VCE legal studies CATs and Work Requirements is included in the text. Detailed information is provided on how to plan, structure and submit papers. As well as advice, the text refers students to other sources useful for VCE legal studies work. Overall the second edition of *Legal Studies for Units 3 & 4* is a great student resource, with invaluable hints on how to achieve successful results in the VCE. ● LB

Legal Fictions. Short Stories about Lawyers and the Law

edited by Jay Wishingrad; Quartet Books 1995; 402 pp; \$19.95 softcover.

This is a book that can be judged by its cover. The front cleverly masquerades as your archetypal wood, brass and frosted glass door to your archetypal legal office. The back (turn the lights out as you leave) contains the unforgivable blurb — *Legal Fictions is essential briefing for all those on the case*. The sort of thing you'd present to your lawyer friend for their birthday if you wanted to give the impression that you'd spent three and a half seconds thinking about what to get.

You've got the obvious authors (Kafka, John Mortimer), the old timers (Melville), the major 20th century writers (Greene, Allende, Gordimer). For the cosmopolitan touch there are stories from Czechoslovakia, Sierra Leone, France and Italy. There are also the genre stories that you'd expect: the law case/crime with a twist, the tough life of the outsider (woman, Jew etc.) in a WASP establishment, the language of law taken to absurd lengths (*My client, Mr Wile E. Coyote... does hereby bring suit for damages against the ACME company*), and the desperate grey world of the emotionally scarred, envious, burnt out and repressed lawyer (who probably always wanted to be a writer). There are also editorial musings and the law and literature link — *does the short story bear any similarities to the legal documents that lawyers produce?* Surprisingly the answer is yes . . .

Maybe I'm being unfair. While *Legal Fictions* doesn't contain any particularly surprising selections, it is fairly comprehensive in a white American liberal sort of a way. And there is a surrealistic execution to savour. Reading this anthology is not a complete waste of time. ● ME

BITS was compiled by: Lauren Ban, Michael Easton and Frith Way.



NOTICES

HAPPENINGS

Review of heritage protection legislation

Elizabeth Evatt has been commissioned by the Federal Minister for Aboriginal and Torres Strait Islander Affairs to review the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. A key question for the review will be 'How effective is the Act in protecting areas and objects of significance to indigenous peoples?'. One objective is to foster greater co-operation between the Commonwealth and State and Territory Governments.

Ms Evatt will examine whether there is adequate scope under the Act for applications to be successfully resolved through mediation and whether the Act makes appropriate provision for the protection of areas or objects during mediation.

The review will also consider whether administrative guidelines and an authority, tribunal or commission should be established to administer the Act.

Reporting date is end May 1996. To contact Ms Evatt's staff tel 06 289 3525 or fax 06 281 5421.

The faltering adversarial system

The Australian Law Reform Commission will examine and suggest changes to federal civil, administrative law and family law proceedings. Any suggested changes will be geared to create a structure for dispute resolution capable of dealing with the volume and complexity of modern litigation. It has been suggested that the adversarial system is largely responsible for lack of access to justice. The Commission will first report in September 1997.

Help for remote Queensland women
The Brisbane Women's Legal Service is to extend its services to those women who have traditionally little access to legal services with a new free call legal advice telephone service. The service can be reached on 1800 677 278 and can assist with anything from domestic violence to wills and traffic offences.

Law graduates honoured

The efforts of Joachim Delaney and Benjamin Zisper in organising the first Australian Model United Nations Conference for university students in July

1995 are to be recognised by the University of New South Wales Alumni Association. Jeremy Philips is also to receive an award from the Association for his achievements. Jeremy co-authored a debating book, writes an opinion column for the *Financial Review* and has worked with disadvantaged children, fostering their confidence through public speaking.

Libel suit against arms campaigners

The organisers of the Covert Operational Procurement Exhibition (COPEX) in Surrey have sued members of the Campaign Against Arms Trade (CAAT) for libel. Companies supplying riot control, counter insurgency equipment and public order weapons exhibit at COPEX and, in the past, countries including Iran, Saudi Arabia, Sri Lanka, Turkey, Israel, Columbia, Singapore, Mexico and Algeria were represented. CAAT is calling for donations to help with legal bills. To contribute write to CAAT, Freepost LON 6486, London N43BR.

Gay and lesbian prison outreach project

GLAD has commenced a prisoner outreach project in order to support gay men, lesbians and people of transgender, who are particularly vulnerable in traditional prison settings. The GLAD project aims to offer support from other lesbians and gay men. Those who would like to get involved should contact GLAD at PO Box 2203, St Kilda, Victoria 3182.

PUBLICATIONS

Aboriginal Domestic Violence

The Domestic Violence Legal Help Service visited Aboriginal communities in the NT to educate about domestic violence and examine the problems of the legal system's response to domestic violence in remote communities. Their report addresses the legal response to domestic violence and comments on policing practices, restraining orders and court processes. The report is available from the Darwin Community Legal Service which can be contacted on tel 089 413 394.

New legislation index

The Office of the Chief Parliamentary Counsel recently launched the completely revised *Subject Index of Legislation Victoria*. The new index has 2000 entry points to legislation and is cross-

referenced. It is available from Information Victoria for \$48.00.

Indigenous law reporter

Late last year the new quarterly, *Australian Indigenous Law Reporter*, was launched. The *AILR* reproduces topical primary material from many sources including the United Nations. The *AILR* will be useful to anyone interested in indigenous and related issues and is available by contacting Jennie Hacker on tel: 02 221 6199 or fax: 02 221 5923.

CONFERENCES

The AAT—20 Years Reward

A national conference marking the 20th anniversary of the Commonwealth Administrative Appeals Tribunal

1-2 July 1996

Convention Centre, Canberra

Contact: AIAL Secretariat
(Kathy Malcolm) PO Box 3149,
Belconnen, ACT 2616
tel 06 251 6060 fax 06 251 6324

Criminology

The Australian Institute of Criminology's National Conference Program for 1996 is as follows:

18-19 April Prosecuting Justice (Melbourne)

June Australian Law and the Diplomatic Community (Canberra)

July Superannuation Fraud (Melbourne)

August Women in Law Enforcement (Sydney)

October Family Violence (Adelaide)

For further information contact Conference Administration at the Australian Institute of Criminology on 06 260 9200 or fax them on 06 260 9201.

Australian Institute of Judicial Administration

The AIJA's fifteenth annual conference will be held on 21-22 September 1996, with a welcome on 20 September, in Wellington, New Zealand. For further information contact Margaret McHutchison on (03) 9347 6600.

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Cover: Illustration by Michael Rowland.

OPINION

Multiculturalism: the road ahead

The Attorney-General and the Minister for Immigration and Multicultural Affairs are not members of the new federal Coalition Cabinet. This doesn't bode well for a 'robust multicultural democracy'.¹ Already, the Minister for Social Security, Senator Newman, has announced that migrants arriving in Australia will not be eligible for income support for the first two years of their residency. Such moves are perhaps not surprising from a government that seems determined to sacrifice social justice to fiscal imperatives. Difference is OK as long as we don't have to pay for it.

The Coalition's campaign slogan, 'For All of Us', created a deceptive impression of inclusiveness, eliding differences between people to construct a falsely homogeneous 'Us'. This ideological position is dangerous because treating all people the same doesn't ensure substantive equality. The focus should be on equality of outcome rather than identical treatment.

The election result and much post-election debate proved that a large number of people feel disenfranchised by the attention given to special interest groups. It is important that the Government does not use this mood as a justification for abandoning the principles that underpin multiculturalism.

The 'overwhelming mandate' that the Coalition received in the March election should not be a mandate for racism, paternalism and assimilation. A number of senior bureaucrats, such as the Human Rights Commissioner, the Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner,

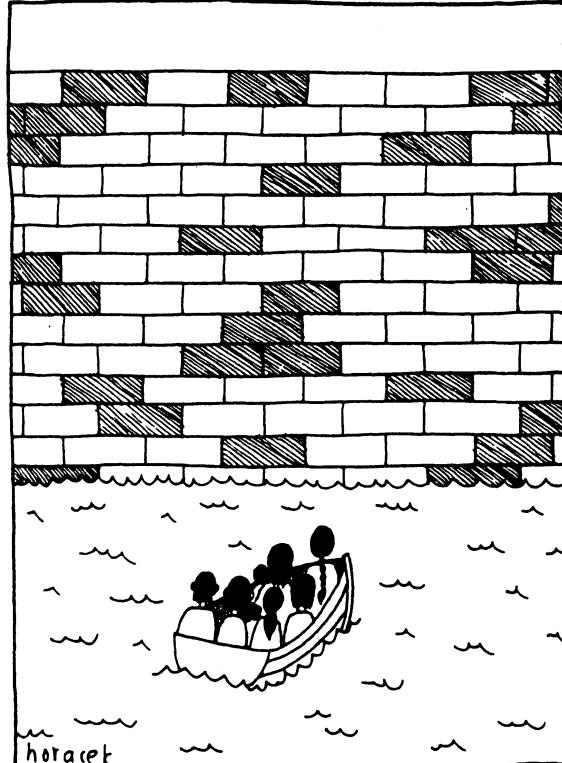
have spoken out against the recent tide of racism. As have representatives of community groups such as the Federation of Ethnic Communities Councils of Australia and the Cape York Land Council. But then that's their job. Where are the other voices? The academics, the investigative journalists, the teachers, the judiciary, the appalled fellow citizens?

Since the election, complaints to the Race Discrimination Commissioner have more than doubled. Perhaps this means that, all of a sudden, the targets of racism have become aware of their rights. More likely it means that people who hold racist views think it's now alright to express them given that their compatriots voted for candidates who had vilified racial minorities prior to the election.

In its law and justice policy, released six days before polling day, the Coalition stated:

The Liberal and National parties have a proud record in immigration and ethnic affairs and are vigorous opponents of racism in whatever form it occurs.

The most lasting and meaningful way to reduce and hopefully eliminate racial hatred is by changing racist attitudes and encouraging tolerance and fairness.



This from the same mob who vigorously opposed the passage of the *Racial Hatred Bill* last year. It is time for the Prime Minister and his Cabinet to walk their talk on multicultural issues. A truly civil, humanitarian society respects and fosters cultural diversity.

Catherine Duff and Frith Way

Catherine Duff and Frith Way are Sydney lawyers.

Reference

1. Professor Cornell West quoted on *Four Corners*, 25 March 1996.

Broken promises

Patricia Easteal

Violence against immigrant women in the home.



Violence in the home is probably the most horrific sort of violence. We laugh about it. We talk about the horrors of war but not hitting in your own private home . . . I wouldn't feel safe if our country was attacked by another one but I think I would feel safer than if you feel threatened that you will be hit or be killed by someone you live with and share your life with. [Marguerite, migrated from France with her Spanish husband]

Many who marry undoubtedly cherish hopes for the future. For some, these images may be based on novels, television or other fictional portrayals of married life, and not be derived from a realistic framework. Whether oriented in realism or fantasy, it is certainly doubtful that any woman's dream of marriage or intimacy includes being kicked, shoved, slapped or punched by her partner. She also doesn't imagine being raped by him. Nor does that dream involve her being called a hopeless slut and other terms and language that we would define as verbal abuse. She doesn't picture herself being held a virtual prisoner controlled by financial or economic violence.

Refugees who are fleeing from persecution also have hopes for a new life in Australia; an existence without the violence, repression or lack of liberties that have propelled them to a new land. There are others who migrate 'down under' because of the desire for something better, a need to start over somewhere else, or by a multitude of push and pull factors that culminate in a global human maelstrom of movement. The migrant or refugee woman's dream of life in Australia does not, one thinks, involve the violence, suppression, and lack of liberties and human rights that she will experience if she is subjected to violence in the home.

The violation of her rights may be replicated in her experiences with government agencies and service providers or by her failure to access assistance. Successful support and policies dealing with immigrant survivors of marital violence need to be constructed upon an empirical foundation. Given the covert nature of violence against women, and quite possibly even greater secrecy within migrant communities,¹ how do we gather such knowledge? *Shattered Dreams*,² the book from which the following article is drawn, represents part of the answer. Its principal objectives are to enable more understanding about 'domestic' violence in general and to highlight the unique experiences of the overseas-born.

How was the study done?

- Over 800 victim surveys were completed by legal aid staff for domestic violence clients throughout Australia and by refugee residents in the ACT, NSW, Queensland, South Australia and Victoria.
- Three other surveys gathered the views of nearly 400 legal aid practitioners and ethnic welfare agency staff in all States and Territories and refugee workers in the ACT, NSW, Queensland, South Australia and Victoria.

Patricia Easteal, is a Visiting Fellow, Faculty of Law, Australian National University.

Information on a total of 3061 'domestic' calls was collected from police in all States except for Western Australia and Queensland.

21 survivors provided life histories through in-depth interviews.

With unknowns excluded, over four-fifths of the callers to police were Australian-born while one quarter of the victims in the legal aid sample had been born overseas. A higher proportion of refugee residents were migrants (58.7%), which may reflect, at least in part, which refugees chose to participate in the research. Nevertheless it would appear that more immigrant women go to legal aid or to refuges than to the police. And, their fairly high representation at those agencies should be interpreted in light of the lack of knowledge about legal and refuge services among many migrants. Those women who have accessed help may therefore represent only the tip of the iceberg.

Living in violence — immigrant and Australian-born

The dynamics in violent marriages, gleaned from survivors and workers, is the same, whether the women are Australian-born or overseas-born. The most pervasive image is that of isolation. Even if the women understand English and the legal and social service systems, they still become emotionally cut off from friends and family while some are secluded in their homes. Safia migrated from Turkey as a child; her marriage was arranged with another Turkish immigrant. Her description of going to a shop after she moved away from her husband, provides a dramatic insight into how total the captivity may be.

... I went to a milk bar and bought a packet of bread and I gave them one dollar. The shopkeeper kept on staring at me. He didn't put the money in the money thing and he kept looking at me. He said to me, 'Where is the rest of the money?' I said, 'How much is the bread?' He said, 'Where have you been, lady? It's a \$1.75.' I was so embarrassed. I left the packet of bread. I said to him I'd be back in a minute. I went home and got another dollar and came back and paid the man the money.

Both within the family and outside, the violence is generally not discussed. Not talking is the effect of numerous factors including the women's own feelings of responsibility for the abuse and the idea that such violence is no longer exceptional but just a normal part of what has become an abnormal reality.

How does this happen?

Picture assault within the home as centring around control — the male's desire to dominate his partner. Accordingly, different manifestations of this power quest appear. Starting with seemingly innocuous incidents that often involve jealousy, it culminates in treatment both as a possession and as a hostage and the erosion of the victim's self-esteem. As in Safia's experience:

He did everything very slowly. You get used to everything very slowly. One day you will be taught that he does not like the way your jeans are — either too loose or too tight — or no jeans at all. You don't like it but you say to yourself, 'Is wearing jeans more important than my marriage?' If you put both of them on a scale to have them weighed, of course your marriage is heavier, so you change that.

He doesn't like the way you dye your hair or the colour of your hair or don't wear makeup — every day it's one thing. When visitors come or you've gone to visit someone, the way you sit down, the way you stand up, the way you talked. When you come

back home or when the visitors go, he'll be at you: 'Stop talking and talking and talking'. Or if you refused or disagreed or something like that, you'll get beaten up. So you listen. You don't say anything. You just listen.

And after a while, you will be looking into the mirror and you will not recognise who you are. The person you see reflected in the mirror is not you and you don't even know how this has happened because it is such a slow process. And then you just can't get out of it. You realise you're stuck. He has done it to you so slowly from the beginning. If he tells you he doesn't want you wearing jeans: 'I don't want you wearing jeans'. If straight away you did something about it, because at that time you are strong enough to do something about it really but you don't. You don't realise these things; it's okay, it doesn't mean that he is going to be possessive, he's going to be violent — you don't think. From the beginning he really does tell you what he is like, but you refuse to believe, refuse to see.

Melina, a Greek woman who migrated with her husband when she was just 17, believes that the emotional violence was worse than the physical.

Sometimes I would tell my husband to hit me rather than keep on that indirect manipulation that no one could see because I was the crazy one in the whole situation. No one could see that form of abuse. I would rather have that broken nose because at least I can show it.

Emotional violence was frequently followed by physical assault and then, they would be enacted concurrently. The following excerpt from Nouraika's story dramatically depicts this coupling of physical hurt and insult. She had married her Australian husband in Malaysia, moved to Australia and found herself isolated in the bush.

We were on a property once and an Italian woman taught me how to make spaghetti bolognese. I thought this was great and so I made it one night when it was very cold and he came home from the pub . . . Anyway, he came home and I served him the meal and he looked at it blurry-eyed and said, 'What is this wog food?'

He got up and it was all kept hot — I waited up for him, the children were all in bed — he picked up the plate — I'll never forget it — and walked towards me and I thought he was going to throw it out and he tipped the whole lot on my head. I had very long hair and we didn't have housing with hot water and we had to boil the copper outside, carry the water inside. I was washing my hair until about twelve and drying it until about one in the morning and cleaning the kitchen while he went off to sleep.

Two thirds of the legal aid cases and three quarters of refuge cases involved physical injuries. Thu, a Chinese-Vietnamese woman, who migrated with her Vietnamese husband, describes the onset of violence in her marriage.

The first time he hit me he was so drunk and I was about eight months pregnant . . . He hit me many times. Usually he grabbed my hair and pushed me to the wall. One time he broke a beer bottle and said he was going to kill me.

Francesca's Australian-born partner also became even more violent during her pregnancy. She was the child of Italian immigrants.

And then I fell pregnant. I was trapped. I had all his family around me. We moved while I was pregnant. I thought things would be better when we moved but he only got worse. He'd bash me really hard. A few times he knocked me unconscious. He used to hit me in the stomach. One time he threw me down the stairs.

For many survivors, one specific physical act of violence experienced was rape. Some women didn't define or see the

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sexual acts perpetrated by their partner without their consent as violence while others minimised the impact. Susanne, who came to Australia from France as a baby explains how it can take place.

I was doing things to please him even though I didn't feel good about it but I thought I knew why — because I'd been abused. So in that sense, no, I don't think I knew any better. He only did what he could. I don't think sexually he really abused me; it was just the fact that he didn't understand maybe.

I wouldn't tell him I didn't want to because I thought it was because of my abuse. I didn't understand that no meant no. A lot of my problems — I wasn't allowed to say no to anyone, even when I didn't like things, because I felt that because my life had been pretty hard I could deal with practically anything.

Melina says that her husband also didn't see himself as a rapist, just as a husband.

He wasn't the typical bashing guy. Normally people classify abuse as when you are being punched in the face or in the gut. His abuse was more subtle. It was over a long period of time. For me it looked like a big mountain of abuse that I just wanted to get away from. It was things like sexual abuse. But he didn't see it as abuse because I was his wife and his property and I had to submit to his pleasure whenever he wanted it. If I didn't, then I'd be pushed and pulled around but that was 'normal', that was 'okay'. I've come out of it with a bit of bruising but that's 'all right, it's a part of sex play'.

For Safia, anal rape was the final straw.

Straight away — he's your husband and you're his wife and whenever he wants to have sex with you, you would do it. You don't have to even enjoy it — as long as they enjoy it. I would say that I was raped by him. My husband believes that God created women for men's pleasure. It's very embarrassing to say this but every part of your body belongs to him. There is a normal way of having sex with a man through the vagina. One day I was beaten up very badly and I fell on my face and he raped me, but from behind, not through the vagina. I have never been able to say this to anybody in my life because it is so degrading. I feel so small, so down. That was the only reason that I took my child and went away. I could put up with everything. I could put up with being beaten up. I put up with every abuse but I cannot put up with the way that I got raped. That was the last blow for me.

In addition to other expressions of power, some husbands took absolute control of the finances. This economic violence may be more common among immigrants, especially in cases where the women don't have knowledge about their rights to family allowance or social security payments. The next two women, both sponsored from the Philippines, describe their total economic dependency on the violent partner. First, Maria:

I just only know now that I have family allowance for children and I didn't know. He didn't tell me that I was getting a family allowance . . . I'm just signing. I don't know that it is the family allowance for the kids. He puts it in his account and I don't have absolutely any money in my pocket. Sometimes I want to buy something for the kids. Luckily I brought all my clothes from the Philippines because if not, my God, I'd be naked because I cannot buy myself anything.

And, Rosa:

Then after that — a week, a week, a week — every time we went shopping he said to me [he didn't give me money any more] 'The boss is the man. I told you before in the Philippines' . . . So I said it was no good and I had to talk to him. He said, 'No, if you want, I can give you \$15.00 as your allowance for the fortnight. That's your budget for yourself.'

I'm like a robot. He said to me, 'If you cook, don't cook one kilo of chicken wings. Cook only just a half a kilo of chicken wings. What do you expect?' The children are very innocent. They come from the province. They say, 'That's enough, two wings for one child and rice. And he is eating ice cream in front of my children. He doesn't want to give them ice cream.

Abuse toward the children does often coexist with violence against the woman in the house. Among the refugee sample, children were direct victims in 59% of the cases (with known information). They were witnesses in more than four-fifths of the families. Melita, who came to Australia as a young adult and married another Maltese here, describes his abuse of their children.

So he was continuously shouting at the kids and bashing them up. He was physically violent towards the kids. One of the boys got these shoes with spikes. He hit one of the boys with that. That was about two years ago.

Rosa discovered that her husband had been assaulting their baby since she was a newborn:

And then in the night after we had been fighting, I was washing the dishes. I cleaned the kitchen. He is the one to look after the baby, my daughter, and she is only six months old at that time. And then I was just washing the dishes and the baby was screaming a lot, non-stop. I asked what had happened. He said, 'I don't know what I'm doing'. So I grabbed Linda and I held her to stop her and then I found out she could not move her hand and she cannot put it up — because when the baby is crying she is moving a lot. I found out that she had broken bones in the wrist. He was squeezing.

Contributing factors

The tragedy of violence repeating from generation to generation was illustrated by a number of the women who had experienced abuse in their own childhoods. In addition, some survivors specifically mentioned their violent partner's own traumatic childhood and their belief that it had somehow contributed to his violence.

In the context of contributors, what part, if any, does alcohol play? More than half of the police calls (with unknowns excluded) and legal aid cases involved an alcohol affected perpetrator; likelihood increased in the evening and night-time. Cultural heterogeneity was evident with offenders from areas such as the Middle East, Asia, Africa and Latin America more apt to be sober. Victims were far less likely to be under the influence although the likelihood increased if the offender was drinking.

Forty per cent of the refugee residents believed that the offender's alcohol consumption played a contributory role in his violence.

He gets drunk very often and it occurred when he was drunk because he was good other times. [El Salvadoran survivor, age 42]

— ♦ —

Often he would drink and get drunk with his friends, and become abusive in front of them and hit me when they left if I said anything. [Greek survivor, age 56]

— ♦ —

He's always violent but when he was drunk he became worse. [Vietnamese survivor, age 40]

Rajendra, a Fijian Indian who migrated to Australia as an adult and married an Eastern European migrant, describes how drunkenness and unemployment were intertwined in her husband's life, along with his violence:

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He lost a few jobs because of his drinking . . . They only last for a couple of years. He gets the sack in direct relation to his drinking. That's what keeps him from work or he gets drunk at work. I think that's what it is. He gets drunk at work and he becomes very vicious to the people he is working with and he gets into more trouble. He was extremely irritable when he was out of work. He was very difficult and constantly irritated and cranky. I think he drank more when he was in trouble at work. He'd stay home and he'd drink 24 hours a day — just one long drinking binge.

What about the role of unemployment? With information unavailable in over a third of the cases, almost three quarters of the remaining offenders who had contact with the police were unemployed. For more than a third of these, their unemployment was long-term. The legal aid data showed a higher proportion of offenders employed, 45%. The refugee respondents' information about employment was similar with 42% of the violent partners employed full time. Almost one quarter of the employed offenders in the legal aid survey and one third of the employed partners of refugee residents were identified as professionals or self-employed. Migrant perpetrators were more apt to have jobs than were the non-Aboriginal Australian-born.

Slightly less than half of the female partners of unemployed men (in the refugee sample) felt that their husband's lack of employment had contributed to the violence.

Special issues for immigrant women

Many survivors and people who work with migrant women expressed the view that aspects of being a migrant contribute to abuse by the immigrant husband. Normative wife abuse within the culture of origin, belief in family privacy, changes in gender roles in Australia, isolation, lack of support, language difficulties, and downward shifts in employment status were a few of the factors reiterated. These same forces may militate against a victim seeking help.

In Vietnam, men have the right to hit their wives so it was accepted. There is an adage, "If you married with a dog you have to follow him for all your life". [NSW, Vietnamese welfare worker]



Machismo and patriarchy within Argentinian culture and the status of women and men in Argentina vary greatly. [Argentinian survivor, age 51]



Upset he cannot provide for family. And the experience of migration; unused to culture and cannot handle daughter growing up and living Australian lifestyle. [Iranian survivor, age 37]

The migration experience itself was cited by many as problematic since it meant leaving support systems behind and expectations that might not be met.

It was very difficult because we left all our family and friends in Croatia. The experience of migration has been very traumatic because we have no support networks. [Croatian survivor, age 53]



I have believed it will be better, but you can change a planet and you cannot change a person. With our migration when you must start all your life from beginning, our problems are more evident and more obvious. We do not have any more our established life, families, friends, that contributed to staying in our hard marriage. [Croatian]



The migration, the pressure of work and the alcohol, I wouldn't say they were the cause of the violence but they were factors that would prepare the ground. People who display violence have a very low self-esteem and being in another country aggravates your sense that you are not good enough. There was an obsession with making money. We had a reasonably good life but he had much higher expectations than that. [Marguerite, French survivor]

Solicitors, refugee workers and ethnic welfare staff all concurred that the issues of isolation and lack of support are particularly applicable to Asian women (who may have even less awareness of their rights) sponsored by non-Asian men. Their violent husbands can translate these women's lack of knowledge into threats based on false information. Take what Min's (a Chinese woman) Australian-born husband said to her:

He said that I only married him to get permanent residency, not for him. He told me if I didn't want to do the things he asked I should go back to China. I told him that life would be better for me in China because I was also very angry. He said he was going to report me to the Immigration Department and say that I was here under false pretences.

Aside from the Asian brides, another group emerged as particularly vulnerable to abuse by their husband and his parents. Brought to Australia to wed someone from their culture already resident here with his family, these sponsored women may experience particular isolation. The women's parents, back in the homeland entrust the care of their daughter to the parents of the groom who in turn violates that trust, either by overt abuse themselves or by the complicity of maintaining silence. Ruziye, whose marriage was arranged in Turkey, describes how it happened to her.

They became very violent and kept me in total isolation. I wasn't allowed to go anywhere. Each time he came home, he would beat me up over little reasons. He used to kick me out of the bed. I stopped going to my mother-in-law's house. We were reconciled a couple of times but then he became violent again and started bashing me up every day again.

Cemille, who was also brought over from Turkey to marry, explains why she stayed in the relationship for six years.

I was informed by some other people that there were some services available; that it's a crime in Australia but I had that fear with me all the time and it took me six years to overcome that fear. I was not confident enough to leave that relationship and start a new life on my own. That fear could be because it's a new country, I don't know the language but I always had that fear with me.

Telling family or friends

More than half of overseas-born and Australian-born refugee residents believed that they had experienced particular difficulties telling friends or family about the violence. The reasons articulated by immigrant women included the shame and humiliation expressed by those born here, plus there were additional factors attributable to being from another country.

Only dearest friend who helped me run away but they don't know the services so I was stuck. It is not my culture to tell other people about how bad my husband is. [Korean survivor, age 25]

A substantial number had no one to tell since they had no family in Australia.

My family is not here at all so I am very lonely. [Uruguayan survivor, age 26]



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I have no family here at all other than my kids and was too embarrassed to tell friends. [Greek survivor, age 50]

Going to the police

Women from Pacific, Asia, Middle East and Latin America cultural backgrounds were more likely to state that they had difficulties in contacting the police. There were some who were unable to because they could not speak English.

Because of language and because we don't trust police. [El Salvadoran survivor, age 26]



My English-speaking is not well enough to express what I want to say. Moreover, I feel it is not right to go to the police station in order to report about my husband. [Vietnamese survivor, age 25]



I cannot speak and understand English. I felt like the whole thing going to be big and of course I might get my husband into trouble by reporting to police. [Korean survivor]



I felt embarrassed as my English is not good and I did not want it to become known that I had problems at home. [Italian survivor, age 60]

Some women didn't know that in Australia police are supposed to play an interventionist role.

I do not know much about women's rights in Australia. [Vietnamese survivor, age 35]



Didn't know it was police's role. [Lebanese survivor, age 43]

Or the women were concerned about the perceived prejudice of the police.

Police would be prejudiced and say 'she's just a wog'. [Greek survivor, age 26]

In at least two cases the survivor's previous experience with the police, within the context of the violence, contributed to her reluctance to contact them again.

The first time I was badly hit by my ex-husband the police didn't do anything so I lost my trust of the police. [Philippine survivor, age 24]



I felt uneasy at times because I felt I wasn't believed sometimes. As if they thought I may have provoked it somehow. [Argentinian survivor, age 45]

Lack of knowledge about rights and services

There was marked similarity between the responses of ethnic welfare, legal aid and refuge workers to some immigrant women's lack of knowledge about rights and support agencies.

The survivors concur.

Because I have no family here to help me, I could not leave — didn't know how. [Lebanese survivor, age 23]



I didn't know anybody or any services to turn to. [Turkish survivor, age 21]

Refuges

Some immigrant survivors didn't know that refuges existed until directed there by police. Others had heard about them

but had been given a negative image. Once they attempted to get help, there wasn't always adequate availability of space. In addition, many women experienced difficulties relating to cultural differences and loneliness. Theresa, a South American woman who has been a survivor and a worker, explains:

Men have said really bad things about refugees. They say the women there are lesbians. Only a minority of migrant women are reaching support services. They might be scared of someone who doesn't present herself in the image of a woman. Workers should present themselves well.

Refuges may present problems because of the mixture of different cultures in one place, from family values to standards of cleanliness. Unless they are completely forced by the situation they are escaping, mostly they try but then they go back to their homes. If they have come to a refuge and go to a social event, people would find out and they would be talked about. For migrant women to open up they need to talk to other migrant women. Mostly women are surprised when they come to a refuge that it is an okay place and is comfortable. Sometimes the women become quite obsessive about cleaning the place.

Cemille also had received negative messages about refugees from people in the Turkish enclave:

I realised that I was not the only one. I have met other women who came out to Australia to arranged marriages. Refugees have a bad name in our community which has been created purposely by men. In order to deal with all those problems we need more refugee workers. There are so many women that I know that are stuck in violent relationships because they don't know the options.

What are the solutions?

Over the last decade particularly, the Commonwealth, largely through the Office of the Status of Women has highlighted the issues of domestic violence, has put moneys into education and service provision and has worked to revise many of the relevant laws. In addition, the Department of Immigration has made a number of changes in its policies, legislation, actions and funding in regard to domestic violence; most of these modifications have, however, focused on serial sponsors. In light of these positive measures, it is not surprising that the women who had come to Australia from other countries overwhelmingly thought that the services here to assist domestic violence survivors were far better than what was available in their homelands. Additionally, they identified Australian culture as more supportive and less apt to hide such violence away.

Despite the improvements, the research done for *Shattered Dreams* shows that there is an urgent need for further action to be taken. First, in the area of violence against women in general, the following areas require on-going (government commitment to) change:

- attitudes about domestic violence, both in mainstream Australia and in ethnic cultures — learn to see it as criminal assault;
- attitudes about jealousy — learn to recognise that it can be an early sign of serious problems;
- attitudes about alcohol abuse — learn the risks;
- the mainstream criminal justice system's response — the police and courts need to stop trivialising and minimising violence against women in the home.

Continued on p.63

Cultural blindness

CRIMINAL LAW IN MULTICULTURAL AUSTRALIA

Simon Bronitt
Kumaralingam Amirthalingam

Ignorance of the law is no defence: a truism that operates harshly in a multicultural society.



The last decade has seen much rethinking of the criminal law. Doctrinal concerns about coherence and certainty have been displaced by concerns about the discriminatory rules and practices embedded in the criminal law.¹ This article analyses how the criminal law responds to the demands placed on it by multiculturalism through an examination of the defence of provocation and the legal truism that 'ignorance of the law is no defence'. Provocation provides a fertile ground for such an inquiry since insults, anger and modes of violent retaliation often have a significant cultural dimension. More significantly, since provocation is a defence which is constructed around the reactions of the hypothetical 'ordinary person', it provides unique insights into the purported 'cultural blindness' of the criminal law.²

Similar insights are provided by an examination of the rule that 'ignorance of the law is no defence'. The rule purports to uphold the principles of equal protection and equality before the law, but in reality operates harshly in a multicultural society, unfairly penalising individuals who are unaware of the relevant prohibition and who are hindered by language and cultural barriers from finding out. We examine whether the justifications for maintaining this rule based on equality and expediency outweigh the interests of individual justice, or whether an exception which allows justifiable ignorance of law as a defence should be made on cultural grounds.

The provocation defence: the ordinary 'Anglo-Saxon-Celtic' person test

The law governing provocation, which operates to reduce murder to manslaughter,³ reveals the tension between subjective and objective standards in the criminal law. These tensions precisely mirror the debates surrounding *mens rea* and whether the fault standard should be based on the subjective state of mind of the defendant (intent, recklessness, knowledge) or should be determined by reference to an objective standard (the mental state of a hypothetical reasonable or ordinary person placed in the defendant's position).

In the context of provocation, the question becomes whether the test for loss of self-control should be determined exclusively by reference to the subjective characteristics of the defendant or should be qualified by objective standards of self-control which can reasonably be expected from a hypothetical reasonable or ordinary person placed in the defendant's position. It should be noted that community expectations about 'reasonable' or 'ordinary' responses to provocative conduct have always limited the availability of the defence. Before the emergence of the 'reasonable man' standard,⁴ these limitations took the form of substantive rules that required the defendant's retaliation to occur 'suddenly' without delay or premeditation, while at the same time being proportionate to the deceased's wrongful act or insult.⁵ Over the last 20 years, the High Court has transformed the provocation defence in many ways. The 'reasonable man' has been transmogrified to the

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'ordinary person', a concession both to gender neutrality and the fact that it is the ordinary person, not necessarily the reasonable prudent person, who kills in the face of provocation. Also, the rules requiring suddenness and proportionality of response have been banished from the substantive law, although they remain relevant 'factors' that the jury may use as evidence to infer that the defendant had lost self-control, and that the defendant's response is one which could be shared by the ordinary person.⁶

The High Court in *Stingel* (1990) 171 CLR 312 and more recently in *Masciantonio* (1995) 183 CLR 58 reviewed the ordinary person test and affirmed that there is a large degree of conformity between the common law and the Code provisions dealing with provocation. Stripped to its bare essentials, the question the jury must determine in a case raising provocation is whether the defendant killed in a state of loss of control in circumstances where an ordinary person, faced by that degree of provocation, could have formed the intent to kill or do grievous bodily harm. The test is whether an ordinary person *could* have done what the defendant did, corresponding to the nature and extent of the violence used by the defendant (at 69).

But before applying the ordinary person test, the jury must determine the seriousness of the provocative conduct. In determining this threshold question, the High Court held that the jury may consider any of the defendant's characteristics which affect the gravity of the provocative conduct including age, sex, ethnicity, physical features, personal attributes, personal relationships or past history (at 67). Indeed any of the defendant's personal characteristics, whether permanent or transient, are relevant provided that there is a causal connection between the provocative words or conduct of the deceased and the particular characteristic.⁷

Although relevant to determining the gravity of the provocation, the subjective characteristics of the defendant (including ethnicity) are irrelevant to the standard of self-control imposed by the law; a standard which is determined by reference to the hypothetical ordinary person facing that degree of provocation. However, this purely objective approach to self-control has drawn criticism from both academics and judges. In 1970, Professor Brett, drawing on psychological and sociological research about human behaviour under stress, demonstrated that many aspects of the provocation defence are based on fallacies about human nature. Clinical research proved that it is impossible to identify an ordinary or average response to stress situations:

Some men are highly vulnerable to stress, others are strikingly resistant to it. This fact has been demonstrated both by clinical observation and by experiment, though it is as yet unknown why these differences should occur. It seems likely, however, that a number of factors, some genetic, others environmental, combine to produce the differences of susceptibility and response.⁸

Similar concerns were later reflected in the views of Murphy J in *Moffa* (1977) 138 CLR 601. His proposal for an entirely subjective test for provocation was rejected by the majority, but his criticism remains a powerful challenge to the appropriateness of an objective standard in a multicultural society:

The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a

reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances. [at 626]

These words, spoken almost 20 years ago, have even greater force in an Australian society which is now avowedly committed to multiculturalism.

These reservations about the ordinary person test did not translate into legislative reform, although in some jurisdictions the courts denuded the test of its absolute objectivity by investing the ordinary person with the ethnicity of the particular defendant. In these cases, the law maintained the pretence of the objectivity of the ordinary person test by affirming the irrelevance of the personal idiosyncrasies of the particular defendant. This approach was not only inconsistent with the rationale of the objective test, but it was difficult to identify any consistent criteria being used to identify those subjective characteristics of the defendant that could be attributed to the ordinary person and those that could not. In one Victorian case, the defendant, who killed his daughter following her revelation that she had engaged in premarital sex, was described by the trial judge as being 'Turkish by birth', 'Muslim by religion' and 'a traditionalist'. The jury was directed to consider whether an ordinary person, whose make-up included these characteristics, could have reacted in this way.⁹ In the Northern Territory, where the criminal courts have a long history of accommodating Aboriginal cultural perspectives, the 'ordinary person' in the Code provision dealing with provocation is attributed with the cultural background of the defendant, and in one case that was defined by the judge as an ordinary Aboriginal male person living today in the environment and culture of a remote Aboriginal settlement.¹⁰ Arguably such an approach is not a departure from an objective standard, but is simply legal recognition that the standard of self-control can only be determined by reference to the dominant culture, in that case, indigenous culture.¹¹

These judicial attempts to develop a multicultural dimension to the ordinary person test have been largely thwarted by the High Court. The only qualification to the ordinary person test that the High Court has been prepared to acknowledge is age in the sense of immaturity.¹² The High Court concluded in *Stingel* that to attribute to the ordinary person other characteristics of the defendant such as gender or ethnicity would depart from the principle of equality:

No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test. [at 329]

The Australian Law Reform Commission (ALRC) has expressed similar concerns that 'a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups

would lessen the protection to all afforded by the criminal law'.¹³

These conceptions of equality are seriously flawed. Feminist scholarship has highlighted that liberal conceptions of equality (which include both formal and substantive equality rights) operate to conceal and perpetuate discrimination against women. In many facets of public life, including the criminal law, women are judged by a standard, which though ostensibly neutral, is in fact *set by and for men*.¹⁴ Both self-defence and provocation have generated rules based on 'truths' about human nature which have excluded the experiences of women and unfairly denied the opportunity of an acquittal or partial defence to women who, with justification or excuse, kill their violent partners.¹⁵

There are similar dangers that the conception of equality embodied within the ordinary person test, by excluding cultural and ethnic background as a relevant consideration, conceal and perpetuate discrimination against minority groups. When a tribunal of fact is called on to decide whether the defendant's conduct complies with the standards of reasonableness or ordinariness imposed by the law whose standard is being applied? Objective standards are predicated on the existence of a 'community consensus' about what constitutes reasonable and ordinary behaviour, but where minority groups are not adequately represented either on juries or on the bench, objective standards will be determined by the values of the dominant Anglo-Saxon-Celtic culture exclusively.¹⁶ In reality each tribunal is constructing the standard of judgment according to its own values, and though represented as an 'objective' and 'neutral' standard it produces a highly discretionary system of regulation.¹⁷

There are signs that cracks are beginning to appear in the ordinary person test. In *Masciantonio* the majority affirmed the objective test of self-control in *Stingel*, and the fact that the defendant's characteristics were irrelevant (Italian migrant background, limited education, and that as a result of a head injury he reacted overtly to stress and was prone to dissociative states). McHugh J, however, delivered a powerful dissent in which he rejected the majority's view that the ethnic or cultural characteristics of the defendant were irrelevant to the ordinary person test:

Ethnic or cultural characteristics

The ordinary person standard would not become meaningless, however, if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar. [at 73, footnotes omitted]

He admitted that his views on this matter had been swayed by an article by Professor Yeo¹⁸ and conceded that the judgment in *Stingel* (to which he was party) was liable to cause injustice:

Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities. [at 74]

Unlike the provocation test suggested by Murphy J in *Moffa*, McHugh J's proposal does not abandon objective standards. It does expose the danger that an objective standard which does not comprehend and accommodate non-dominant cultural perspectives may be discriminatory and the cause of injustice.

However, the adoption of an ordinary person standard which is sensitive to cultural variation is not without its own dangers. Such a modified standard could accommodate cultural claims about the use of domestic violence to discipline women and children, providing a partial defence to murder in communities where violence is recognised as a culturally appropriate response to provocative acts of 'domestic disobedience'. This conflict of moral imperatives, between multicultural and feminist claims to equality, is irreconcilable. There is a tendency to obscure this conflict by means of a judicial 'sleight of hand'; namely the law merely recognises but does not condone such cultural practices.¹⁹ Certainly a multicultural model of provocation could legitimately refuse to recognise cultural claims which are discriminatory on the grounds of gender, sexuality or age. This limitation would be consistent with the protection offered under the law of assault, where violence inflicted for the purpose of 'domestic discipline' is unlawful irrespective of the cultural practices or consent of the parties involved.²⁰ Moreover, it would conform to the position in international human rights law, where in cases of irreconcilable conflict, the right of minorities to enjoy their own culture, religion or language is qualified by individual rights to equality and non-discrimination.²¹

Another danger with accommodating different cultural perspectives relates to proof. In determining the reactions of an ordinary person of a particular ethnicity there is a risk that judges and juries may draw on discriminatory generalisations about the cultures of minority groups of which they have little or no understanding. These dangers can, however, be overcome by both 'out of court' measures (crosscultural training for judges and lawyers, and better representation of minorities on juries) and 'in court' assistance from independent witnesses who have expertise in cultural issues. With respect to the latter, the admission of expert testimony is a matter for the discretion of the judge, and under the common law expert opinion can only be admitted where it is based on formal qualifications acquired through study or instruction in some relevant or specialised field.²² This restriction results in a heavy reliance on academics or specialists, and the exclusion of knowledge which has been acquired through informal means. The recent changes introduced by the *Evidence Act 1995* (Cth) and (NSW) redefine expert opinion in terms which include 'specialised knowledge acquired through . . . experience' (s.79), providing a broader range of expertise from which the judge and jury can learn about different cultural norms and values.

Ignorance of law: the cultural perspective

Criminal liability is premised on blameworthy conduct, one indicator of which is the defendant's mental state. The common law has embodied this requirement in the legal maxim, *actus non facit reum nisi mens sit rea*. Roughly translated it means an act does not make a person guilty unless the person's mind is also guilty. This state of mind is commonly called *mens rea*. The courts originally construed the guilty mind as 'an evil intention, or a knowledge of the wrongfulness of the act' which was required in every offence.²³

Knowledge of the unlawfulness or wrongfulness of the conduct was central to the legal concept of guilt. Under the modern law, the focus of *mens rea* has shifted from a normative conception of blame to a psychological one; hence the law disregards motive, defining *mens rea* in exclusive terms as intention, recklessness or knowledge.

Although the courts originally considered knowledge of wrongfulness as an element of *mens rea*, this normative conception of blame was qualified by the effect of another legal maxim, *ignorantia juris non excusat*, that is, ignorance of the law is not a defence.²⁴ This rule is one of convenience, not one of justice nor one of principle.²⁵ One of the reasons why the maxim has remained unchallenged is the notorious 'floodgates' argument — to allow individuals to plead ignorance of the law would encourage others to do so, and the law would fail in its educative role and the criminal justice system would grind to a halt. Notwithstanding these concerns, there is some academic support for the introduction of a defence based on justifiable ignorance of law with the qualification that the ignorance of law must be 'reasonable in the circumstances' in order to counter frivolous claims and to ameliorate concern about proliferation of specious defences.²⁶

The ALRC recognised that the rule that ignorance of the law is not a defence has the potential to operate harshly in a multicultural society. To punish a person for acting without knowledge of wrongfulness is unjust, and the present law reflects this position by excusing defendants who, because of their infancy or mental disorder, are unable to appreciate the legal or moral quality of their conduct. Similarly it would be unjust to punish a person who does not know, and could not reasonably be expected to know, the content of the criminal law because of language and cultural barriers. The Commission acknowledged the lack of moral blameworthiness in this situation, but rejected proposals for a defence of justifiable ignorance of law based on cultural experiences or expectations:

The basic principle of imposing responsibility on all members of the community to know what is and is not allowed should not be disturbed merely because it is difficult for some people to know what the law is. Instead, governments and responsible agencies should improve their efforts to communicate the substance of legal restrictions to those likely to be affected by them.²⁷

The problem with this recommendation is two-fold. First, as the ALRC recognised, the rejection of the proposed defence means that in these circumstances a person's conduct may be criminal, but not morally blameworthy. The principle of individual justice requires that criminal liability should not be imposed unless individuals had a fair opportunity to conform their conduct to the law.²⁸ Indeed in some jurisdictions, ignorance of an offence created by subordinate legislation is a defence where the person does not know, and could not reasonably be expected to know, of its existence.²⁹ In our view, a similar defence of justifiable ignorance of law should be enacted for a person who, due to language or cultural barriers, does not know, and could not reasonably be expected to know, of the prohibition which has been infringed. Unlike the ALRC's proposal, our approach provides governments with a legal incentive, not just a political one, to 'do the right thing'. The provision of appropriate educational materials on particular criminal laws which address these cultural and language difficulties would limit the scope of the defence; the availability of such material would provide cogent evidence that it is reasonable to expect that a person in the defendant's position ought to know and understand

those laws. This approach promotes the educational function of the criminal law, while simultaneously keeping faith with the principle of individual justice by ensuring that only truly blameworthy conduct is punishable.

The second problem relates to the ALRC's recommendation that the responsibility to know the law should be applied equally to all members of the community. This conception of equality is seriously flawed — as with provocation, culpability is measured against a standard determined exclusively by reference to the dominant culture, in this context the ability and opportunity of members of the dominant culture to know and understand the applicable criminal laws. To ameliorate unfairness, the ALRC did recommend that ignorance of the law based on cultural factors should be taken into account in the exercise of the court's sentencing discretion (including the discretion not to record a conviction) and the prosecutor's discretion not to prosecute.³⁰

The ALRC's proposal to give effect to the fundamental principle of individual justice by resorting to discretion at the pre-trial and sentencing stage is inherently problematic. It is widely acknowledged that minority groups are subject to a greater amount of discretionary justice and that discretion is often exercised in a discriminatory manner. As one commentator has observed:

It is indeed ironic to leave the 'cultural defence' to discretionary procedures that have traditionally been biased against the very groups that the defence is intended to benefit.³¹

As discretionary practices are *ad hoc* and lack transparency, they cannot provide consistency in the law, nor guidance on how similar cultural factors are to be dealt with in future cases. It is our contention that these fundamental questions about criminal culpability should not be pushed to the margins, but should be tackled from within the framework of the substantive law.

Within the present framework of defences there is some scope for acknowledging ignorance which stems from cultural differences. Statutory defences of reasonable care and due diligence can be founded on reasonable ignorance of law.³² Although the rule that ignorance of law is no defence has not developed a specific exception on cultural grounds,³³ the courts have circumscribed the scope of the rule by adopting a restrictive notion of what constitutes ignorance of law. Generally, where the defendant is acting under a mistaken view of the civil law the rule does not apply.³⁴ Also the law treats mistakes which relate to matters of fact and those which relate to matters of law differently. Since a mistake of fact may operate as a defence, the legal characterisation of the defendant's mistake is crucial.³⁵ In the High Court case of *Ianella v French* (1968) 119 CLR 84 at 114, Windeyer J in his discussion of ignorance of law and the distinction between matters of fact and law held that foreign law was a matter of fact. By analogy, a mistake based on customary law ought also to be regarded as one of fact. The Court also held that a mistake based on both law and fact would be treated as a mistake of fact. In many cases it will be unclear whether the mistake is strictly one of law (a belief that the Australian law permits the particular conduct) or one of fact (a belief that under foreign law or custom this practice is lawful). In cases of uncertainty, the 'mixed mistake' rule is likely to apply, and courts will regard the mistake as one of fact.³⁶

Another exception to the ignorance of law rule, the claim of right defence, has the potential to accommodate the defendant's cultural beliefs. But as we shall see this cultural accommodation is both indirect and incomplete. This is

because the defence is not premised on the legitimacy of those cultural beliefs, but rather on the defendant's ignorance of law. A claim of right is a common law defence that is applicable only to property offences, arising where a person acts under the belief that they are entitled in law to engage in the conduct concerned.³⁷ Only a legally recognised claim of right will be taken into account, albeit that claim may be based on a mistaken view of the facts or the law.³⁸ A moral claim of right is not recognised and is unlikely ever to be recognised.³⁹ To be effective, the belief in a legal entitlement to the property must relate to the law of the relevant State or Territory, and therefore claims based exclusively on customary law are not effective. However, the clarity of this distinction is muddled by the growing judicial recognition of international and customary law norms within the fabric of domestic law. Thus a claim of right defence may be effective where it is based on a belief that the custom is one which is recognised by the law of the relevant State or Territory. An example of this type of claim of right is a belief that Australian law, following Mabo, requires the recognition of rights under Aboriginal customary law. Such a belief may provide a valid defence even where this belief is not based on reasonable grounds or is wrong as a matter of law.⁴⁰ A similar belief that a cultural practice or rule is recognised by Australian law should provide a valid basis for a claim of right defence.

The ALRC rejected the proposal for a general cultural defence, though it did recognise that for some offences a special exemption on cultural grounds should be enacted. The ALRC argued that the enactment of a cultural defence or even widespread cultural exemptions would mean that the obligations under the criminal law would be determined by reference to one's membership of a particular cultural or ethnic group — not only are the parameters of this defence difficult to draw, but such a defence would violate the principles of equality. But it does not follow that ignorance of law is therefore irrelevant to the question of culpability where the defendant, due to language or cultural barriers, did not know and could not reasonably be expected to know of the existence of the offence. In these situations, the law should acknowledge these cultural perspectives by providing a defence — this is not the creation of a special multicultural defence, but rather further evidence of our legal system's commitment to the fundamental principle of individual justice. There may be fears that the defence could be abused for serious offences like murder. But such fears are unfounded. Crosscultural claims of ignorance of law would be unlikely to be justifiable for many core offences. As Professor John Braithwaite has pointed out, criminological research has established that there is 'a global consensus about a set of core offences which are regarded as crimes by citizens everywhere: murder, assault, rape, robbery, theft, fraud'.⁴¹ Accordingly, defendants raising ignorance of law in these cases would find it extremely difficult to establish that their ignorance of law was 'reasonable' in the circumstances.

Conclusion

The tension between individual justice and broader interests of the community lies at the heart of many debates in the criminal law. Multiculturalism builds a symbolic bridge between these two values. Incorporating different cultural perspectives into the substantive rules allows the law to address those individual differences which derive from membership of a distinct cultural group. It does not abandon the question of culpability to the perils of subjectivity, but rather ensures that the objective standard that is applied is one which

accommodates non-dominant cultural perspectives. It has been suggested that the function of the criminal law, as well as to prevent harm to others, is to promote the welfare of the community.⁴² The principle of welfare is not simply morality in another form — rather it encompasses the values, needs and interests which a community has decided, through its democratic processes, are fundamental to its functioning and, therefore, require protection by the criminal law. It is undeniable that the Australian people through their elected representatives are now committed to a policy of multiculturalism. The task for the legal system is to embrace an inclusive rather than exclusive conception of 'community', one which recognises the many different communities which exist in Australia, and to develop a criminal justice system which can be responsive to those different cultural values, needs and interests.

References

1. See for example, Lacey, N., Wells, C. and Meure, D., *Reconstructing Criminal Law*, Weidenfeld and Nicolson, 1990; Norrie, A., *Crime, Reason and History*, Weidenfeld and Nicolson, 1993; Brown, D., Farrier, D. and Weisbrod, D., *Criminal Laws*, Federation Press, 1996, 2nd edn. This scholarship may be contrasted with the rethinking of an earlier generation of criminal lawyers — a 'rationalising enterprise' typified by the influential treatises of Fletcher, G., *Rethinking the Criminal Law*, Little, Brown and Co., 1965 and Williams, G., *Criminal Law — The General Part*, Stevens, 1961, 2nd edn.
2. This feature is not unique to provocation. See also the defence of duress which employs a hypothetical person of 'ordinary firmness of mind and will': *Abusafiah* (1991) 24 NSWLR 531. By contrast self-defence does not apply a hypothetical person test, but rather requires the defendant's actual belief (that it is necessary to do what he or she did in self-defence) to be based on reasonable grounds: *Zecevic* (1987) 162 CLR 645.
3. In the Code States of Queensland and Western Australia, provocation also operates as a defence to assault offences. The High Court recently held that provocation is not a defence to attempted murder: *McGhee* (1995) 183 CLR 82.
4. The reasonable man of provocation emerged at a relatively late stage, first appearing in *Welsh* (1869) 11 Cox 336.
5. Also the law originally provided that 'mere words' could not constitute provocation: see *Holmes* [1946] AC 588 at 600. This strict rule was relaxed by the High Court in *Moffa* (1977) 138 CLR 601 and abolished by statute in some jurisdictions: s.23(2)(a), *Crimes Act 1900* (NSW) provides that 'grossly insulting words' may constitute provocation.
6. *Johnson* (1976) 136 CLR 619, 639-640. Similar developments occurred in the law governing self-defence: see *Zecevic* (1987) 162 CLR 645.
7. *Croft* [1981] 1 NSWLR 126.
8. Brett, P., 'The Physiology of Provocation' [1970] *CrimLR* 634 at 637.
9. *Dincer* [1983] 1 VR 460 at 466-467, per Lush J. See also *Voukelatos* [1990] VR 1 at 24, where Hampel J held that psychotic illness could be a characteristic attributable to the ordinary person even where that illness may have been induced by the defendant's chronic alcoholism.
10. *Jabarula v Poore* (1989) 68 NTR 26 at 33.
11. The Privy Council, hearing an appeal from the West African Court of Appeal, recognised the objective standard for provocation must accommodate the dominant indigenous cultural perspectives: 'The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable': *Kwaku Mensah* [1946] AC 83 at 93, per Lord Goddard.
12. Cf in England, the House of Lords has been prepared to acknowledge the relevance of gender, as well as age, to the ordinary person test: see *Camplin* [1978] AC 705 at 708.
13. ALRC, 'Multiculturalism and the Law', Report No. 57, 1992, p.187.
14. Lacey, N., 'Legislation against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411.
15. The literature exposing this embedded gender bias in these homicide defences is voluminous: see Sheehy, S., Stubbs J. and Tolmie, J., 'Defending Battered Women on Trial: the Battered Woman Syndrome and its Limitations' (1992) 16 *Crim LJ* 369; O'Donovan, K., 'Law's Knowledge: The Judge, The Expert, The Battered Woman and her Syndrome' (1993) 20 *Journal of Law and Society* 427; Leader-Elliott, I., 'Battered But Not Beaten: Women Who Kill in Self-Defence' (1993) 15 *Sydney Law Review* 403. In addition to the removal of many of the overtly discriminatory rules governing self-defence and provocation, expert evidence on battered woman's syndrome is now admitted to

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- combat the myths about women who remain in a violent relationship: see *Runjanjic* (1991) 53 *A Crim R* 362; *Kontinnen*, (unreported decision of Supreme Court, South Australia, 27 March 1992); *Lavallee* [1990] 1 SCR 852.
16. ALRC, above, pp.183-4
 17. Lacey, N., Wells, C. and Meure, D., *Reconstructing Criminal Law*, Weidenfeld and Nicolson, 1990, p 33.
 18. Yeo, S., 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3.
 19. Indeed a similar argument is used to justify sentencing decisions where payback by spearing within Aboriginal communities, while not condoned, is recognised as a factor relevant to the mitigation of sentence: see *R v Minor* (1992) 70 NTR 1 at 11, per Mildren J; *R v Wilson Jagamara Walker* unreported, Supreme Court of the Northern Territory, Martin CJ, 10 February 1994, SCC No. 46 of 1993.
 20. See *Watson* [1987] 1 Qd R 440. By contrast, the law still permits adults to use some force for the 'reasonable chastisement' of children.
 21. See Evatt, E., 'Cultural Diversity and Human Rights' in P. Alston (ed.), *Towards an Australian Bill of Rights*, Centre for International and Public Law, Australian National University and Human Rights and Equal Opportunity Commission, Canberra, 1994.
 22. *Weal v Bottom* (1966) 40 ALJR 436.
 23. *Sherras v De Rutzen* (1895) 1 QB 918 at 921 per Wright J. See also *Tolson* (1889) 23 QB 168 at 172 per Wills J.
 24. The rule has been enacted in s.9(3), *Criminal Code Act 1995* (Cth). Mistake and ignorance are conceptually different, reflected in the earlier debates whether a mistake of law (positive belief) or ignorance of law (absence of belief) should ground a defence: see Keedy, E., 'Ignorance and Mistake in the Criminal Law' (1908) 22 *Harvard Law Review* 77, cf Hall, J., *General Principles of Criminal Law*, 2nd edn, 1960. The better view, reflected in s.9(3), is that there is no legal difference between mistakes and ignorance: 'ignorance is the genus of which simple ignorance and mistake are the species' in Williams, G., *Criminal Law: The General Part*, 2nd edn, 1961, pp.151-2.
 25. Several justifications have been provided for the rule including the presumption that everyone should know the law: see Blackstone, W., 4 *Commentaries* 27; utilitarian arguments: see Holmes, O., *The Common Law*, 1881, p.48; pragmatic concerns: see Austin, J., *Jurisprudence*, 1861, p.688; and more recently and more interestingly, duties of citizenship: Ashworth, A., *Principles of Criminal Law*, 1991, p.209. Ashworth argues that each citizen has a duty to acquaint themselves with the criminal law. For criticism of Ashworth's views see Husak, D., 'Ignorance of Law and Duties of Citizenship' (1994) 14 *Legal Studies* 105.
 26. Husak, D., above, p.115; Amirthalingam, K., 'Mistake of Law: A Criminal Offence or A Reasonable Defence' (1994) 18 *Crim LJ* 271.
 27. ALRC, above, p.179.
 28. See Hart, H.L.A., *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford, 1968, pp.180-3. 'Criminal law is concerned with social control through the deterrence of crime, but it is a system of control qualified by the requirement that justice be done to the individual': Norrie, A., 'Freewill, Determinism and Criminal Justice' (1983) 3 *Legal Studies* 60.
 29. See s.9(4), *Criminal Code Act 1995* (Cth); *Lim Chin Aik* [1963] AC 160 (Privy Council).
 30. ALRC, above, pp.179-81.
 31. See Editorial Note, 'The Cultural Defence In the Criminal Law', (1986) 99 *Harvard Law Review* 1293 at 1298.
 32. Amirthalingam, K., above, ref.26, pp.277-80.
 33. *R v Esop* (1836) 7 C & P 456; 173 ER 203.
 34. *Maintenance Officer v Starke* [1977] 1 NZLR 78; *Bonollo* [1981] VR 633.
 35. For crimes of *mens rea*, a mistake of fact (which if true would render the defendant's conduct innocent) will operate as a defence even though the mistake is unreasonable in the circumstances: *DPP v Morgan* [1976] AC 182. For crimes of strict liability (where *mens rea* is not required), a mistake of fact to operate as a defence must be reasonable in the circumstances: *He Kaw Teh* (1985) 157 CLR 523.
 36. *Thomas* (1937) 59 CLR 279.
 37. The common law defence has been codified in some jurisdictions, see s.9(5), *Criminal Code Act 1995* (Cth); s.22, *Criminal Code* (Qld), s.22, *Criminal Code* (WA); s.12, *Criminal Code* (Tas.). In those jurisdictions adopting the UK model of the *Theft Act*, a belief based on claim of right negates dishonesty: see s.73(2)(a), *Crimes Act 1958* (Vic); s.96(4)(a), *Crimes Act 1900* (ACT).
 38. *Bernhard* [1938] 2 KB 264, *Walden v Hensler* (1987) 163 CLR 561, *Mitchell v Norman*; *Ex parte Norman* [1965] Qd R 587, *R v Love* (1989) 17 NSWLR 608.
 39. *Walden v Hensler* (1987) 163 CLR 561.
 40. For consideration of the arguments for the recognition of an inherent Aboriginal criminal jurisdiction which survived settlement, see Yeo, S., 'Recognition of Aboriginal Criminal Jurisdiction' (1994) 18 *Crim LJ* 193. The High Court, per Mason CJ, recently rejected these claims to recognition in *Walker v New South Wales* (1994) 182 CLR 45.
 41. Braithwaite, J., 'Towards Criminology' in K. Hazlehurst (ed.), *Crime and Justice: An Australian Textbook in Criminology*, LBC Information Services, 1996.
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Easteal article continued from p.57

Specifically in resolving or improving the plight of immigrant women:

- further modification of the immigration laws as they affect battered women;
- improving migrant women's access to information about their rights;
- further screening of sponsors;
- improving migrant women's access to information about domestic violence and services;
- improvements to refuges and more assistance for women trying to leave the violence;
- increased outreach programs for remote and rural areas;
- appropriately skilled and bilingual workers;
- greater co-ordination of government services.

Violence against women is about control. Policies and practices that are constructed without an understanding of what it means both to be a migrant and a battered woman collude in the victimisation of these women. It is also too

easy to ignore or minimise the predicaments of people whose words we may not understand. And yet if we look a bit closer and start to put names like Marguerite, Safia, Melina, Thu, Maria and Rajendra to the numbers, then perhaps they become a little harder to forget and their hope of a better tomorrow becomes a tenable dream.

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Detained

Pending repatriation

Hoi Trinh

A personal perspective on the Vietnamese boat people in Hong Kong.

The Editorial in *Refugee Concern* newsmagazine (Issue 4, March 1995, published by Refugee Concern Hong Kong) began with these words:

Someone once said words to the effect that we would not be truly civilised until we cared as much about the man starving halfway around the world as we cared about the man starving next door.

In many ways, Australia has been trying to assist those halfway around the world through Austcare and other non-government organisations. These achievements are commendable. However, Australia could do much more to alleviate human suffering by taking a more humanitarian approach when processing off-shore refugee and resettlement applications. In particular, Australia must ensure that its domestic policies do not adversely affect the well being of refugees overseas.

The issue

For many people the issue of Vietnamese boat people has been too complex and has gone on too long. It is the 21st anniversary of the Communist victory in South Vietnam on 30 April 1996 and this will remind many Vietnamese in Australia of the beginning of their dangerous exodus across the South China Sea in search of liberty. Many perished on the way to find a better future while some triumphantly made it to Australia where they are now rebuilding their lives and enjoying the freedom they were searching for.

Following the fall of Saigon in April 1975, the Communist victors began their campaign of ideological conversion. Hundreds of thousands of ex-officers of the South Vietnamese Government were put in so-called 're-education' camps across the country. Some were detained for a few years while others of more senior ranking were imprisoned for up to 15 years. Those who were considered to belong to the capitalist class had their property confiscated. Families were moved to New Economic Zones located in mountainous regions as punishment for their capitalist background.

This inevitably led to the mass exodus of South Vietnamese to neighbouring Asian countries. For a while the people of the Western world were shocked by what they saw on their TV screens every night. Vietnamese people from all walks of life left their homes and set sail for the open sea crammed in dangerous numbers in rickety crafts. Those who survived the perilous journey were awarded automatic refugee status pending resettlement in the West.

This did not last long. On 15 June 1988 (14 March 1989 for other asylum countries), Hong Kong announced that all arrivals would thereafter be 'screened' to determine their status, a practice which is applied in Western countries to 'sift the wheat from the chaff', the political refugee from the economic migrant.

Since then, all new arrivals have been treated as asylum seekers pending status determination. They are detained in detention centres

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until they can be screened. If the definition of a refugee is met, that is, a person who has a well-founded fear of persecution if returned, they are granted refugee status (screened-in) and moved to 'refugee' camps while those denied status (screened-out) remain in closed detention centres pending repatriation.

Being a Vietnamese migrant myself who came to Australia ten years ago, I have always been intrigued by the war and interested to see how the international community would end the boat people tragedy, a primary product of the infamous Vietnam War in its own right.

An opportunity came in the summer of 1992 when the then *Australian Lawyers for Refugees Inc. (ALRI)* asked me if I would like to join their volunteer legal team in Hong Kong for three months as a paralegal/interpreter. As it turned out, not only did I stay in Hong Kong that entire summer, my next two summers were also spent in Hong Kong where I had the pleasure of working for a remarkable 65-year-old grandmother lawyer, Pam Baker of Pam Baker & Co, the backbone of the now Hong Kong-based *Lawyers for Refugees (LR)*.

Hong Kong

At present, there are approximately 40,000 Vietnamese boat people still living in refugee camps in Hong Kong, Malaysia, Indonesia, Thailand and the Philippines. Hong Kong for the moment is bearing the bulk of the burden, housing more than half of the total population. At a meeting in Bangkok in January 1995, the United Nations High Commission for Refugees (UNHCR) and host governments decided that all but 1500 of those remaining in the camps did not satisfy the criteria for political refugee status, and will therefore be forcibly repatriated over the next few months, unless they volunteer to go home first.

In choosing to follow this path, first, the UNHCR and host governments have in effect reversed their policy of encouraging voluntary repatriation.

Second, the international community and most notably the UNHCR continue to ignore the fact that the refugee status screening process is fundamentally flawed and unfair. This has resulted in *bona fide* refugees being wrongly screened out.

The US Senate public hearing in July 1995 saw many refugee law experts and lawyers working closely with refugees testifying that the determination procedure is riddled with problems of translation, obtaining information, guidance for the applicants on procedures and their right to appeal. Most importantly, in Hong Kong the process is overridden by an executive desire to halt refugee arrivals to such an extent that international law for refugees is being wilfully ignored. In addition, the screening process has been severely compromised by the extent of corruption among immigration officials, most notably, in the Philippines and Indonesia.



*Education in the camps has been axed, leaving the children to fend for themselves.
[Whitehead Detention Centre, Hong Kong, Section 1.]*

Third, despite assurances from both the Office of the UNHCR and the Vietnamese Government the fact remains that Vietnam is still a socialist state which persecutes as well as prosecutes its political dissidents. There have also been cases of returnees being harassed and imprisoned on the false pretext of having committed 'crimes' before they fled the country.

Having said all that, the heart-wrenching fact remains: the asylum seekers prefer to be detained even though in the poorest, most inadequate facilities. Many have been detained for more than seven years.

What can Australia do?

The question of precisely what could, or should be done in the circumstances is admittedly one of considerable controversy.

In an attempt to discourage Vietnamese from remaining in detention centres, the United States and other countries including Australia changed their policy in 1993 requiring failed refugee applicants to return to Vietnam while awaiting the results of their visa applications to reunite them with their spouses living overseas. There can be no dispute about the urgent necessity to process these split family cases and allow the reunion of family members some of whom have been separated for up to four years.

A recent US Court ruling held that US policy violates the US *Immigration and Nationality Act* which provides that 'no person shall be . . . discriminated against in the issuance of an immigration visa because of the person's . . . nationality . . . or place of residence'. This illustrates how the international community has mismanaged the refugee situation in pursuit of its agenda, resulting in anger and disbelief on the part of the boat people.

International conventions and equity demand that immigrant visa applications for Vietnamese detainees be processed while they remain in the camps. All applications should be treated alike, irrespective of nationality and place of

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residence. Requiring asylum seekers to return to Vietnam to be considered for a visa application places them in a distressing and potentially dangerous situation.

The argument for resettlement in the West on humanitarian grounds also applies to the cases concerning unaccompanied minors and those who are found to be stateless. One is considered to be stateless if no government recognises you as their national. For example, the Vietnamese Government categorises people of Chinese origin, albeit born in Vietnam, as non-nationals of Vietnam if they do not possess any form of Vietnamese identification documents such as household registration to prove the existence of their former life in Vietnam.

The recent *habeas corpus* (illegal detention) case heard in the High Court of Hong Kong and the Privy Council in London highlights the fact that for many years a large number of these stateless people have been illegally detained with their legal rights being totally disregarded. Despite the Vietnamese Government's consistent policy not to accept the repatriation of non-nationals, the Hong Kong Government continued to arbitrarily detain these people until the Privy Council's ruling ordered their release on the basis that it was unlawful to detain them indefinitely.

These stateless people still do not have a home to go to, and neither do they have any credible assurance from the international community that they will be resettled. There is not only a moral obligation but also an international duty to resettle these stateless people.

Australia can play a significant role in resolving the present situation concerning the rest of the camp population. Uncensored information about the situation in Vietnam should be made available and any legal rights to which the detainees are entitled should be readily acknowledged. It must be recognised that this is not just Hong Kong's problem but an international one requiring a great deal of goodwill from all the Western nations involved. Resettling a few hundred stateless people does not pose a huge threat to national security. In fact by doing so, Australia would act within the spirit of international conventions for refugees.

In October 1994 the Australian Senate resolved that the UNHCR and the Commonwealth Government should look

into allegations of incompetence, bribery and sexual demands from immigration officers in asylum countries. These actions have undermined an effective screening process and it is alleged that there is an urgent need to rectify the situation.

On the one hand, it is important to ensure that internationally recognised immigration procedure is not abused. On the other, Australia must ensure that applicants who have arrived on our shore, despite having been screened out elsewhere incompetently or negligently, are rescreened.

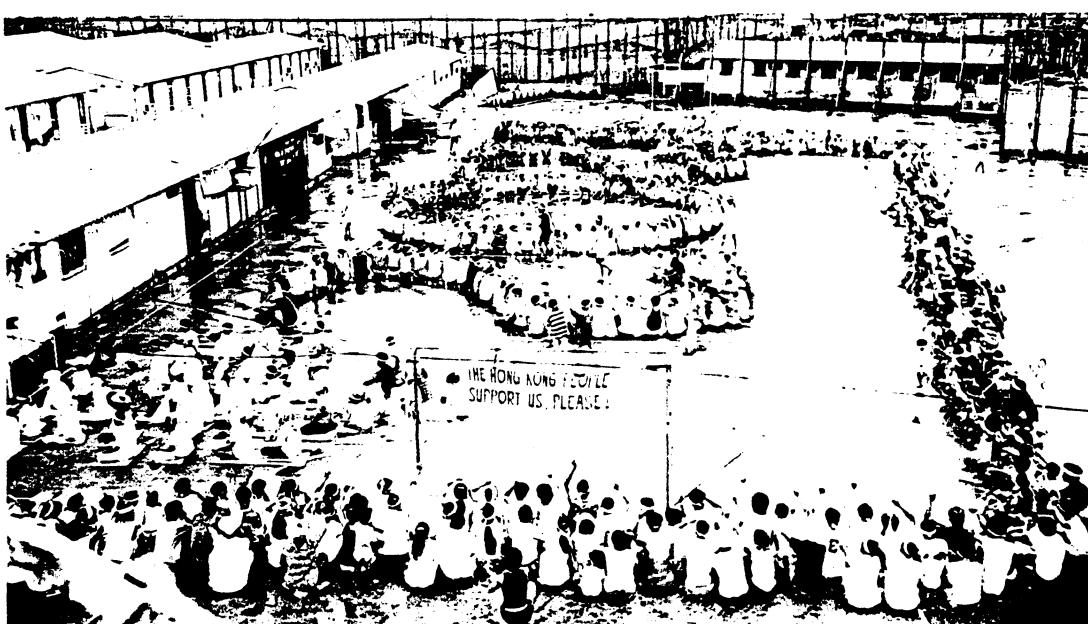
Last year Australian Immigration Officers granted refugee status to two Vietnamese applicants despite the fact that they had been determined not to be refugees by Malaysian immigration officers. Australia, however, stopped screening new arrivals shortly after this incident announcing that they would not rescreen those who failed to gain refugee status elsewhere. To process these new arrivals' applications is not only required by our own common law principles but also by international refugee law.

It becomes increasingly evident that there has to be collective international effort to enable Vietnam to prosper through economic progress and political liberalisation, particularly to assist those asylum seekers forced to return. Australia's efforts to assist Vietnam through aid and trade is a step in the right direction. However, Australia must ensure that as a trade off for assistance, Hanoi gives a guarantee that it will respect basic human rights. After all, if the human rights of refugees were respected at home, there would have been no reason for them to flee to other countries in the first place.

Conclusion

For the boat people in asylum countries such as Hong Kong, many months or years of uncertainty still lie ahead. Those in the camps still face years of detention while they wait in vain for resettlement.

As suggested above, the international community, including Australia, must quickly respond to the problem by introducing drastic measures to remedy the fundamentally flawed refugee status screening process. We also need to assess split family cases for resettlement on humanitarian grounds and respect the legal rights of detainees. Unless this is done, the sorry tale of Vietnamese boat people will continue to haunt our consciences in the years to come.



*The distinctive SOS formation: a cry for help to an unhearing world.
[Whitehead Detention Centre, Hong Kong.]*

MIGRANT RIGHTS

Time to reassess

Arthi Patel

Ten years on: what has been achieved for migrants since the 1985 inquiry into human rights?



The legal status of non-citizens in a community is, along with the recognition accorded to the rights of prisoners, a useful indicator of the extent to which that community observes human rights.

P. Bailey¹

Migration decisions affect people in the most fundamental way, determining where they will live. As a group, people affected by migration decisions represent some of the least powerful members of our society, often having limited English, and limited understanding of the legal system. It can be argued that because of this vulnerability they should be afforded extensive legal protection against arbitrary actions of the state. However, their non-citizen status has afforded them lesser rights than citizens. The history of migration law in Australia is dominated by the exercise of unfettered state control,² with the notion of 'rights' for non-citizens being heavily circumscribed.

In 1985, following a string of complaints about migration decisions, the then Human Rights Commission (HRC) held an inquiry into human rights and the *Migration Act 1958*.³ The report of the HRC inquiry highlighted a number of areas of concern including the treatment of people with disabilities, children and people illegally in Australia. It was particularly critical of decision-making procedures which at that time were highly discretionary and inconsistent, and of the fact that there was limited or no access to independent review.

The following treaties were identified as being breached to various degrees: the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of the Child, the Declaration on the Rights of Disabled Persons, and the International Convention on the Elimination of all Forms of Racial Discrimination. Ten years down the track there have been dramatic changes to the system of regulating entry and presence in Australia of non-citizens. In 1989 a codified system came into place, which has been subject to continuing amendments. Much of the change has been driven by a desire to manage and control people who are illegally in Australia more effectively, as well as to improve and standardise decision-making procedures and reduce judicial intervention. Whether the present system is consistent with Australia's human rights obligations is unclear. This article considers the HRC Report, and legislative progress since that time, and points to areas of continuing concern.

Decision making

In 1985 the *Migration Act* was largely machinery legislation that allowed the Minister or her/his delegates to exercise discretion in decision making. Ministerial policy determined the broad directions of the migration program, while complex manuals were used by departmental officers to guide decision making. There was little public scrutiny of policy as changes were rarely publicly announced and manuals were not easily available. For example, each month workers at the Immigration Advice and Rights Centre (IARC) had to attend the

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Thanks to Jane Goddard and Ingrid Gubbay.

Freedom of Information Section of the Department of Immigration and Ethnic Affairs (DIEA) and comb through departmental manuals in order to establish whether any changes had been made. Many of the complaints to the HRC focused on inconsistency or bias in decision making. Despite the existence of guidelines, different officers exercised their discretion differently (HRC Report, para. 61). Limited types of decisions were subject to internal merits review on the papers, by Immigration Review Panels. The system appeared and was, in many instances, arbitrary. Increasing numbers of people sought the personal intervention of the Minister. The HRC found that the scheme breached the ICCPR by not affording all people equal protection under the law, and by expelling lawful aliens without adequate review (ICCPB Articles 26 and 13). The Commission recommended that there be legislative criteria for exercise of discretion, plus access to independent merits review to ensure consistent application of eligibility criteria.

In 1989 migration law was reformed in line with these recommendations. Policy was codified, with the criteria for visas and entry permits put into extensive regulations (Migration Regulations 1989). Departmental procedures were contained in a series of publicly available Procedures Advice Manuals (PAMs). A system of merits review by an independent tribunal was established. Virtually all discretions were removed. Judicial review continued to be available under the broad provisions for review contained in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*AD(JR) Act*).

The codified system continued to develop and change. Most significantly, in 1994 a code of procedure for dealing with applications was legislated, and access to merits review was broadened. While the codified system has provided more clarity, the removal of virtually all discretions means that many people in unusual circumstances not predicted by the regulations or with strong compassionate grounds cannot be considered as they do not meet strict visa criteria. People unlawfully in Australia must now be removed unless they can apply for a visa; no discretion can be exercised to consider their circumstances. This fundamental problem has major consequences in relation to the rights of children, families and people with disabilities.

While access to merits review was broadened, access to judicial review was severely circumscribed in 1994 with the removal of the application of the *AD(JR) Act*. People affected by migration decisions can no longer seek review in the Federal Court on the grounds of unreasonableness or natural justice. According to the Government, the code of procedure in the *Migration Act* embodies the principals of natural justice. However, in a number of ways the code falls short of the coverage in the *AD(JR) Act*.⁴ The Federal Court provided a useful safety net to ensure decisions were made lawfully and fairly. In a number of instances the Court has been prepared to give weight to humanitarian considerations.⁵ To remove migration from the scheme of judicial review for decisions made under other Commonwealth enactments signifies different treatment, without justification, for people affected by migration decisions.

The current system is also incredibly complex: the *Migration Act* contains over 500 sections; the Migration Regulations (1994) are over 600 pages; and there are four different versions of departmental procedures (PAM, PAM 2, PAM 3 and Migration Series Instructions). Although the material is publicly available, dramatic changes continue to be made with little or no public consultation. This is possible because

regulations containing key functions can be amended without parliamentary debate.⁶ Rapid change contributes to an ongoing perception that migration law is still subject to arbitrary state control. A better scheme would incorporate community consultation processes.

Children

The HRC Report was critical of the treatment of Australian citizen children whose parents were unlawfully in Australia (para. 68). At that time any child born in Australia automatically acquired Australian citizenship regardless of the immigration status of their parents. Thus many children with illegal parents had a right to remain while their parents were subject to deportation. Deportation of parents constituted forced departure of children legally entitled to remain. The outcome of this dilemma was the amendment of the *Australian Citizenship Act* (Cth) in 1986, such that only children born with an Australian citizen or permanent resident parent are Australian citizens.⁷ The amendment assumes that children born in Australia, to unlawful parents acquire the nationality of their parents. However, in some instances prolonged absence of unlawful parents from their country of origin can result in loss of citizenship. Children born in Australia to parents who have lost their citizenship are stateless. A number of international treaties including the ICCPR (Article 24) and the Convention on the Rights of the Child (CROC) (Article 7) state that every child has a right to a nationality and citizenship legislation should be amended to reflect this.

The major issue today is the position of children who are born in Australia with one citizen or resident parent and one unlawful parent. These children are Australian citizens but their unlawful parent can be removed from Australia with no consideration being given to the interests or needs of the child (*Migration Act 1958*, s.198). These provisions breach CROC which requires that in actions undertaken by administrative or legislative authorities the best interests of the child should be a primary consideration, and that children should not be separated from their parents against their will unless it is in their best interests. A parent who has been unlawful for more than one year cannot be granted a visa in Australia. He or she must leave Australia, serve a re-entry ban (or seek a waiver) and then be sponsored to return. The children are often forced to leave also as there is no one left to care for them. The parent can apply for a parent or special need relative visa in order to return to Australia but children under 18 cannot be spon-

Mary

Mary is a Samoan national in Australia whose visa expired in 1993. In 1994 she had a child Jay whose father Tom is an Australian citizen. The relationship between Mary and Tom broke down in 1995. Mary is now Jay's sole carer and Tom has access rights. Mary was detected by the DIEA last month. As an unlawful she is subject to automatic detention and removal, unless she can apply for a visa to regularise her status. She is not eligible for an aged parent visa, or a special need relative visa as she has been unlawful for more than one year. There is no other visa available. She has to leave Australia and be sponsored to return as either a parent or special need relative. She will be subject to a three-year re-entry ban. Jay cannot conduct the sponsorship as he is under 18. An assurance of support, social security bond and Medicare levy must be provided before either visa can be granted.

sors and there are substantial financial obligations attached to both visas.

Conversely, there is no absolute right of a parent to sponsor a child who is under 18 for migration to Australia. Only 'dependent' children can be granted a visa. The concept of dependence requires a high level of continuing contact and support. Depending on the political stability of the country of origin, this type of contact may be difficult to maintain. Again this seems inconsistent with CROC in relation to a child's right to live with his or her parent/s.

Families

The ICCPR states that people have a right to live with their family and that right should be protected by the State (Articles 23, 2.2 and 2.3). The HRC Report noted that immigration policy was increasingly based on family reunion, and that a broad definition of family which reflects social reality should be adopted (para. 59). Social reality has been recognised to some extent with interdependency visas for long-term companions, and gay and lesbian partners of Australian citizens and permanent residents. There are visas for parents, aged dependent relatives and last relatives left outside Australia but strict formulas are used to establish eligibility. Decision makers have no discretion to grant a visa where the relative does not satisfy the formula, even if there are strong cultural and humanitarian considerations. For example, parents of citizens and residents can only be granted a visa if they pass the balance of family test. This purely numerical test requires a parent to show that either half their children are permanently in Australia or more children are in Australia than any other single country. No account can be taken of psychological or financial ties between the parent and sponsoring child, or the impact of cultural norms on the family structure.⁸ Failure to take cultural norms into account may constitute indirect race discrimination. The Regulations appear to be racially neutral, but the impact is to prefer a particular type of family composition, with cultural differences being ignored. The strict application of the test appears contrary to the spirit of the ICCPR provisions.

The HRC Report noted that the need to demonstrate assurance of support created a very real barrier to family reunion, constituting a breach of the ICCPR (paras 96-99). The assurance of support has been reduced from ten to two years but it continues to represent a significant barrier, particularly to poorer applicants and sponsors. The assurance is a contract between a sponsor (usually) and the Australian Government stating that for two years after entry of the relative to Australia the assurer agrees to repay certain social security benefits received by the relative during that time. (The benefits to be repaid are job search, newstart, special benefit and widow, partner, parenting and youth training allowance.) The assurance of support can be requested for any of the family reunion visas, and for some visas it is a mandatory requirement. Where the assurance is mandatory, an up front payment of a social security bond (\$3500) and Medicare levy (\$891) must also be made before the visa can be issued. The social security bond is held in a bank account for two years. If the migrant relative receives a social security benefit covered by the assurance of support in the first two years in Australia, the money will be first recovered from the bond and then the assurer. If the migrant does not receive any benefits the bond is refunded at the end of the two years. The Medicare levy is a one-off non-refundable fee. Only sponsors who have an income above the health care card limit can be an assurer, thus excluding unemployed sponsors or low-in-

come earners. There is no discretion to waive these requirements. Where an assurance is either requested or mandatory it must be provided or the visa will be refused.

The scheme has a significant impact on poorer Australian citizens and residents, in some cases preventing the sponsorship of immediate family such as spouses. People granted refugee status in Australia are placed in a particularly invidious situation. Many have been completely displaced from their families. For others, the only way to escape a home country is if the rest of the family is left behind. Despite obtaining refugee status in Australia, the family members left overseas have to be sponsored through the cumbersome and costly family migration program. With limited or no community around them the sponsors often have extraordinary difficulty meeting the financial requirements.

Reshma

Reshma is a Sri Lankan national who has been granted refugee status in Australia. She fled Sri Lanka after close family members were killed in a village massacre. After she has been in Australia for 18 months Reshma discovers that her sister Sarojini also escaped the massacre and is living in Colombo on her own, with no family or other support, and is subject to constant sexual harassment. Sarojini is not eligible for a refugee or woman at risk visa as she is still in her home country. Reshma nominates her for another humanitarian visa for Sri Lankans. This is refused as the processing officer determines that Sarojini is eligible to apply for another permanent visa, as she is Reshma's last remaining relative. Reshma sponsors her sister in this category. Sarojini satisfies the visa requirements, however an assurance of support must be provided along with payment of a social security bond (\$3500) and Medicare levy (\$891). Reshma is learning English and has not been able to find work, she has few savings. She is not eligible to sign the assurance and cannot pay the fees. The visa is refused.

Health

All visa applicants must meet a health requirement. In 1985 applicants could be refused a visa if they had a disease/condition that was a danger to the Australian community or would require significant care or result in significant costs to the Australian community. The HRC Report was very critical of the conflation of public health concerns and disability. The Commission recommended that public health concerns be separated from disability and that disability per se should not be grounds for refusal of a visa (para. 107). The Declaration of the Rights of Disabled Persons prohibits discrimination on the grounds of disability (Article 10).

With the *Disability Discrimination Act 1992* (Cth) the Government took the rare step of enacting domestic legislation to enforce an international treaty. However, decision making by DIA is specifically *exempted* from the operation of that Act.⁹ The health requirement, now specified in the Migration Regulations (Schedule 4), continues to discriminate grossly against people with disabilities. Disability is still considered in the same light as diseases that pose a risk to public health, and is grounds per se for refusal of a visa. No consideration is given to the contribution a person with a disability can make to Australia, or the family support that may be provided to them. The Regulations go so far as to

specify that the assessing officer must consider only a person's *need* and *eligibility* for health care or community services, without regard to whether that person will *use* those services (Reg. 2.25B). The health requirement can be waived in some limited visa classes, if there is no *undue* cost or prejudice to access to health care for Australians.

Where a family applies for migration, if any member of the family unit fails the health test the application for all members will be refused. The HRC Report was critical of this practice, noting that 'in family reunion cases the anguish which is caused by rejecting a family's application on the basis of one member's disability is considerable' (para. 110). There has been no change to this requirement.

Debbie

Debbie applies to come to Australia as the last remaining relative of her brother Marco who has been living in Australia for a number of years. Debbie's husband recently died and Marco wishes to support his sister and her three young children, who are his only close relatives. One of the children, Poppy, has Downs Syndrome and has been attending a special school in Greece. Debbie is the main visa applicant and the children are included as members of Debbie's family unit. The whole family's application is refused on the grounds that Poppy has a condition which will result in a significant cost to the Australian community in terms of health care or community services, and will prejudice access of an Australian citizen or permanent resident to community services. There is no provision for waiver of the health requirement in this visa class.

Unlawfuls

The HRC Report noted the difficult balance between recognising that people unlawfully in Australia have broken the law and are subject to sanctions contained in it and, on the other hand, recognising and respecting their basic human and legal rights (para. 50). The Commission stressed that rights of people illegally in Australia should be the same as the rights of other non-citizens, particularly in relation to protection of the family, protection of the child, the right to a fair trial, liberty and security of person, and the right not to be subjected to cruel and inhuman treatment. Despite significant changes to the system of control of unlawfuls, the balance continues to be tipped towards excessive control to the detriment of fundamental human rights.

The HRC Report was critical that people unlawfully in Australia had limited opportunity to regularise status, and were often deported despite significant family and other ties in Australia. The Commission urged that before an order for deportation was made certain matters relating to human rights, should be considered. These matters included the situation of the family, the degree of absorption into the Australian community, rights of children involved and cruel and inhuman treatment (para. 229). Rather than move towards recognition of these rights, migration legislation has gone in the opposite direction. Unlawfuls are automatically subject to detention and 'removal'¹⁰ unless they can be granted a visa. There is no longer any *decision* to deport, and therefore limited scope for judicial review. Cronin writing before the implementation of the detention and removal scheme stated:

The proposed provision is without legislative parallel. It reverses the common assumption that it is for the state to justify the decisions to deprive a person of his/her liberty.¹¹

All visa criteria are codified and unlawfuls are subject to strict time requirements. People who have been unlawful for more than one year are prevented from being granted almost all visas, and no consideration can be given to family or other circumstances. Unlawfuls who have been refused a visa in Australia are prevented from making a second application, except in very limited circumstances (*Migration Act*, ss.48, 48A, 48B). There is no room for human rights in this tightly legislated scheme and people who don't fit neatly into the rules are left in extreme hardship (see Mary's case study).

The HRC Report stressed the entitlement of unlawfuls to appropriate legal advice when in detention. The *Migration Act* now provides that people in immigration detention, if they request, shall be afforded facilities for obtaining legal advice (s.256). This provision is limited in that it relies on the unlawful person making a request. The Act also provides that a detainee may apply for a visa, and should be told of the consequences of detention. A very significant exemption exists in relation to people who arrive in Australia without a visa. There are no obligations for DSEA to advise these 'unauthorised arrivals' whether they can apply for a visa, or to give them the opportunity to apply for a visa, or to allow access to legal assistance (s.193). It is difficult to see any justification for this exemption. Many unauthorised arrivals are in an extremely vulnerable position, having fled their home country without documentation for fear of their safety.

Unauthorised arrivals who do manage to apply for a visa (usually refugee status and a protection visa) must be held in detention while the application is considered (with some limited exceptions).¹² In some instances this can amount to a number of years, usually spent at the Immigration Detention Centre in Port Hedland. In contrast, people who arrive in Australia lawfully and subsequently become unlawful can remain in the community while their visa application is considered. Bail type provisions, in the form of bridging visas, were introduced in 1994 and have been operating very successfully. Where a decision to refuse a bridging visa results in detention, the refusal is subject to speedy, independent merits review in the IRT. The differential treatment of unauthorised arrivals has little justification and may constitute cruel and inhuman punishment. A complaint arguing breach of the ICCPR in relation to lengthy detention in Port Hedland is currently before the United Nations Human Rights Committee.¹³

The HRC Report considered the treatment and accommodation of people in detention was highly problematic, and inconsistent between various detention centres (para. 210). There has been a general improvement in facilities at detention centres but accommodation facilities are different in each State, and in some jurisdictions detainees continue to be held in the general prison system. This seems completely inappropriate treatment given that unlawfuls have not committed criminal offences but rather have breached administrative procedures.

Race discrimination

The Australian Government prides itself on having a non-discriminatory immigration policy. The criteria for visas are clearly listed in legislation and anyone, regardless of nationality is entitled to be granted a visa if they meet the criteria. The HRC Report raised a number of concerns about discrimi-

natory practices, such as disproportionate detection and deportation of certain ethnic groups, and inconsistent processing times at various overseas posts. Accurate information about the methods and targets for detection is difficult to obtain. There is clear evidence that the time taken to consider a visa application continues to vary significantly according to the place where the application is lodged. The table is a sample of the average processing times in various overseas posts for spouse (subclass 100) visas.¹⁴

Four slowest overseas posts	Four fastest overseas posts		
Jakarta	8.4 months	Osaka	1.3 months
Hanoi	10.6 months	Berne	1.9 months
Nairobi	9 months	Vancouver	1.6 months
Bangkok	8.2 months	Washington	2.1 months

Equitable staffing to reflect workload at overseas posts is a simple remedy for this ongoing discrimination.

Overall, migration law has moved away from determining eligibility according to nationality and race but the assessment of visitor visas has moved back to race-based decision making with the use of the 'risk factor'. The risk factor is present if a person has lodged an application for migration in the last five years or fits into a statistical profile of likely overstayers. Where the risk factor is present, an applicant must convince DIEA that there is very little likelihood of overstaying.

Roxanna and John

Roxanna is a 20-year-old Chilean woman. She applies for a visitor visa, providing evidence of her financial resources and a support letter from her aunt in Australia. The application is refused as she falls into a risk factor category — all Chilean women aged 20 and over are considered to have a high risk of overstaying.

John is a 20-year-old Englishman. He applies for a visitor visa, supplies evidence of his finances and is granted the visa. UK citizens are not considered to have a high risk of overstaying.

Impact of *Teoh*

The High Court in the *Teoh* case (*MIEA v Ah Hin Teoh* (1995) 128 ALR 353) found that ratification of an international treaty by the Australian Government gave rise to a legitimate expectation that treaty provisions would be considered by administrative decision makers. If the decision maker intends to depart from the treaty, the person affected should be given notice and an opportunity to respond. The decision has been met with a good deal of hysteria, and allegations that Australian sovereignty is under threat. However, the decision is in fact very limited. Decision makers do not have to follow treaty obligations, they only have to consider them. A legitimate expectation will only arise where there is no contrary domestic legislation.

Mr Teoh applied for a visa on the basis of his relationship with an Australian citizen, and their seven Australian children. The application, lodged before the codified system began, was refused on the grounds that Mr Teoh was not of

good character as he had recently been convicted of drug importation. In the Federal and High Courts Mr Teoh successfully argued that he had a legitimate expectation that CROC would be considered by DIEA. The Convention provides that in decisions affecting children the best interest of the child shall be a primary consideration (Articles 3 and 9). DIEA made Mr Teoh's character a primary consideration. They failed to give Mr Teoh notice and an opportunity to respond to their departure from the treaty.¹⁵

Teoh was based on the *Migration Act* before codification. The directions regarding character assessment were in policy only. In contrast, the character provisions are now in the *Migration Act* (s.501) and Regulations (Schedule 4) and the best interests of the child is not mentioned as a legislative criterion for any visa category. Codification simply excludes consideration of treaty rights such as those contained in CROC. Litigation as a tool for enforcing human rights is substantially limited. There are a few areas where the legislation does not clearly specify criteria to be taken into account, for example, human rights can be read into terms like 'compassionate and compelling circumstances' in relation to waiver of re-entry bans.

Conclusions

Just a few areas of human rights concern have been covered in this article. Many of the points raised in the HRC Report, such as refugee determination and sex discrimination have not been considered. Given the dramatic and fundamental changes to migration law in the last 10 years, and the ongoing human rights concerns which span the entire complex system, it seems timely for HREOC to take another look at migration. Following the *Teoh* decision the Government announced a review of Commonwealth administrative decision making, and there are strong arguments that DIEA should be the first department to be considered. Given the limitations of the *Teoh* decision, such a review may not go far enough. Legislative reform to allow for consideration of fundamental human rights in migration decisions is necessary. The pattern of reform in this area in the last ten years has been towards increasing legislative control, limiting the discretions of decision makers and preventing judicial interpretation. This is ironic given the increasing preparedness of the courts to give weight to international human rights obligations. Cronin has stated that the obsession with control and 'judge proofing' has gone too far: 'the mechanisms of control are complicated and inflexible, and at times overtly discriminatory', hard cases are avoided and human rights ignored to the detriment of the whole community.¹⁵

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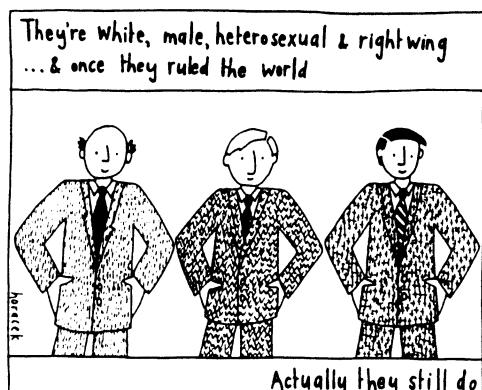
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The legocentric citizen

Margaret Thornton

Exploring notions of citizenship in multicultural Australia.



Multiculturalism is the ultimate soundbite. It embodies not only a claim of inclusion. It is also metaphor for the opposition to institutional rules that reframe in meritocratic terms the historical exclusion of people of color and women. It is metaphor for the demand for a reconceptualization of the 'public' as heterogeneous, not homogenous and assimilated. It is also metaphor for an idea of inclusion that transcends formal equality and narrow conceptions of legal remediation.¹

By and large, law or, more accurately, liberal legalism, has had remarkably little to say about citizenship, other than in regard to the existential question of 'in' or 'not in'. The primary role assigned to law has been to police the metaphysical boundaries in order to maintain the exclusivity of the in-group within the international community. The preponderance of reported cases in Australia deal with disputes relating to entry permits and deportations. A superficial reading of key Australian legal texts could induce one to believe that the substantive meaning of citizenship was inconsequential. However, a closer inspection reveals that liberal legalism is constantly engaged in a subtle constitution and reconstitution of the citizen.

Like many terms favoured by liberal legalism, citizenship poses as a universal, of the kind that is familiar within the public realm, the realm of generality. However, the post-modern imperative demands that cognisance be taken of the subcutaneous meanings lurking beneath claimed universals. Law, as the pre-eminent discourse of modernity, continues to be resistant to the critiques of feminists, critical race scholars and others, who argue that the universal is a convenient carapace designed to occlude the identity of its typical beneficiary, who is white, Anglo-Celtic, male, heterosexual, able-bodied, and veers to the right of centre in political and social issues, a creature whom I have dubbed 'benchmark man', since he is the standard against which normativity is invariably measured.

The deconstructive project of post-modernism has coincided with an historical high point in Australia — the simultaneous celebration and soul-searching emanating from the temporal lacuna between the Bicentenary of 1988 and the impending centenary of Federation. Sloughing off the last of the imperial ties is high on the agenda, as is the desire for an Aboriginal reconciliation in the aftermath of *Mabo*. The sequential dissonance has caused us to be more reflexive about notions of Australian nationalism and identity, demanding interrogation of 'the citizen'. In this brief comment, I suggest that the universality and ostensible neutrality of citizenship has served a significant ideological purpose by occluding the play of partiality and power beneath its carapace.

Texts

The Constitution

The Australian Constitution, a key text, one would have thought, for determining the relationship between citizen and state, alludes to 'citizens' only incidentally, although there are scattered references to

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'subjects', 'residents', 'people' and 'persons' — hardly the same thing at all. The framers of the Constitution rejected a focus on 'the citizen' because of what were perceived to be its republican origins; subjecthood was deemed more appropriate within a monarchy.² People are important in the Constitution only in so far as they constitute States, for the Constitution is primarily concerned with the allocation of powers between the Commonwealth and the States, the mode of governance of the Commonwealth and the separation of powers. There is no express reference to individual rights of the kind found in the American Constitution, such as freedom of speech and equality before the law.³ Westminster governance and British subjecthood were considered adequate protection by our Constitutional framers:

'I am a British subject,' is equal in practical and Imperial significance to the proud boast of the Roman '*civis Romanus sum.*'.⁴

However, this boast did not extend to inclusion of an equality clause, for the benchmark men of Federation undoubtedly had an interest in retaining discriminatory legislation. After all, neither women nor Aboriginal people possessed the status of legal subjects at the time of the Constitutional conventions, even if enfranchised, and discriminatory legislation involving 'aliens', such as the Chinese, was a feature of the times, and was to crystallise in the infamous White Australia policy (*Immigration Restriction Act 1901* (Cth)).

The single reference to citizenship in the Constitution is that contained in s.44(1), which refers to 'a citizen of a foreign power', the implication being that it is only nations other than Australia that have citizens. In one sense, the allusion is unsurprising, since the creation of the Australian nation did not formally confer Australian citizenship on eligible Australians, who retained the status of British subjects until the end of World War II. The Australian Constitution is, after all, an Act of the British Parliament (63 and 64 Victoria, Ch 12).

The formalistic approach to citizenship was long sustained by the High Court's favoured adjudicative mode of 'strict legalism', most notably associated with former Chief Justice, Sir Owen Dixon. Nevertheless, despite the striking shifts in constitutional adjudication that have occurred since the 1980s, a deference to form has by no means been jettisoned, a proposition I shall illustrate by reference to the case of *Sykes v Cleary and Others* (1992) 109 ALR 577. The primary question was whether the first respondent, who was on leave from the Victorian Education Department, held an 'office of profit under the Crown' contrary to s.44(iv) of the Constitution. This question was answered in the affirmative (per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; Deane J dissenting).

The citizenship issue in *Sykes* related to whether two of the candidates in a House of Representatives by-election should have been disqualified by virtue of s.44(i) of the Constitution if either was a person who:

[is] under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power.

Both Mr Delacretaz and Mr Kardamitsis were naturalised Australian citizens who were found not to have taken 'reasonable steps' to have divested themselves of their Swiss and Greek citizenship respectively, despite long periods of residence in Australia. Mr Delacretaz had lived in Australia for

40 years and had been naturalised for 30 years. At the time, he had renounced all allegiance to any sovereign state and sworn an oath of allegiance to the Queen. He had also sworn to 'observe the laws of Australia and fulfil [his] duties as an Australian Citizen' (at 588). However, he had not applied to the Swiss Government to terminate his citizenship. Mr Kardamitsis had lived in Australia for more than 20 years and had been naturalised for 17 years. He was married to a naturalised Australian citizen and had three children who were Australian citizens. Mr Kardamitsis had sworn a similar oath of allegiance to that of Mr Delacretaz and had surrendered his Greek passport. Mr Kardamitsis had also taken oaths of allegiance as a requirement for serving on his local council and becoming a Justice of the Peace. He was unaware that there was a procedure by which he could have his nationality discharged by applying to the appropriate Greek minister. Both men held Australian passports, the familiar indicium of citizenship within the international community. The ubiquitous and slippery test of 'reasonableness', a favourite hermeneutic device for masking dominant ideologies, was held to depend on the 'circumstances of the particular case' (at 591), which may include 'the situation of the individual, the requirement of the foreign law and the extent of the connection between the individual and the foreign state of which he or she is alleged to be a subject or citizen' (at 594).

Section 44(i) of the Constitution was designed primarily to circumvent treasonable behaviour on the part of Members of the Australian Parliament,⁵ the likelihood of which not a scintilla of evidence was adduced in regard to the candidates. *Sykes v Cleary* highlights the distorting effect of focusing on form with scant regard for substance.⁶ The evidence before the court revealed that both men had done all that could reasonably be expected to extinguish their original citizenship, which included a formal renunciation of prior allegiances and a long period of residence in Australia. As Gaudron J (dissenting) pointed out, the Parliament could not have intended that the oath and affirmation, involving the formal renunciation, should be 'entirely devoid of legal effect' (at 614). Turning the test around, she suggested that it did not seem reasonable to expect Mr Delacretaz 'to seek release when it necessarily involved acknowledgement of citizenship that has already been formally renounced' (at 617). Why was it not possible for a person to be a Swiss or Greek citizen by birth and an Australian citizen by naturalisation? While the *Australian Citizenship Act 1973* (Cth) suggests that a grant of citizenship places a person in the same position as one who was born in Australia, a majority of the High Court does not agree.

According to Aristotle, and subsequent theorists,⁷ the good citizen is one who serves [his] community by actively participating in the life of the polis, that is, by holding office. A mere passive belonging does not suffice. Despite having gone through a ceremony of conferral of citizenship and receipt of the certificate attesting to the grant, Messrs Delacretaz and Kardamitsis were adjudged not fit to hold office and represent their fellow citizens in Federal Parliament, although good enough to be chosen to enter the country and to be granted citizenship. Their ineligibility to stand for Parliament denied them the capacity to be good Australian citizens. Dual citizenship had the effect of downgrading them from citizens to denizens.

Sykes v Cleary illustrates the residual resistance to diversity in the constitution of citizenship, albeit that Australia is an immigrant society, which boasts of its racial heterogeneity

and beneficent multicultural policies. It takes no more than a small scratch to reveal the latent xenophobia beneath the bland surface of universalism that legal formalism endeavours to occlude.

The Citizenship Act

White Australians, either born in Australia, or naturalised, were not formally deemed to be citizens until 1948, when the *Nationality and Citizenship Act* (changed to the *Australian Citizenship Act* in 1973) was passed. Similarly, there was no Australian nationality, as distinct from British nationality, in formal terms until 1948. The formal citizenship status of Aboriginal Australians remained ambiguous after that date, as they were not enfranchised in Queensland and Western Australia until 1962.

The Commonwealth was empowered to enact legislation dealing with citizenship by virtue of s.51(xix) of the Constitution, the head of power pertaining to 'naturalisation and aliens'. The conjunction communicates the absence of a positive image of citizenship, as well as a sense of the prevailing xenophobia of the 1890s. Cognate sections of the Constitution, which also involve policing the boundaries of citizenship, include s.51(xxvii) 'Immigration and Emigration' and s.51(xxix) 'External Affairs'.

Despite its title, the *Australian Citizenship Act 1948* (Cth), like the Constitution, does not attempt to define 'citizen', although 'Australia', 'child' and even 'responsible parent' are defined in the interpretation clause (s.5). The Act nevertheless proceeds to regulate citizenship by birth, adoption and descent. It also authorises citizenship to be granted to a person who is able to satisfy the Minister that he or she has been (*inter alia*) a permanent resident for two years, is over 18 years, is of good character, possesses a basic knowledge of English, and has an adequate knowledge of the responsibilities and privileges of Australian citizenship (s.13(1)). The grant of citizenship or 'naturalisation' purports to confer on the grantee the same status as that which a natural-born Australian acquires by birth. In *Sykes v Cleary*, the majority judges did no more than cursorily advert to the respondents' naturalisation under the *Citizenship Act*. There was no consideration of the *character* of Australian citizenship under that Act, and no acknowledgement by the majority that they were creating both a bifurcation and a hierarchisation of the concept.

Until recently, the *Citizenship Act* was a paradigmatic illustration of the formalistic approach to citizenship — solely concerned with how to get in and out of it — as there was no advertence to obligations, such as voting or defending the country against invasion, although a departmental officer may have informed grantees that assuming such responsibilities was what citizenship meant.⁸ However, in 1993, as a result of criticism that the Act contained 'no comprehensive statement of who are citizens, nor of their rights and obligations, and because of the obscure drafting of the Act',⁹ amendments were effected to acknowledge ideals of citizenship. A Preamble was included in the Act, which referred to citizenship as a 'common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity . . .' In addition, a Pledge of Commitment, based on a poem by Les Murray, was added:

From this time forward [under God],
I pledge my loyalty to Australia and its people,
whose democratic beliefs I share,
whose rights and liberties I respect, and
whose laws I will uphold and obey.

Despite the inclusion of more stirring and inspirational sentiments, the *Citizenship Act* falls far short of a code of the rights and responsibilities of citizenship. Even the amendments I have adverted to are not found in the body of the text, rendering their effect hortatory rather than mandatory within the canons of interpretation. Although it is apparent that there has been some movement away from the constraining effects of 'strict legalism', Australian citizenship is still generally perceived as being somewhat limited in content, as witnessed by the fact that more than one million Australian permanent residents have declined to apply for 'naturalisation'.¹⁰

Active citizenship

While a formalistic appraisal of the legocentric citizen identifies the passive or descriptive elements of citizenship, it cannot capture the active elements, including the discrepancies in power between citizens that shape their ability to be good citizens.¹¹ Civility is invisible to the juridical gaze. Indeed, the universalism of citizenship, underpinned by the liberal myth that the citizenry constitutes a community of equals, is designed to mask differences. Alterity has to be muted or suppressed altogether within a sphere of generality.

Jocelyn Pixley argues compellingly that the opportunity to engage in employment is a basic condition of being a citizen.¹² Indeed, it is apparent that economic worth, property and rationality operate to produce the power capital that conduces to active or 'good' citizenship. Unemployment and dependency may be devastating for those on welfare, particularly for many women, Aboriginal people and people from non-English speaking backgrounds. Lack of power capital denies them a speaking voice. Legal formalism, attuned as it is to the carapace of universalism, chooses to disregard these crucial differences.

The power capital of women is significantly affected by the fact that they are expected to undertake socially necessary caring work in order to leave men free to fulfil their civic duties, as well as to participate in work, war and sport. Even if women participate in employment, they are still expected to bear responsibility for the preponderance of caring work. The symbiosis between private and public worlds has shown itself resistant to change, despite the contemporary rhetoric. The power capital of benchmark men is augmented by this symbiosis. Not only does it free them from the responsibilities of childcare and housework, it enables them to enhance their power capital through the fraternal ties of civil society, such as those emanating from sporting and club life.

The facilitation of 'good' citizenship for benchmark men has enabled them to be seen as the indigenous inhabitants of the polity, whereas women have not properly been accepted as citizens, despite the significant gains of second wave feminism.¹³ Like Messrs Delacretaz and Kardamitsis, they have not been permitted to be 'good' citizens through participation in public affairs, other than at the local level.¹⁴ Formal admission to the polity through enfranchisement did not guarantee representation. Indeed, it was deemed necessary for most Australian States to enact special legislation to permit women to be political representatives.¹⁵ As recently as 1959, there was a formal (albeit unsuccessful) challenge to the nomination of two women to stand for the South Australian Legislative Council (65 years after enfranchise-
ment).¹⁶ Resistance to the idea of women as representatives of benchmark men continues, compounded by a history of masculinist authority in the public sphere.¹⁷ The complemen-

tarity thesis, which avers that women can realise their good citizen potential by being good mothers in the private sphere has not disappeared, despite formal acceptance of the non-discrimination principle. Vestiges of the juridically unequal treatment of married woman, rendering them less than legal persons in their own right, are still to be found in the toleration of domestic violence, as well as in the affirmation of indivisibility in financial and property transactions. Religious and ethnic minorities, together with gay men and lesbians, have also been located within a 'marginal matrix of citizenship'.¹⁸

Aboriginal people have been constructed as subordinate by two centuries of violent practices, exclusion and paternalism. Enfranchisement certainly did not guarantee instantaneous admission to the community of Equals. Aboriginal women may have been formally, albeit inadvertently, enfranchised in South Australia in 1894,¹⁹ but enfranchisement has not guaranteed social acceptance or an end to racism.²⁰ Aboriginal people have been confined to a citizenship shadowland. However, the *Racial Discrimination Act 1975* (Cth), which has recently celebrated its 20th anniversary, together with positive initiatives, such as *Mabo*, prefigure a more active conceptualisation of citizenship.²¹ Such developments represent discursive moves in the discriminatory narrative of citizenship that I have outlined.

Conclusion

While citizenship appears to be an empty abstraction within legal texts, the currency of the term within popular discourse manifests attempts to slough off the heritage of colonialism, together with its correlative racism and sexism.²² The law cannot divorce itself from social change, despite the well-entrenched positivistic myth that it is neutral and autonomous. As substantive ideas of citizenship crystallise within popular discourse, a hazy reflection of this revisioning begins to form within the legal imagination.

Deconstructing the legocentric citizen exposes a number of characteristics not otherwise discernible. First, one can see how the concept has begun to acquire colour and shape, as Australia has gradually acquired more confidence in the wake of post-colonial subjecthood, boosted by the triumph accompanying the celebratory moment. Second, when we take a step backwards from the citizen and examine his or her averredly common national identity, we find a plethora of differences emanating from race, class and sex, which affect his or her ability to participate in the community and be a good citizen. We see that the opacity of citizenship within legal texts has permitted the polis to authorise benchmark men to invest it with a substance that continues to operate to their advantage. Stepping back also enables us to discern the dialogue between the passive and the active dimensions of citizenship that is beginning to occur. It is within the interstices of this dialogue that the possibilities of social change are located. Scrutiny is already causing the legocentric citizen to assume a more varied complexion.

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Tackling the causes



Kasey Pearce

Juvenile crime prevention in New South Wales.

The need for a refocusing of resources on preventive rather than law and order responses to juvenile crime has been a recurring theme in a number of reviews of the New South Wales juvenile justice system conducted in recent years.¹ These reviews emphasise the importance of an approach which 'seeks to tackle the causes, the opportunities and the incentives behind juvenile crime'² rather than simply responding to the crime incident itself. A refocusing of efforts on the causes of crime rather than on enforcement and sentencing is long overdue. However, while advocates for crime prevention claim that prevention is less stigmatising and less damaging than traditional justice responses to crime, in practice, so called crime prevention initiatives can display many of the same shortcomings attributed to traditional justice approaches to crime.

This article explores some of the shortcomings inherent in the concept of crime prevention and argues that a reconceptualisation of crime prevention is necessary if crime prevention is to be accepted as a means of ensuring a more just and equitable means of responding to crime committed by juveniles.

In the last 10 years considerable change has been made to the legislative base and administrative arrangements governing juvenile justice in NSW. A far reaching package of legislative reform to proceedings involving children was introduced in 1987, the basis of which was the separation of 'care' (i.e. welfare) matters from criminal proceedings.³ While the desirability of ensuring a distinction between welfare and criminal matters is clear, there are considerable difficulties associated with maintaining a strict delineation between the two. The criminal justice system, for example, has been criticised for too great a concentration on the incidence of the crime itself without sufficient consideration of issues of causation, while a focus solely on welfare matters ignores the correlations between such factors as homelessness and family breakdown (traditionally the province of the various welfare agencies) and involvement in criminal activity. Crime prevention, it would appear, allows some scope for bridging the chasm between crime and welfare. The challenge, on a practical level, is to maintain an appropriate balance between the two.

Research shows that much juvenile offending is transitory and that the majority of juvenile offenders do not reoffend in so far as they do not re-appear in the Children's Court after their first proven court appearance.⁴ The criminal justice system in NSW reflects society's view of the less serious nature of much juvenile offending by making a clear distinction between juvenile and adult offenders at every stage of the criminal justice process. This distinction has probably led to a greater willingness to focus on prevention in the case of juvenile rather than adult crime.

The concept of crime prevention is not new to academic circles. However, its acceptance by governments in Australia as a valid approach to addressing crime is a recent phenomenon. One of the major

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achievements of the recent reviews of the NSW juvenile justice system is to have put crime prevention on the agenda of the NSW Government. However, having played a significant role in convincing Government of the value of a greater emphasis on prevention in relation to juvenile crime, the community sector in NSW is still a considerable way from embracing crime prevention in practice. This divide must be confronted and addressed if crime prevention is to be taken seriously.

What is 'crime prevention'?

It is the nebulous nature of crime prevention that accounts, to a large extent, for the uneasiness many feel about the concept. While the term has clearly gained greater currency of late in NSW, its meaning still remains amorphous. It is uncertainty about what crime prevention means in relation to juveniles and how it will be used by government that is at the root of concern about this new approach to juvenile crime.

Overwhelmingly the approach taken to juvenile crime prevention in recent reviews of the NSW juvenile justice system, and indeed, elsewhere in Australia, has focused on primary prevention, that is, the early identification of the social and psychological 'causal factors' of juvenile offending. It is clear also that the preferred definition of primary prevention in relation to juvenile crime at an academic level, rests very much in the social rather than the situational domain, that is, on initiatives which attempt to shape positively the behaviours, attitudes and values of at-risk groups and individuals, rather than those which focus more on preventing opportunities for offending, by means such as target hardening, design modification and surveillance.⁵

The current NSW Government clearly articulated its commitment to crime prevention, prior to the 1995 election, in its policy statements, 'Juvenile Justice in NSW' and 'Labor's Plan to Fight Crime'. However, the existence of a juvenile crime 'wave' and the problems associated with 'gangs' of juveniles were focuses of the election campaigns of both major parties in the lead up to the May election, indicating that at a political level, far from heralding a new approach to dealing with juvenile crime, crime prevention remains firmly wedded to a continuum of responses, the major rationale of which is crime control. The slogan adopted by the Labor Party in the lead up to the last State election, 'tough on crime: tough on the causes of crime' suggests such an understanding of crime prevention. This approach is understandably problematic for the community sector and for young people themselves, particularly as the result of such a view of crime prevention has, in some areas, seen the introduction of measures like those contained in the *Children (Parental Responsibility) Act 1994 (NSW)* (under which police officers are empowered to detain juveniles under the age of 16 years considered to be 'at risk' of offending) or the increase of particularly aggressive forms of security and surveillance such as the use of closed circuit television or armed security guards.

Concerns about crime prevention

The focus on juvenile crime at a political level has led some critics to express concern about the potential for juvenile crime prevention to become *de facto* youth policy. In NSW, the demise of the Office of Youth Affairs subsequent to the May 1995 election and the resulting vacuum in youth policy has ensured that this concern is of particular relevance. On a more pragmatic level, many fear that the political hysteria

surrounding crime will ultimately lead to a situation in which community agencies providing services for young people will have to demonstrate the capacity of their services to prevent crime in order to attract government funding.

Another concern that has been sounded persistently in critiques of crime prevention is the potential it has for net-widening. Critics have warned that the identification of 'pre-delinquent' youth on the basis of known correlates of offending constitutes a net-widening feature of criminal justice systems in which increasing numbers of young people are brought to the attention of the authorities. Closely allied with these concerns are issues relating to the stigmatisation of young people or families as 'at risk' (many commentators feel uncomfortable with this term preferring instead to use 'disadvantaged' or 'marginalised').

The ideological orientation of many professional youth workers means that crime is generally not seen as a youth 'issue' and talk of crime prevention is met with extreme wariness.⁶ This, coupled with misgivings about the uncertain role of the police and other criminal justice agencies in many crime prevention projects has led to an understandable reluctance among workers in the community sector to be associated with projects with an overt crime prevention focus.

Another direction of criticism comes from those who claim that crime prevention is rather pointless and doomed to fail if the fundamental structural issues associated with youth alienation such as high unemployment are left unaddressed. These critics argue the need for policies that directly address the underlying perceived 'causes' of crime including homelessness, substance abuse, unemployment and family separation rather than policies which place these concerns within a crime-centred framework.⁷

Crime prevention and international conventions

At an international level, juvenile crime prevention is seen as inextricably entwined with concepts of social justice and social development for young people. The United Nations 'Guidelines for the Prevention of Juvenile Delinquency' (The Riyadh Guidelines) is the principal international instrument of relevance to the prevention of juvenile involvement in crime. According to the Guidelines, they are to be interpreted and implemented within the broad framework of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child and the Convention on the Rights of the Child, and in the context of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, as well as other instruments and norms relating to the rights, interests and well-being of all children and young people.

The Riyadh Guidelines assert that 'the successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood'. Also emphasised is the importance of a 'child-centred orientation' to delinquency prevention measures, one in which young people have an active role and partnership rather than simply being considered 'mere objects of socialisation or control'.

Within the framework of the Riyadh Guidelines, delinquency prevention is seen as 'facilitating the successful socialisation and integration of all children and young per-

sions'. Responsibility for delinquency prevention is not considered to rest solely with the criminal justice agencies, but is seen as lying with 'the family, the community, peer groups, schools, vocational training and the world of work, as well as (through) voluntary organisations'.

Towards a reconceptualisation of juvenile crime prevention

Youthful behaviour and conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood. The majority of juvenile offenders will simply 'grow out' of crime. However, for a minority of juvenile offenders involvement in criminal offending is symptomatic of more pervasive disadvantage. We know that many juveniles in detention have lives characterised by lack of access to, among other things, education, employment, health services and adequate housing. It is this minority of juveniles who commit the majority of juvenile crime. In short, the majority of juvenile crime is inseparable from wider issues of disadvantage facing many young people.

While there is a role for specific crime prevention initiatives which attempt solely to address offending behaviour, it needs to be recognised that the 'problem' of juvenile crime will not simply be solved by allocating government funds to programs that attempt only to address offending behaviour. A far more comprehensive approach is necessary, one in which the overall role of these specific initiatives will probably be quite small. However, where they are implemented, these specific crime prevention initiatives should have mechanisms to achieve social justice objectives and to preserve human rights built in from the outset. In order to minimise the potential for net-widening, the role of criminal justice agencies in such initiatives should be kept to a minimum.

Comprehensive 'mainstream' family, education and youth policies probably offer a greater chance to prevent crime than separate and specific crime prevention measures. Many of the measures necessary to reduce juvenile crime are not *crime* prevention measures as such. They can have many benefits of which reduced offending is only one. This is particularly true of early intervention strategies such as family support programs that can reduce family breakdown and the likelihood of young people being placed in care, both of which are associated with offending.⁸

There are dangers evident in making crime the focus of intervention in the lives of young people, rather than considering appropriate means of redressing the disadvantage facing many young people and their relative lack of power. While crime remains the central object of concern in the development of programs for young people, attention can be deflected from the development of initiatives to address the real problems that many young people face. In the fervour to prevent crime, we should not lose sight of the interrelationship between disadvantage, victimisation and offending. Critics such as Garry Coventry have suggested that no matter how well intentioned, the overall impact of crime prevention programs and strategies can be negative if their result is that the more fundamental issues of economic and cultural dislocation are glossed over or government is provided with excuses to avoid building and maintaining adequate welfare and social justice infrastructure.⁹

The Riyad Guidelines speak of delinquency prevention, that is, preventing the inadequate social development of

young people. Within this discourse, involvement in crime is but one aspect of delinquent behaviour and is placed in the context of the total life experiences and life chances of young people. If crime prevention is to be accepted in NSW, a similar approach needs to be adopted.

The prevention of crime should not be the initial justification for social intervention and the provision of services which address the life conditions of disadvantaged young people in NSW, but should, as is the case at an international level, be integrated with a wider set of policies designed to improve the opportunities available to young people generally and to prevent the harm that many young people do both to themselves and to others.

Instead of focusing only on crime, it may be more productive to build initiatives around concepts of community well-being. Fundamental to this shift in emphasis is a greater recognition of the central position that social justice and social development should play in crime prevention. The aim should be for juvenile crime prevention to form part of an integrated youth or social justice policy that fosters the positive social development of youth and counters negative images of young people. Ultimately intervention should be normalised in a wide range of informal settings not traditionally conceived as crime response related, so that notions of crime prevention are subsumed within broader social policies in the fields of health, education, training, leisure, employment, income support and so on. It is this shift that Coventry describes as 'the necessity not to criminalise social policy, but to socialise criminal justice and crime prevention policy'.¹⁰

When crime prevention is reconceptualised so that it is inextricably linked with concepts of social justice and social development, a greater potential for intervention is created than when crime prevention is linked only to crime control.

Conclusion

Both the media and politics in NSW are dominated by conceptions of youth and youth behaviour as a problem. Young people are seldom perceived as community members and are more often seen as threats to community safety and cohesion. If crime prevention is ultimately to be accepted, a fundamental turn-around in this attitude to young people is necessary. It is only when young people are perceived as more than a *problem* and, instead, as part of the *solution*, that crime prevention will become a means by which the successful integration and participation of young people in the community may be ensured rather than just another way by which they can be manipulated.

If crime prevention is ever to deliver on its promise of ensuring a more just and equitable means of responding to juvenile crime then there needs to be a shift in our understanding of what is meant by crime prevention. Fundamental to this is a framework such as that which exists at the international level, that places crime prevention squarely within a social justice rather than a crime control continuum.

References

1. See Youth Justice Coalition, 'Kids in Justice: a Blueprint for the 90s', Sydney, 1990; Parliament of NSW, Legislative Council, Standing Committee on Social Issues, 'Juvenile Justice in NSW', Sydney, 1992; Juvenile Justice Advisory Council of NSW, 'Future Directions for Juvenile Justice in NSW', 1992, Sydney; NSW Government, 'Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW', Sydney, 1994.

References continued on p.92

LEGAL EDUCATION



Specialised clinical legal education begins in Australia

As the variety of clinical approaches to legal education widens in Australia, Monash University/Springvale Legal Service has begun a pilot specialised clinic in conjunction with a regional sexual assault centre.

Two decades of Monash clinical legal education

It is 20 years¹ since Monash began its clinical program in a joint venture with Springvale Legal Service (SLS). In that time, the Monash program has matured from a mixture of hope and enthusiasm on the part of students and 'tutors' (as they then were) to a systematic integration of educational priorities, service delivery and social justice issues. While Monash University's Law Faculty aims to integrate the teaching of skills and ethics into its undergraduate 'core' subjects (for the first three years of a law degree), the clinical program (in the fourth and fifth years of the LLB) has been developing 'depth' in three distinct areas:

1. A student advocacy program² for students enrolled at both SLS and Monash-Oakleigh Legal Service (MOLS) has operated since 1993. Student advocacy is well established overseas, particularly in the United States and the opportunity to represent clients as advocates in the Family Court and Magistrates Court is grasped by most (but not all) students. This program was the first of its kind in Australia.

2. Computerised case management was introduced at SLS in 1990. Data management at SLS was always a problem because of its huge client base.³ Conversion to computerised statistics began in 1988, retrospective to 1985. It incorporates electronic file creation, conflict searches and negligence awareness prompts. These features tie directly into responsible legal professionalism and have become increasingly attractive to students as their consciousness of the cultural excesses of the 1980s has been raised and their electronic literacy has improved. This software is now being rewritten and again the opportunity to introduce expanded 'professional' features is being taken.⁴

3. Similarly, SLS has taken advantage of its large casework window to identify specific, recurring themes which signify reduced access to justice. Each student joins a preferred task group of four students that works towards educating the client group about the particular theme.⁵ Over a three to five-year period, this leads to socio-legal campaigns by the client group⁶ and to direct law reform lobbying by the student task group.⁷ At all stages, the clinical supervisor has the responsibility to encourage students' involvement in these processes and to place on the agenda for task group discussion the links between direct service and non-casework activity, between 'theory' and practice, and between social policy and the demands of conventional legal practice. These connections are usually made with clarity by students because the context is real (as opposed to simulated) and they know that they have a direct (though limited) responsibility for the decisions that arise from the discussion.

Specialised experience

Clinical legal education at fourth and fifth year level has used the transition from the simulations of earlier years to the 'real client' environments of SLS/MOLS, to re-emphasise professional responsibility as the key component in linking 'skills' and 'ethics'. We are now adding another ingredient — specialisation.

In conjunction with the South Eastern Centre Against Sexual Assault (SECASA) and Monash Medical Centre (MMC), SLS has commenced a pilot joint clinical legal service to assist victims of sexual assault. This is the first of a number of specialised options to be made progressively available to law students over the next few years. A steering committee of SLS and SECASA selects as possible 'staff', students who have performed competently and demonstrated a developed feminist analysis during their placement at SLS/MOLS. Those selected have been invited to volunteer for the pilot clinic and all have done so.

The pilot process is limited to three or four students, each with a maximum of three clients referred from SECASA. Initial interviews will be conducted jointly with the referring SECASA counsellor. Clinical services will concentrate on crimes compensation applications, civil actions for damages (if appropriate), emergency housing relocation and police-victim liaison (in the event of criminal proceedings commencing).

Evaluation of the joint service will proceed over 12 months to measure its effectiveness from a client point of view, the particular problems of specialised supervision, SECASA and MMC concerns (if any) and the best methods of assessment of student performance.

As the students are volunteers, there can be no formal assessment of their work or accreditation within the LLB framework. However, these issues will be reviewed and various assessment methods will be used in anticipation of accreditation. The intention is to 'hasten slowly'. Professional and educational acceptance of this innovation depends on demonstrating that the low file load and high supervision ratio (four students supervised by two volunteer, experienced community lawyers) can ensure both quality clinical education and — because the students will work in conjunction with SECASA counsellors and have more time available per file than private practitioners — far better than average professional services.

Specialised clinical experience of this sort is designed to consolidate and deepen a student's perception of a range of professional issues, including drafting, advocacy, multi-disciplinary approaches and 'client care'. Sexual assault is only one example of this potential. Monash/SLS is continuing to explore suitable specialised options with the intention of further development of clinical education where defined areas of client need can be identified.

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YOUTH AFFAIRS

Public spaces — the visibility of NESB young people and bowlers

Media reports describe some groups of young people who congregate together as 'roaming in packs'. They say they are 'feral... looking for trouble... waiting to pounce'. One of the 'packs' described in the media is a group of Samoan boys in Brisbane who were also portrayed as gangsters. This group of boys 'hang' together. They do this for companionship; they share common interests that are promoted in their culture. Their parents encourage them to go out in a group; they think that there is safety in numbers and it is better to be with other Samoan boys of the same age. The boys wear similar clothes — this is what hip boys their age wear. But this is seen as characteristic of gang membership. They are regularly stopped by police and security officers and asked for their ID and are constantly suspected of 'looking for trouble'.

On a train recently, I saw a group of elderly women going to bowls. Now here is a group of people of similar age, dressed all in white (gang colours?), talking loudly (possibly because some were hearing impaired), drawing attention to themselves and disturbing other passengers. If they stopped at David Jones on their way to bowls to 'knock off' a couple of handbags, shop assistants would not look at them suspiciously and assume that they were 'looking for trouble'.

I take the point that the Samoan boys are much larger than the bowls set, and probably not interested in handbags. However, most of the time when the boys travel by train they are stopped by railway officials, when they are in the Mall they are stopped by the police, and when they visit Southbank Parklands, the security guards regularly ask them for ID and warn them they will be banned if there is 'any trouble'.

As an adult, I personally would be appalled if I was stopped in the street and asked where I was going, or for my ID.

Behaviour at Southbank Parklands is covered by legislation, the *Southbank Corporation (Amendment) Act 1995* (Qld). The Act purports to cover children as well as adults despite the wording of the *Juvenile Justice Act 1992* (Qld) which clearly claims exclusive

jurisdiction with respect to dealing with child offenders. The *Southbank Corporation Act* was amended in December 1995 in order to give power to police and security officers to stop people, ask for their name and address and direct them to leave the site for 24 hours if the officer considers that the person is causing a public nuisance. Further, the security officers can unilaterally ban the person from returning to the site for up to 10 days if he or she disobeys a direction, is drunk or disorderly, or even if the security officer simply considers the ban is 'justified in the circumstances' (s.37B(5)). Alternatively a security officer can apply to a court to ban the person from the site for up to one year.

Many of the young people who seek the services of the Youth Advocacy Centre have been affected by the laws pertaining to the Southbank site. In particular, Aboriginal and Torres Strait Islander or non-English speaking background (NESB) young people have been affected by the by-laws, and are affected by the provisions of the *Southbank Corporation (Amendment) Act* because of their public visibility. For example, some Muslim and Papua New Guinean boys described to us how they witnessed a man hit his girlfriend with a beer bottle. When they tried to stop him doing this, it was the Muslim and Papua New Guinean boys who were told to leave the site by the security officers.

The concept of excluding young people from public places through the use of laws or the employment of security officers is discriminatory. It is also an invasion of civil rights and a breach of the United Nations Convention on the Rights of the Child, to which Australia is a signatory. There is a growing occurrence of such discrimination and invasions of human rights across Australia. At the National Community Legal Centre Conference in Hobart in 1995, those present at a workshop on young people in public spaces reported the experiences of many young people in all parts of the country who have been banned from shopping centres, parks and other public areas.

It is not surprising if young people are confused about their status when governments introduce legislation that excludes them from the public domain whilst formulating policy that seeks to include them. For example, the Queensland Government announced a 'Youth in Public Spaces Program' as part of its 'crime fighting package' that seeks to offer 'alternative activities to reduce the number of young people who might otherwise hang around in public places'.¹ This assumes that young people are not allowed in public places because they will commit crime. Further, young people are hearing from the same program that the Government wants to 'integrate them with the community' (assuming that they are not part of the community in the first place) but they are at the same moment subjected to legislation which allows for their removal from the public domain.

Young people in NSW are currently being subjected to a similar problem through the *Children (Parental Responsibility) Act 1994* (NSW). The Act has a 'Welfare of Children in Public Places' provision that allows for curfews in some areas and the removal by the police of children from public places. This is inconsistent with the Police Service Youth Policy which proposes fair treatment of young people and the protection of their rights.

Until positive processes are put into place that acknowledge young people are individual rights holders in our community and that they are equally as worthy of socialising in the public domain as adults, then governments will continue to legislate young people out of sight.

Some of the Muslim and Samoan boys mentioned above attended the National Police Ethnic Youth Relations Summit in Melbourne in July 1995. Along with their peers of other cultural backgrounds, they discussed the racial tensions which exist between themselves and police officers. The boys reported that they felt that the conference had made a difference and had provided an opportunity to improve those relationships, particularly in public spaces. In an effort of goodwill the boys organised a social barbecue at Southbank

Parklands with youth workers and police officers who had participated in the Summit. Sadly, despite receiving two invitations and sufficient notice from the boys, no police officers attended the function. Understandably the boys were disappointed, particularly as they were enthusiastic when police officers indicated they would come. The security guards at Southbank

did, however, attend (albeit uninvited) and hassled the boys for laughing too loudly while they were playing in the pool and warned them that they would be banned from returning if they kept up the noise.

Gwenn Murray

Gwenn Murray is Director, Youth Advocacy Centre, Brisbane.

Reference

1. 'Youth in Public Spaces Program', Media Release, 26 June 1995, 'The Goss plan to tackle graffiti louts'.

NESB young people and the Children's Court

'I wish they'd take us out the back and give us a good hiding'! This statement was, for me, the quote of 95, uttered by a young Pacific Islander male being supported, by myself and a co-worker, through interminable proceedings in a New South Wales Children's Court, in which he was defending a charge of maliciously intending to cause grievous bodily harm. Although this statement could have been made by anyone, it was significant coming from a Pacific Islander young person, for many of whom physical punishment is often acknowledged as acceptable in the domestic setting. My client would have preferred a punishment with which he was familiar, and that would have been, for him, a culturally appropriate one. He would rather have had it over with, than endure the laborious lurch from adjournment to adjournment in the Children's Court. Although there is irony in my story, especially given the nature of the charge, that is not my point. My point is that young NESB people have special needs that can, and should, be addressed by the court system. This is not to suggest that the system of checks and balances protecting civil rights and the needs of society is *deeply* out of kilter with the needs of multiculturalism, merely that significant improvements could be made.

A non-English speaking background provides a primary layer of experience, together with gender, socio-economic status, education level and employment status, through which the young person sieves and processes the system. The effects of this background are numerous. Not only do young NESB people bring their belief systems and culture to the court room, but their background also affects the way in which they deal with court, and indeed, how the court deals with them.

For most NESB young people, the single most important cultural effect

and determinant of their ability to cope is their grasp of the English language and through this their ability to decipher court processes and outcomes. In a society underpinned by the adversarial system and the notion of advocacy, these young people often have no idea about what has occurred in the courtroom, what has been put to the court on their behalf and indeed what their next move may have to be. Far more than with Anglo clients, the question I hear from NESB juveniles on leaving a courtroom tends to be 'what happened?'. Although it has been recommended many times that magistrates, legal practitioners, court officials and others dealing with clients in the Children's Court system should be thorough in their explanations and while taking instructions, and should use language that the child can understand, my experience tells me that the current situation is a long way shy of the ideal. In the Children's Court, where more emphasis is placed on the *welfare of the child* than on the needs of society as a whole, how can it be acceptable that so many of the young people processed have so little idea of what is happening to them and why?

Beyond language problems there is the question of the unique life experiences and cultural complexities that a NESB individual may bring with them. For instance, it has long been acknowledged that people from differing cultures have very different responses to authority. Refugees, for example, are often extremely fearful of the power of the justice system especially if they have escaped from dictatorial and brutal regimes.

For many families of NESB defendants, the fact that one of their children is appearing before a court is a source of terrible shame and this can have repercussions within their community's honour system. Very often a young person's

family will refuse to attend court because of the loss of face involved. Children who are unsupported by their families usually get a worse result from an Australian court than supported children. Furthermore, a NESB young person's parents often understand even less about the court proceedings than the young person.

Ethnicity seems unlikely to be taken into account by the court, unless one can assume that magistrates harbour racist tendencies. However, the recent study into the over-representation of indigenous children in detention suggests that racism is far more apparent in policing practices than in sentencing.¹ If it is true that courts are not guilty of negative discrimination, it is equally the case that they unlikely to discriminate positively. This is not suggested in terms of what tariffs are handed out, but merely in terms of how sensitive the court is to the needs of NESB young people, be they defendants, victims or witnesses.

It is absolutely vital in a multicultural society that a court system steeped in an English tradition develops more culturally sensitive approaches if these young people are not to continue to get an extremely bad deal.

Steve Campbell

Steve Campbell is a youth legal support worker at Copeland Youth Services, Sydney.

Reference

1. Luke, Garth and Cunneen, Chris, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Juvenile Justice Advisory Council, Sydney, 1995.

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

Victoria's first

On 5 March 1996 Girlie heard reports of a big hole having been sighted in the dome of the Supreme Court building in William Street in Melbourne. Going to investigate, she discovered the cause, looking mildly triumphant and unscathed, amongst the broken glass and metal. Her Honour Rosemary Balmford had catapulted from across the road at the County Court, through the ceiling, to become the first woman to be appointed to the Supreme Court in Victoria. Congratulations Justice Balmford on this daring feat and our best wishes for the challenges ahead. (Repairs to the dome are coming along nicely, with new flexible materials being used to replace the sadly decayed spars uncovered by the incident, but which many observers of the building have long suspected was holding the ol' dome together.)

Welcome Chi

The Victorian Supreme Court building hosted another auspicious welcome of female talent this month. *The Age* reported that on 1 April 1996, Mrs Chi Dinh, a lawyer who came to Australia as a refugee from Vietnam 18 years ago, was admitted to the Bar in Victoria. She has battled language barriers and the difficulties of combining family and study commitments to gain an Australian law degree. She is the first Vietnamese woman lawyer to be admitted to the bar of another country. Girlie offers her congratulations, and welcome to the Australian legal profession.

Australian men saved!

Disaster has been averted by the Californian medical board that suspended the licence of Dr Melvyn Rosenstein, a Los Angeles urologist who has made tens of millions of dollars by performing and promoting controversial penis enlargement surgery. *The Australian* (March 1996) reported that huge numbers of American men have paid out around \$US6000 to have fat sucked out of their buttocks and filled into a hole at the base of (what they perceived to be) their wee willies. Unfortunately, like many recipients of breast implants, the good doctor's clients are less than

happy about the results of their operations — up to 70% of them have reported problems including: infections, open holes, lumpiness and a 'deformed look'.

The enterprising doctor was in the midst of plans to expand his practice to Australia when the medical board struck — so we will be spared his sophisticated techniques to persuade potential clients to undergo the unpleasant procedure. In the US, ads in newspaper sports pages carried large headings like: 'He's the nicest guy I ever dated, but he's just too small'.

Ms Elisa Wolfe, Deputy Californian Attorney-General, who is heading an investigation of Dr Rosenstein said that 'judging by the grievous nature of the evidence against him, we're not looking at a reprimand here, but more likely a severe punishment'. Perhaps she could devise something appropriate for the manufacturers of silicone implants, the mass media and other members of the body image police who make it hard for both sexes to love their bits the way they are.

Down on the floor

In January, the NSW Equal Opportunity Tribunal was treated to an 'interesting' account of life on the trading room floor at the Sydney stock exchange, when Julieanne Ashton, a trader's assistant brought an allegation of sexual harassment against her employer, Bankers Trust (BT). *The Age* (25 and 27 January 1996) reported that her complaints included: being asked by male colleagues 'what about a head job?'; suggestions about 'bending her over' and her being a 'slut'. This unwanted male attention went on over a two-year period. She told the Tribunal that her manager ignored her complaints and wrote negative assessments of her work. Other witnesses before the Tribunal corroborated Ms Ashton's account. A former BT employee, Ms Connie Nicolopoulos said Ms Ashton, as a 20-year-old junior, was an 'obvious candidate' and that she knew her colleague was the butt of suggestive sexual language from some of the men 'on a regular basis'.

Another confirmed that locker-room style 'banter' and nudge-nudge jokes were a normal form of interaction at the exchange — that on Monday mornings men would often ask each other 'Did you get one on the weekend?'. However, this male witness saw the greeting as merely a substitute for 'How are you doing?' — 'It's like that male bonding thing they go on about'. Yeah, mate.

This type of behaviour seems to be prevalent in many parts of the finance sector. *The Age* also referred to comments made by Ann Sherry, the former head of the Office of Status of Women, at the Australian Financial Markets Association conference last year. She accused banks and other finance houses of accepting behaviour 'stamped out of blue collar workplaces five to ten years ago'. She cited strippers jumping from cakes, pornographic pictures on office walls, requests for sexual favours, sexual innuendo and snide remarks about personal appearance. Wow, talented young women must be just queuing to get into such a professional and supportive work environment.

Girlie has to ask, how smart is it to defend this sort of culture? Sexual harassment can cause debilitating physical and psychological symptoms. No-one wins. When the sexual harasser is not dealt with appropriately in an employment situation, many victims are so traumatised they are forced to quit. Employers lose valuable staff members, and are liable to prosecution and negative public exposure when people like Ms Ashton have the courage to take complaints further. In this instance you'd think, as the national women's officer for the Finance Sector Union, Sharon Hutchinson commented, 'banks and financial institutions [would be] keen to project a solid corporate image, rather than be shown up as employers of vulgar yahoos who go ape at any passing woman'.

Truly amazing then, are the remarks made by Ken Farrow, chief executive officer of the Australian Financial Markets Association: '... When the market's rising, the mood is professional.



When there's a market lull, the pressure falls and people are more frivolous.' (Girlie thinks Mr Farrow may want to check the dictionary before he refers to 'frivolity' again in the context of serious sexual harassment allegations.) And even more helpful: 'The dealing room is male dominated, with a style and function not suited to the female personality'. Other commentators have pointed to the 'hideous atmosphere' of the trading room and the enormous pressure on traders to make money.

In response to Ms Ashton's allegations, BT did not attempt to dispel the lewd image of human exchange on the trading floor. Rather, the *Age* reports, BT's counsel argued that 'Ms Ashton took part in the boys-will-be-boys fun and games on the trading floor and had no basis for complaint, being treated no differently from the men'.

The case is part heard and will conclude in April 1996. Girlie is waiting to learn whether the Equal Opportunity Tribunal was as unimpressed by this argument as she was.

Death row

The *Australian* (17 January 1996) reported that Guin Garcia, on death row in Illinois, USA, had 'a sense of peace' about her impending execution by lethal injection. She maintained that she 'deserved to die', having suffocated her 11-month old baby and subsequently killed the husband she married while serving a 10-year sentence for the child's murder. Death penalty opponents were reported to be less than calm about the decision, working furiously to have her sentence stayed, despite her plea for them to 'stay out of [her] life'.

Guin's position has also been confronting for feminist lawyers and activists engaged in the debate about legal defences for battered and abused women who kill. Guin was orphaned and sexually abused by her uncle before she was six. According to her lawyers, she made her decision to kill her child when she learned welfare authorities were planning to foster her daughter with her grandmother, in the house where her uncle still lived. She shot her husband after he had physically, sexually and psychologically abused her.

Last year Guin decided to drop all appeals — the forum in which argument in her defence may have been heard about her having battered woman's syndrome, post traumatic stress disorder, or that she responded 'normally' to the abuse (provocation) she had suffered.

The Cook County Jail chaplain said Guin's decision not to go ahead with appeals had brought her 'more tranquillity than she had ever had in her troubled life'. Not so for those outside concerned about Guin and what her case represents. Should Guin's choice be respected (she can make her own choices, that's what feminism is about), or questioned (she can't make a valid decision about her future in her powerless position)? And the multi-layered debate will no doubt continue — with Guin as an unwilling participant, as Illinois Governor, Jim Edgar, has stayed her execution with a last-minute clemency decision.

Misplaced gallantry

Girlie recently heard a story about a female member of the bar who did her best to defend her client at an appearance before a magistrate in country Victoria. She did not count on being hampered by a force beyond her control — old fashioned gallantry.

Her client had been charged with using indecent language, but had been very drunk at the time and couldn't recall the exact words he had used. He did assure her though, that they couldn't have been indecent (he wasn't that kind of guy). The magistrate heard the prosecution's case without the actual words the accused was alleged to have used being mentioned. They were written down and handed to the magistrate. The defence barrister was forced to ask the magistrate to reveal the relevant utterance. He refused, saying they were not fit for a lady's ears. Our heroine argued that she would be making a submission that the words were not, in fact, indecent. The magistrate told her he would entertain no such submission, and, gallant to a fault, said (words to the effect of), 'You may take your seat, Miss X. I can assure you of the indecency of your client's language and, I'm afraid, that I am compelled to find him guilty.' The exact nature of her client's conduct seems destined to remain one of the mysteries of her legal career.

Sporting nightlife

In early February, Melbourne newspapers were full of headlines about Wayne Carey. For those unfamiliar with the reason for Wayne's newsworthiness, he is, according to the *Sunday Age* the 'most valuable player and most inspirational captain' of the North Melbourne Australian Rules footy team. Unfortunately, during the 1995 Grand Final Wayne had a bad day and only scored

one goal, and he and his team mates ultimately lost. Like real men they went out to drown their sorrows in the nightclubs along King Street. By nine o'clock the next morning, Wayne and his mates had had a few. He approached a young woman on the street, grabbed her left breast and said 'why don't you get a bigger set of tits?'. For this 'indiscretion' Wayne was charged and ultimately pleaded guilty to indecent assault. The magistrate gave him a good behaviour bond and released him without conviction or fine, saying Wayne had done a 'bucketful of work for the community'. (Girlie is offering a prize for those who can guess this magistrate's favourite sport.) Outside the court Wayne said he was sorry if his actions had offended anybody and that he just wanted to get on with the footy now. (Another prize for anyone who can work out who Wayne might have offended.) Wayne's sponsor, Nike, issued a statement to the media that they intended to continue to support Wayne despite his brush with the law. Well done Nike — *just blew it!!*

D. Lynn Quent

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3. Approx. 75,000 separate client records have been created over the last 22 years and 35,000 of these are now indexed using Paradox software.
4. See also Note 3. The Office of Legal and Family Services (LAFS) administers legal aid for the Commonwealth. Since 1990, LAFS has sought to require community legal centres around Australia (now numbering over 100) to standardise and computerise their data. The stated intention is to permit more precise targeting of legal aid, based on demographic trends made clearly accessible for the first time by this material. Building on an earlier program developed for Victorian legal centres by La Trobe University, the new National Information System (NIS) will eventually produce useful material but it is a passive program with no 'pro-active' case management features. The SLS version provides this capacity.
5. Current access 'themes' at SLS are police assaults on ethnic youth, legal professional complaints processes, family violence advocacy and environmental/planning law changes in Victoria.
6. For example, a resident campaign against PCB pollution in a declared toxic industry zone near SLS.
7. For example, a long series of submissions to government in order to remove control of lawyer complaints processes from the Law Institute of Victoria.

MULTICULTURALISM

The death of a Lama

SABINA LAUBER reports on the inadequacy of Australian laws to deal with cultural and spiritual rituals other than those of mainstream Christianity.

The death of Gyalsay Tulku Rinpoche in Canberra in 1993 tragically exposed the inadequacies of Australian law in dealing with cultural and spiritual beliefs about dying that differ from mainstream Christianity. The circumstances surrounding Rinpoche's death caused international uproar and lead the ACT to review its laws on post-mortem examinations. However, other Australian jurisdictions still maintain laws that deny the fundamental right to die in accordance with one's cultural or spiritual beliefs.

The death of an esteemed Lama

Gyalsay Tulku Rinpoche was a Tibetan Buddhist Lama¹ born in East Tibet in 1952. At the age of five he was recognised as the 14th incarnation of a high Lama of the Sakya lineage of Tibetan Buddhism. He was also recognised as the head of the Sakya lineage and second in protocol to His Holiness, the Dalai Lama. In 1988, Rinpoche came to Australia. In 1990 he founded the Sakya Tharpa Ling Buddhist Centre in Balmain, Sydney. The Centre grew rapidly and many devoted students gathered around him.

On the evening of 21 November 1993, while giving a teaching at a student's house, Rinpoche developed a headache and retired to his room earlier than usual. He died unexpectedly the next morning.

Tibetan Buddhist beliefs about death and dying

Tibetan Buddhists believe that the actions and state of mind around the time of death and immediately after death, will have a significant impact on the quality of the next rebirth. Specific rituals and practices exist for guiding a Tibetan Buddhist through this time. The dying or dead person, his or her Master and fellow students or family are involved in these rituals. The rituals are particularly important for the first two to three days after death, during which Buddhists believe that an ordinary person's consciousness remains with them. For high Lamas, this can be seven or more days. For example, the Senior Tutor of His Holiness the Dalai Lama remained in consciousness for 13 days after death.

During the time that the consciousness remains with the body, it is crucial that the dead person is not touched or moved. Where a Lama has died, the body is traditionally embalmed after the rituals have ended, and preserved for 49 days as an object of spiritual devotion before it is cremated.

The ACT Coroner's Act

Under the *ACT Coroners Act 1956* (the Act), the Coroner must hold an inquest into the manner and cause of death of a person who has had an apparently unnatural death (s.12(1)). To complete this task, the Coroner has the power to issue a warrant to authorise the police to take the body, and may then conduct a post-mortem examination (ss.28(1), 30). Under Australian common law, there is an obligation on every person to report a death to the Coroner. It is then the common law right and duty of the Coroner to take possession of the body.

Coronial powers are important to the proper functioning of criminal law and to protect the safety and lives of individuals. The actual focus of the Coroner's role is not to determine the rights of particular parties or individuals, but for the benefit of the community as a whole. However, this focus has resulted in Australian laws that give no scope for the Coroner to take into consideration any spiritual or other beliefs of the person who has died.

Rinpoche's body

Rinpoche died early on the morning of Sunday, 22 November. He was staying at the house of a student, who found his body. The student contacted paramedics to try to revive the body. He also contacted other students and messages were sent to other Lamas in Canberra and Sydney who left immediately to come to the body to begin the necessary rituals.

Shortly after the paramedics had declared Rinpoche to be officially dead, they contacted the police to collect the body, as they are required to do by law. The police came immediately. Some of Rinpoche's students tried to barricade the house to stop them removing the body. One student contacted a senior police officer in an attempt to delay the removal of the body, at least until the Lama arrived from Sydney. She also contacted the ACT Attorney-General, Terry Connolly, at home. His instant reaction was that the law had to be carried out, but he offered to contact the Commissioner of Police to delay removal of the body until the Lama arrived from Sydney. However, by this time the body had been removed by the police.

By all accounts the police handled the situation well, with sympathy and patience. However, on the orders of the Coroner (a magistrate rostered for that day), the police were bound to move the body. Later, two Lamas performed rituals at the morgue.

The next morning a meeting was held with the ACT Attorney-General, the Coroner, the Professor who would do the autopsy, the Office of Tibet and Dr David Cheah who was Rinpoche's doctor and had signed a death certificate for him. The aim of the meeting was to try to delay the autopsy for two to three days, to allow the appropriate rituals to be performed. The position put by the ACT authorities was that the law had to be carried out. However, as a compromise, a limited autopsy was carried out on Rinpoche's head. It was confirmed that he died of a stroke.

After the autopsy, the body was embalmed and Canberra's Buddhist community from all traditions performed meditation practice and rituals in front of the body for several nights

at the funeral parlour. At the end of the week, the body was flown back to Rinpoche's monastery in India where the appropriate rituals and cremation were performed. There was considerable distress at the monastery at the incisions on the body and the manner in which it had been handled before the necessary rituals had been performed.

The right to religious freedom

Article 18 of the Universal Declaration of Human Rights provides that:

Everyone has a right to the freedom of thought, conscience and religion; this right includes freedom to change his [sic] religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance.

However, the Australian Constitution and Australian law do not provide a right to freedom of religion or cultural practices. Buddhism is the fastest growing religion in Australia, partly due to the high level of Asian immigration to Australia and partly because of the high number of Australian converts to Buddhism. In particular, many seriously ill patients, for example living with cancer or HIV/AIDS, practise Buddhism in anticipation of imminent death.

Buddhists are not the only cultural or spiritual group to have been critical of coronial laws. Jewish and Muslim communities have also been vocal about the inability of these laws to respect their beliefs and practices at the time of death.

The events surrounding Rinpoche's death in Canberra led to an immediate review of the *Coroner's Act* in the ACT. An Issues Paper was released in 1994 and an Exposure Draft of the proposed amendment Bill was issued in late 1995. The Exposure Draft recommends the introduction of a requirement that the Coroner consider

the desirability of minimising distress or offence to persons who, by reason of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended.

Under the draft proposal, the Coroner would be required to consider requests from the immediate family or other relevant information before making a decision. In addition, the immediate family would receive special rights, such as the right to view the body.

These proposed recommendations are problematic because they seek to expand the Coroner's discretion without guaranteeing a right to die according to one's cultural or spiritual beliefs. Ideally, the Coroner, coronial staff and the police should be made aware of the different cultural and spiritual practices around dying and be obliged to support such practices whenever possible. In addition, special rights to view the body and make requests to the Coroner should not merely rest with the immediate family'. These should be extended to partners, including *de facto* and same sex partners, and spiritual teachers and members of a spiritual community.

It seems strange that a diversely multicultural nation such as Australia has so far failed to address this area of cultural and spiritual rights. The unfortunate circumstances surrounding Rinpoche's death in November 1993 could have happened in any State or Territory — all have similar provisions to the ACT. The new Federal Human Rights Commissioner, Chris Sidoti, has indicated that the Human Rights and Equal Opportunity Commission will investigate this issue.² However, any such review must have the co-operation of the

States and Territories and their will to amend their coronial laws to respect a right to freedom of religion.

Sabina Lauber is a lawyer who works in law reform.

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DISCRIMINATION

Should people's rights die with them?

JULIA CABASSI describes a Federal Court decision as a blow to the effectiveness of federal discrimination remedies.

The Federal Court handed down a decision on 15 December 1995 which significantly undermines the effectiveness of federal anti-discrimination laws. The Court decided that a discrimination case, lodged with the Human Rights and Equal Opportunity, Commission (HREOC), cannot proceed because the complainant died before the case was heard.

Alyschia Dibble lodged a discrimination complaint in November 1994 because she was denied the right to participate in an HIV drug trial and alleged that the decision constituted sex discrimination. Ms Dibble died before her complaint, under the *Sex Discrimination Act 1984* (Cth) was finalised by HREOC. The complaint was continued by the executor of Ms Dibble's estate. In April 1995, HREOC terminated the complaint because of the death of the complainant. The executor of Ms Dibble's estate appealed the decision to the Federal Court, but the Federal Court dismissed the appeal.

The Executor of Ms Dibble's estate has lodged an appeal to the Full Court of the Federal Court. The appeal is to be heard in May 1996.

The Federal Court's decision has far reaching implications because all federal anti-discrimination laws, the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act* and *Disability Discrimination Act 1992* (Cth) are silent on whether an estate can continue a discrimination complaint.

While the decision is a blow to the effectiveness of federal discrimination remedies generally, it has particular significance for the rights of HIV positive people. It is common for HIV discrimination complaints to arise at a time when the complainant is ill, for example getting access to superannuation entitlements. If the complainant dies, then this decision means that the complaint cannot be continued by the complainant's estate. Given the delays so often a feature of discrimination complaints, what will stop superannuation companies from sitting on their hands and waiting for HIV-positive people to die? It is not hard to imagine numerous other scenarios under federal anti-discrimination legislation which will result in injustices where complaints terminate on

death. The unfairness that will result from this decision cannot be underestimated.

The result flies in the face of the purpose of anti-discrimination legislation. The fact that the complainant dies before the complaint is heard should not mean that those responsible for discriminatory conduct get off scot-free. Community organisations have responded quickly to alert people to the problems that will result from the decision and to ensure the consequences are addressed. In a joint media release the Australian Federation of AIDS Organisations (AFAO), National Association of People Living with HIV/AIDS (NAPWA) and solicitors for Ms Dibble's estate, Inner City Legal Centre, have called on the Federal Government to amend all federal anti-discrimination legislation.

AFAO, NAPWA and the Combined Community Legal Centres Group of NSW intend to involve other non-government organisations, whose communities will be affected by the decision in a broad-based campaign to lobby the Government. Solicitors for the estate of Ms Dibble are currently considering the merit of an appeal to the Full Court of the Federal Court.

It is a particular disappointment for HIV-positive women that Ms Dibble's complaint has not been heard by HREOC. Ms Dibble's case was one of great significance as it was set to test the issue of HIV-positive women's access, or lack thereof, to clinical drug trials, an issue long on the agenda for HIV-positive women.

Alys Dibble had lodged a discrimination complaint because she was denied the right to participate in an HIV drug trial, solely on the grounds of her child bearing capacity. Ms Dibble sought to participate in the stage one trial of a protease inhibitor, developed by Abbott Laboratories. The trial was conducted by St Vincent's Hospital. Clinical drug trials are conducted in accordance with clinical trial protocols provided by the drug manufacturer. The relevant clinical trial protocol in Ms Dibble's case includes patient selection criteria, study procedures, and methods of data analysis.

Interestingly, the protocol for the trial sets out *inclusion* criteria, so called, providing for very limited access by women. The protocol states that a female must *not* be able to bear a child for at least one of the following reasons:

- she has been post-menopausal for at least one year
- she has had a hysterectomy, or
- she has had a tubal ligation followed by a negative pregnancy test.

Ms Dibble was 49 years of age at the time the tests were undertaken to determine her eligibility for the trial and was not post-menopausal at that stage. In early June 1994 she was advised that she was ineligible for the trial on the basis of the protocol.

Ms Dibble died in March 1995, before learning of the outcome of her complaint to the HREOC under the *Sex Discrimination Act*.

Ms Dibble instructed that there was no risk of pregnancy as she had not engaged in sexual activity with men for many years and identified as a lesbian. She also advised that she was willing to have a tubal ligation to ensure no risk of pregnancy in order to have access to the trial and made this known to those conducting the trial.

Women's lack of access to drug trials generally and the implications of this are not new issues. In 1990, *Time* magazine reported concerns about the lack of women-specific data

and flagged the significance of this in the context of HIV/AIDS.¹ Andrew Purvis reported that 'medical testing done entirely on male subjects may be adequate when a disease strikes women and men in the same way, but a growing body of research shows that this is often not the case'. He went on to examine the implications of women's exclusion from HIV drug trials elucidating the central issue of concern:

At a time when women are the fastest growing group affected by AIDS, there is troubling uncertainty about whether treatments or the disease itself are affecting women differently from men. Some studies for example, have suggested that women with the virus die more quickly than men, and from a somewhat different range of opportunistic infections.

Strict inclusion criteria for women are not uncommon in clinical trial protocols. The question is, why are the protocols so strict regarding the inclusion of women in drug trials? Unfortunately the answer is often that drug companies do not want to risk the possibility of legal action against them. The fact a woman has provided her informed consent to the risk involved in participation in a drug trial, as all participants are required to do, would not prohibit a child born with birth defects as a result of the mother's use of the drug, from suing the drug manufacturer. In application of the protocols, there is often no consideration of whether the *potential* to become pregnant is a real one, and what means can be adopted to ensure that a woman can participate in the trial.

Generally speaking the inclusiveness of HIV drug protocols for women in Australia has improved in recent years, but the Abbott example shows how it is still possible for one company to be significantly out of step with what is considered reasonable and responsible. The responsibility for ensuring equitable access for men and women has fallen to community representatives on ethics committees. Ms Dibble's case could make drug companies responsible for complying with anti-discrimination laws in Australia.

The implications of this situation are twofold. First, women are often unable to access new HIV treatment options and second, HIV drugs are often not being tested on women, and accordingly little material is available as to the specific effects of such drugs on women.

There have been considerable advances in the issue of women's access to drug trials in the USA and these developments shed light on the need for Australia to be wary of accepting very restrictive trial protocols being applied here. The Food and Drug Administration (FDA) published new guidelines for the enrolment of women in clinical trials in the USA in 1993. In revising the 1977 policy that had excluded women of child bearing potential from the early stages of drug trials, the FDA stated:

In order to fully evaluate the potential for gender differences in drug effects, FDA urges that women of all ages be studied, including early in drug development. There is no longer any restriction on the enrolment of women of child bearing potential in even the earliest phase of clinical trials... The new guidelines call for appropriate measures for minimising the risk of foetal exposure, such as pregnancy testing, contraception and provision of full information about potential foetal risks.²

The rationale for the change to FDA's guidelines was to ensure that there is adequate assessment of the impact of drugs on women. The move to amend the guidelines was a response to the fact that the 1977 policy was paternalistic because it denied women the right to make decisions on the risks they wish to take.

The trend in the USA in recent years has also emphasised the need to target a cross-section of the HIV community in all drug trial research. It is unlikely that such a cross-section of participants is possible while the criteria for inclusion remain restrictive and drug companies continue to offer trials on the basis of such protocols.

AFAO's current position on trials is to argue:

for increased access to trials for women, to address the dearth of gender-specific data by actively moving towards the collection of women-specific data in all trials; and that 'child bearing capacity' should not be a valid criterion for participation in any trial.³

This is essential to AFAO's view that the demography of drug trial profiles should reflect the demographic of epidemic and that the National Health and Medical Research Council should develop a policy to ensure that this occurs.⁴

The net effect of restrictive inclusion criteria is that women are often ineligible for participation in HIV drug trials. While there have been developments in increasing compassionate access to drugs in the trial stage, compassionate access is not a substitution for inclusion in drug trials.⁵ Compassionate access may enable HIV-positive women to access drugs being trialled, but will not result in inclusion in trial data and therefore does not ensure an assessment of the impact of new drugs for women.

While the appeal to the Full Court of the Federal Court is pending, it remains to be seen whether this case will proceed to test the waters on whether the protocol in Ms Dibble's case contravenes the *Sex Discrimination Act*. The case raises issues of public importance. It is imperative for HIV drug testing to investigate the impact of new drugs on women and to ensure that HIV-positive women have equal capacity, alongside HIV-positive men, to access new treatments at the experimental stage.

Julia Cabassi is a lawyer at the Inner City Legal Centre, Sydney.

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INTERNATIONAL LAW

Women and war

KARYN ANDERSON and HELEN DURHAM discuss sexual assault and rape of women in wartime.

The history of war betrays the regularity with which rape and sexual assault are used as physical and psychological weapons. During times of armed conflict, women's bodies are violated for numerous reasons: as prizes and spoils of war; in the destruction of the enemy's 'property' and pride; under

orders and without orders; as revenge; and sometimes mere opportunism.¹ Waging war is about gaining territory. The raping of women is a very effective and cheap way to dispose of citizens by spreading fear and humiliation and making people flee from their homes and land. Time and again women's bodies are used as a battle-field — in East Timor, Afghanistan, Cambodia, Vietnam, Burma, China, Rwanda, Bangladesh, during World Wars I and II and during the more recent conflict in the former Yugoslavia.

Even after the conflicts are over, women's experiences of war are often not recognised or acknowledged. Drive through any small country town in Australia and you will see tall rows of poplar trees and stone monuments to fallen soldiers, their names chiselled with family pride. These memorials can be found throughout most countries in the world in some form or another. A woman does not get a medal if she is raped, or a stone monument for dying of dysentery. Women's experiences of war do not translate into thrilling fire-side stories, action packed movies or exciting novels. More than mundane, many of the events which happen to women during war are silencing, particularly rape.

This 'silencing process' is evident in the lack of prosecutions of rape as a war crime, despite the numerous instruments of international legislation and documentation deeming rape and sexual assault to be unacceptable behaviour.² In the Nuremberg trials no defendant was charged with 'rape' despite the presentation of sexual assault as evidence of crimes against humanity.³ During the Tokyo trials a limited number of officers were prosecuted for sexual assault under Articles of the Charter dealing with 'inhumane treatment', not as an offence of itself. While there are scattered examples of domestic war crimes trials trying soldiers for sexual assault offences,⁴ there is no clear, practical international legal precedent that rape is an internationally recognised war crime. The current *ad hoc* tribunals for Rwanda and the former Yugoslavia are the first opportunity in many years to clarify international humanitarian law in relation to the illegality of rape and sexual assault. If rape is not clearly defined as a war crime by these tribunals, especially in the case of the former Yugoslavia following significant media attention on the atrocities of the 'rape camps', how will women in East Timor and other nations convince authorities that what they have suffered is a war crime and not an 'inevitable consequence' of armed conflict that may go unpunished?

Yet despite the possibilities of clarifying the law, there are technical difficulties in the drafting of the Statute for the International Tribunal Established to Prosecute Persons Responsible for Serious Violations of International Humanitarian Law in territory of the former Yugoslavia since 1991 (the Yugoslavia Tribunal). There is no mention of rape under Article 3 which defines 'war crimes'. Nor are rape or sexual assault listed under Article 2 dealing with 'grave breaches' of the Geneva Conventions. The list of crimes under Article 2 is not exhaustive and there is much debate about whether rape should be deemed a 'grave breach' or whether non-grave breaches such as Article 27 of the Geneva Convention could be included.⁵ However, this is an issue of interpretation that will be left to the discretion of the Tribunal's judges and there is no international legal precedent that rape should be deemed a 'grave breach' rather than a mere breach of the Convention.

The only place that rape is specifically mentioned in the Statute is under Article 5(g) as a 'crime against humanity'. The evidence necessary to prove a crime against humanity is

extremely high. One must first prove that the act was committed because of the victim's connection to an ethnic group and, further, that it was carried out in a systematic and organised manner. Furthermore, in both the Nuremberg and Tokyo trials, the Charters of the Tribunals required that crimes against humanity be 'committed in execution of or in connection with' another crime within the jurisdiction of the Tribunals. It is fortunate that a recent appellate decision of the Yugoslavia Tribunal followed Control Council Law No. 10 and disposed of this nexus requirement. Nonetheless, crimes against humanity are the most difficult to prove, and it is in this context that rape and sexual assault will be dealt with by the Tribunal.

There is little doubt that rape could be prosecuted under other sections of the Statute, such as those provisions dealing with grave breaches including torture and inhumane treatment as mentioned in Article 2. A number of legal theorists have also argued that rape should be dealt with under Article 5 defining the international crime of genocide and the Genocide Convention.⁶ It is argued that rape could constitute genocide where the assaults were committed with the specific intention 'to destroy, in whole or in part' a national, religious or ethnic group.⁷

Law, both domestic and international, is society's attempt to define what is right and what is wrong. While sexual assault is obviously inhumane treatment, its intent and general nature is different to other acts under the same category, such as breaking someone's arm or beating a person with sticks. Actually proscribing that the raping of someone during a time of war, just as during a time of peace, is an illegal act is symbolically powerful. Furthermore, rape and sexual assault must be defined as war crimes because they are a violation of a woman's fundamental and basic right to bodily integrity, not merely as a 'crime against humanity' or as constituting genocide in its use, at a strategic level, to destroy a nation or people. There is a great need for international law to recognise rape as a crime in its own right, as its own category, and without any contextual legal requirements.

Since 1991 Australia has accepted over 14,000 refugees from the territory of the former Yugoslavia.⁸ Many individuals from the region now living in Australia, irrespective of their ethnicity, age and gender, have been victims of or witnesses to breaches of international humanitarian law. Most have family and friends still in the region. The capacity for these new Australians to have access to international justice, if they wish to pursue this avenue, is essential. As stated by Ms Wendy Lobwein, Program Development Coordinator at the Victorian Foundation for the Survivors of Torture:

For many survivors of torture, once they begin to recover from the distressing symptoms of post traumatic stress disorder, anxiety and depression, they begin to seek ways to use their experiences to bring awareness of human rights abuses to the attention of others and to work against apathy, disbelief and complacency. They also seek justice. Access to justice is not just a social issue, but a critical factor in the healing processes for the individuals who have experienced the reality and horror of unbridled violence.⁹

It is accepted by a number of psychologists and academics that unsettled and unforgotten grievances do not disappear. While to the rest of the world, amnesties and peace plans are seen as a final solution, to the victims and their families the trauma of their experiences does not end with the conflict. This is particularly so in relation to the crime of rape. Even

long after the physical body has healed, the violation of human dignity and the social and family implications of having been a victim of sexual assault leave their mark.

It was in the context of this need to allow survivors with the courage and strength to speak out, that the Australian Committee of Investigation Into War Crimes (ACIWC) was created. ACIWC's mandate also followed a request from women at Tresnjevka, a Centre in Zagreb to assist women and children who were victims of war. When asked what the women from the former Yugoslavia wanted from women in Australia, members of Tresnjevka responded that they wanted acknowledgment that what they had suffered was illegal and also wanted to ensure some kind of accountability of the perpetrators for crimes such as rape.

ACIWC currently assists the Yugoslavia Tribunal through the identification of potential witnesses to violations of international humanitarian law from the Australian refugee population. While it has a focus on the crime of rape and sexual assault, it takes statements from people of both genders, all ages and from the three major ethnic groups about any breaches of humanitarian law. The Committee works closely with the Prosecutor's Office of the Yugoslavia Tribunal and has already located over 30 witnesses, some of whom may be giving evidence before the Tribunal this year. The ACIWC is the only organisation of this kind in Australia that facilitates the passage of individual testimonies to The Hague, thus ensuring the experiences of survivors are acknowledged. The collection of such evidence is vital to the successful prosecution of war crimes and the development of international law. The process is also essential to assist in the resettlement process of refugees from the territory of the former Yugoslavia.

Karyn Anderson and Helen Durham are Melbourne lawyers who are members of the Australian Committee of Investigation into War Crimes.

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NESB YOUTH

Kids, ethnicity and law

A federal inquiry into children and the legal process is underway. SALLY MOYLE reports with regard to NESB kids

In August 1995 the then Attorney-General, Michael Lavarch, MP, asked the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (the Commissions) to inquire into and report on matters relating to children and federal legal processes. The Commissions released an Issues Paper in March 1996.

The reference is very broad, requiring the Commissions to inquire into and report on children's interaction with the legal process in all federal courts and tribunals. The Commissions are obliged to give particular consideration to access to courts, legal advice, advocacy and trial outcomes for children and the appropriateness of trial and pre-trial procedures including:

the desirability of children giving evidence in family and associated proceedings; and

legal processes designed to protect children as consumers.

The Commissions are also required to consider the needs of children for whom the Commonwealth has a special responsibility arising under the Constitution, and international obligations.

NESB children

In 1990 Australia ratified the United Nations Convention on the Rights of the Child. Article 2 of that Convention requires parties to ensure that all children are accorded the rights set out in the Convention without discrimination of any kind:

irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The Convention also requires parties to take appropriate measures to protect children against discrimination on the basis of that status.

The inquiry into children and the legal process will attempt to ascertain how, if at all, particular groups of children are disadvantaged in contact with federal legal processes and what can be done to overcome that disadvantage. One such group is children of non-English speaking backgrounds (NESB) and other first and second generation immigrant children.

Australia's population is made up of close to 200 different ethnic groups. The Commissions recognise that language, cultural, religious and historical differences make the experiences of each group and each child unique. However, NESB children share many common experiences.

There is criticism of the use of the term 'NESB' as an indicator of social disadvantage.¹ One argument is that it is

not ethnicity in itself that determines the life chances for children in Australia, but rather the interaction of ethnicity with other factors such as gender and social class.²

Many immigrant children may not be disadvantaged at all relative to children whose parents were born in Australia. Immigrant children and children of immigrant parents from English speaking backgrounds are in some cases even better off than children who were born, and whose parents were born, in Australia.³

Similarly, many NESB children may not suffer social or economic disadvantage in Australia. 'Many people of NESB are, in fact, high achievers, educationally, socially and economically.'⁴ However, some NESB children are particularly disadvantaged and the fact remains that there are many indicators that give cause for concern such as poverty and poor English language skills.⁵ These areas of disadvantage can create impediments for NESB children trying to access courts and other legal services. The Commissions' inquiry is still in its early stages and no conclusions have yet been drawn. However, it is possible to discuss some factors affecting the access of NESB children to the law.

Poverty

A study in 1992 addressed the following three questions.

- To what extent are children of immigrants living in poverty?
- Which children of immigrants are living in poverty?
- What is the relationship between poverty and other forms of disadvantage?⁶

Three common features were identified among those immigrants with the highest poverty rates. Generally, they had been resident in Australia for less than six years, were from a non-English speaking background and only had secondary schooling. Overall, NESB families had less informal support than the other families in the study. Only 29.2% of the NESB mothers had their own mother living in Melbourne, compared with over 60% for both Australian mothers and those from other backgrounds. Similarly, only 75% of the NESB women had friends to turn to for advice, while around 90% of the other mothers had this support.⁷

A 1985-86 study found that the level of poverty among immigrants was significantly higher than for the Australian-born population. While poverty among the Australian-born population rose 16% between 1981-82 and 1985-86, it rose 48% for immigrants.⁸

Language, support and access to services

The acquisition of English is extremely important in enabling NESB children to participate equitably in Australian life.⁹ Conversational English does not necessarily equip children to cope with advanced education. Nor does it equip them to deal with the legal system. The language barrier has been proposed as '... the single most important reason for the inaccessibility of services'.¹⁰ A House of Representatives Standing Committee on Community Affairs report concluded that the provision of interpreting and translating services to NESB people '... is essential to ensuring an equal share of resources and opportunities'.¹¹ However:

[a]ll too often the provision of translated information is used as the easy way to discharge what ought to be more onerous obligations to ensure that NESB people are advised about legal rights and obligations.¹²

The simple translation of documents into a variety of languages can be of limited value.¹³ It requires that the person be literate in their own language, and much legal language (including plain English) is difficult to understand — even for those for whom English is a first language. A related point is that translated information often will not make sense unless the reader is familiar with Anglo-Australian culture and institutions.¹⁴

Many more newly arrived NESB communities have an average age lower than that of the more established immigrant communities. Between 1981 and 1991 in NSW, the number of people speaking Chinese languages at home grew by 90.3%. This was followed by Vietnamese (70.6%) and Arabic or Lebanese (35.6%). In comparison, the number of people speaking Italian grew by just 0.8%.¹⁵ It can be assumed that there will be a number of children from an Asian or Arabic background who will require training in English as a second language as part of their education.

Education

One area of particular concern is education. High school retention rates among females are noticeably lower for the newer migrant group arrivals.¹⁶ Turkish girls, for example, are frequently withdrawn from school at an early age to remain under parental supervision until married.¹⁷

The isolation of some girls has an important effect on their English language skills, which in turn affects their opportunities in Australia. In 1980, interviews were carried out with 96 Turkish girls aged between 15 and 20 in Melbourne as part of a project on the education and employment of migrant youth.¹⁸ Only 5% of these girls spoke English very well, while 30% had a basic understanding but no conversational skills, and 14% spoke virtually no English.¹⁹

Schooling played an important part in the development of English skills. Of those Turkish-born girls who had attended school in Australia for five or more years, 80% spoke English well. However, the study found that the girls received little education in comparison with the general population. While the majority had four to nine years of education, 20% had only one to three years, and one quarter had no schooling at all.²⁰

For groups of NESB children such as this, whose education and English language skills are limited, lack of awareness of the services available can be the chief obstacle to gaining appropriate access to legal processes.

Juvenile justice

One problem in considering contact of NESB youth with the juvenile justice system is that few comprehensive statistics are kept at either a State or national level.²¹ Courts generally do not record the ethnic background of their 'clients'.²² One reason put forward for the non-collection of such data is that it would be racist. This lack of statistics, however, may mask any conscious, unconscious or systemic discrimination within this system against NESB children.

As noted, NESB children, especially those from the more recently arrived ethnic groups, are more likely than other children to be disadvantaged socially, educationally and economically. It has been suggested that they may thus be more likely to come to the attention of the police and then to be drawn into the juvenile justice system.²³ Young people who have emigrated from oppressive regimes may associate police with totalitarian state violence or corruption, rather than seeing them as a source of help or protection.²⁴ This may exacerbate problems between these children and police.

Despite these difficulties, the overall crime rate for immigrant youths appears to be relatively low. In 1989, in response to sensational media reports concerning the alleged extent of Vietnamese gangs, Easteal conducted a study of Vietnamese youth crime, which illustrated the significant differences between the perceptions of youth crime, and actual crime rates.²⁵ The crime rate of children of Vietnamese background was found to be lower than that of the general youth population.

However, early indications are that, at least in NSW, some groups of NESB children are becoming over-represented in the juvenile detention centres.²⁶ This over-representation may begin with initial contact with police and extend throughout the juvenile justice system.

Indo-Chinese youths are particularly over-represented in NSW juvenile detention centres.²⁷ Their numbers in custody have increased dramatically over recent years. Many Indo-Chinese young people are convicted of more serious offences, which means that the sentences given to these young people are on average much longer than those of other young people.²⁸ Children of Lebanese and Pacific-Islander backgrounds are also becoming over-represented, in comparison with their numbers in the community, in NSW detention centres.²⁹

Legal processes which fail to take account of language difficulties, cultural differences and disadvantage may play a part in the over-representation of some groups of NESB children within the criminal legal system.

Conclusion

Legal processes can determine access to the law and its remedies. Legal processes also form part of government decision making in a wide range of matters such as employment, education and welfare. The disadvantage suffered by some NESB children may affect their ability to understand, access or achieve fair outcomes from the legal system and obtain equitable treatment by legal and administrative processes. Disadvantages that NESB and immigrant children experience within society are then exacerbated by contact with the legal system. If language disadvantage and cultural unfamiliarity are ignored in the design of legal processes, those processes can become discriminatory.

The Commissions are interested in hearing how, if at all, children from immigrant backgrounds are disadvantaged by present legal and administrative processes. The Commissions welcome any suggestions about how these processes can be amended to provide access and equity to these children.

Copies of the Issues Paper, *Speaking for Ourselves: Children and the Legal Process*, can be obtained free of charge by contacting the Australian Law Reform Commission (tel 02 284 6333) or the Human Rights and Equal Opportunity Commission (tel 02 284 9600). Submissions on the questions raised in the paper are invited by 31 July 1996.

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With thanks to Kristin Sykes.

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Letter

Dear Editor

Re: Whistleblowing

I read with interest Mr De Maria's article about whistleblowing legislation in Australia [(1995) 20(6) *Alt.LJ* 270]. I do not comment on what he has to say about other legislative efforts, but I find it necessary to correct his account of the South Australian legislation for the benefit of your readers.

1. In Table 1, Mr De Maria says that the qualifications for protection are 'Good faith disclosure to relevant authority'. Wrong. What is required is:
 - (a) a belief on reasonable grounds that the information is true, or belief on reasonable grounds that there is warrant for further investigation;
 - (b) disclosure to an appropriate authority; and
 - (c) that the information is 'public interest information' as defined.
2. In Table 2, Mr De Maria says that a person is not protected if they disclose to the media. Wrong. A disclosure to the media will be protected if it is 'in the circumstances of the case, reasonable and appropriate' to disclose to the media.
3. In Table 2, Mr De Maria says that a person is not protected if they disclose 'involuntarily'. Wrong. The legislation makes no statement about this matter but applies to all disclosures which meet the tests set out above.
4. In Table 2, Mr De Maria says that a person is not protected if they disclose previous wrongdoing. Wrong. The Act specifically applies to disclosures made after it came into operation about events which took place at any time before it came into operation.
5. In Table 3, Mr De Maria says that a person is not protected from contravening secrecy enactments. Wrong. The Act says that a protected person incurs 'no civil or criminal liability by doing so'. Period.

6. In Table 3, Mr De Maria says that a victimised person has no access to an injunctive remedy. Wrong. The Act provides access for the victimised to a civil court or the Equal Opportunity system and both have injunctive powers.
7. In Table 3, Mr De Maria says that a person has no absolute privilege in a defamation action. Since the Act clearly says that a protected person incurs no civil liability in relation to the disclosure, the conferral of absolute privilege would seem superfluous.
8. In Table 4, Mr De Maria says that a victimised person has no access to damages. Wrong. The Act provides access for the victimised to a civil court or the Equal Opportunity system and both have powers to award damages.

Mr De Maria is, I suppose, entitled to publish the unsubstantiated assertion that the South Australian legislation is 'misérably conceived'. He would be much better placed to do so if he could perform the elementary task of reading an Act of Parliament. As it stands, he might be better advised to arrange for the printing of an apologetic series of corrections.

Matthew Goode
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South Australia

Reply from Dr Bill de Maria

Like fridges that don't freeze and planes that don't fly, South Australia has a whistleblower protection law that doesn't work. Rather than face that fact Mr Goode faces me with technical pedantry.

The information in my tables was abbreviated. I can, however, assure the reader that the core material is there for all who would see.

1. Mr Goode contradicts my view of what is required in the South Australian Act (the Act) to warrant protection. Section 2(a) of the Act offers protection when three criteria are met:
 - (i) belief on reasonable grounds that information is true, or
 - (ii) information may be true, and

(iii) disclosure made to appropriate person.

I summarised this to: 'good faith disclosure to relevant authority'.

2. On the point of protection for media whistleblowers in South Australia Mr Goode says that they could technically be protected under s.(2)(b) of the Act. My point is that nowhere in the Act or the second reading speech on 26 November 1992 is there any specific reference to media protection. Instead there is an overbearing philosophy that protection may await the whistleblower who does the 'right thing' and discloses internally.

Perhaps Mr Goode should refresh his memory with respect to s.4 of the Act that sets out quite clearly (and rigidly) the disclosure pathways that must be trod by the whistleblower seeking protection. Deviate from the pathway (such as going to the media) and the Act won't protect you. It can, however, be used as garden mulch for the now unemployed whistleblower to grow vegetables. Like all other whistleblower protection instruments (bar the NSW Act) the SA Act shies away from the biggest test of legislative fair dinkumness — the protection of those who disclose to the media.

3. Mr Goode reads between the lines to proclaim that protection for involuntary disclosures is available under the Act. However, the SA Act does not specifically protect people who disclose, say, under oath, and so we are left with a dangerous level of ambiguity and uncertainty. It would be a very foolish person who made an involuntary disclosure with the expectation that the Act would automatically shield them from reprisal. Whistleblowers demand a level of statutory certainty because their disclosure acts are dangerous. They endanger their health, career and relationships. The last thing they want is a courtroom showdown where the employer's advocate can exploit statutory ambiguity.

4. Mr Goode takes me up on my point that previous wrongdoing is not the subject of protection. He says that the Act specifically applies retrospectively. If it is so 'specific' why didn't he cite the section which provides for this? There appears to be some confusion in the South Australian Government about whistleblower retrospectivity. I have a copy of a letter from the SA Ombudsman to a Senate committee secretary (20 April 1995) in which the Ombudsman unequivocally says: 'however, as a matter of statutory interpretation I am of the opinion that the *Whistleblower Protection Act* arguably does not confer protection for disclosures made prior to the commencement of the Act'. So I ask, who does the whistleblower believe?

5. Mr Goode argues that South Australian whistleblowers are shielded from actions for breaches of secrecy enactments, citing s.5(1): 'disclosure of public interest information incurs no civil or criminal liability by doing so'. He should have

glanced to the left of this apparently catch-all protection because there sits the word 'appropriate' as in 'appropriate disclosure of public interest information'. He would argue that that word is critical to separate the genuine whistleblowers from the whingers, dobbers and ratbags that drafters of whistleblower instruments have nightmares about. I would, on the other hand, argue that 'appropriate' refers more to process than merit or motivation. This goes to s.4 where the 'appropriate' authorities to receive disclosures are set out. So South Australian whistleblowers be warned. If you breach secrecy you commit original sin. The Act has no redemptive powers.

6. On the question of injunctive relief, surely you could park a fleet of Mack trucks between a statute that explicitly offers such relief and a statute that sends you off to an unconnected forum (court) where you *might* get it.

7. On the issue of defamation protection Mr Goode goes back to his neat catch-all '... incurs no civil or criminal liability ...' to argue that the 'conferral of absolute privilege would seem superfluous'. However protection against defamation is uncertain and on the streets of Adelaide there are citizens with information about wrongdoing who will never come forward until 'superfluous' protection against defamation is there in lights. Recently, the Premier of South Australia (Deane Brown) received a formal complaint from a number of people concerned that the State Ombudsman too readily uses his discretion not to investigate whistleblower complaints. Those citizens, who believed they were acting in the public interest sought defamation protection under the *Whistleblower Protection Act* even though the Act does not specifically offer it. More importantly, they were expecting reprisals for acting in the public interest. We await the outcome of this matter with extreme interest.

8. With respect to the final point about damages I can only repeat what I said about injunctive relief.

The South Australian Act is often referred to as the 'oldest' or the 'first' whistleblower statute in Australia. I prefer to think of it as having a premature birth. It predates whistleblower consciousness which really started in Australia in 1993, the same year the Act was proclaimed. Unlike the 1994 NSW whistleblower law which is up for review now, the SA Act has not been reviewed and looks weak when compared to recent efforts, notably the Tasmanian Bill (which was too late for my analysis). Perhaps it's time to take a hard look at the question whether South Australians have the Act they need, let alone deserve.

Bill De Maria

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Women and Imprisonment

by the Women and Imprisonment Group; Fitzroy Legal Service; 1995; 137 pp; \$15.00.

Within the Anglo-Australian criminal justice system, prison is considered the last resort sentencing option. Despite this, an ever increasing number of prison sentences are handed out to women annually in Australia, almost exclusively for the range of victimless poverty-related 'crimes' of property, drug and driving offences. Within the overall framework of sentencing philosophy, rationales for imprisonment are contradictory and include retribution, deterrence, incapacitation and rehabilitation. This book offers a personal and theoretical critique of women's imprisonment, exposing it as a form of social control which creates and perpetrates violence, dysfunction and poverty.

Increasingly, the law and order debate has become a political campaign strategy, whipped up by politicians and the media in an attempt to instil fear in the community generally. Such campaigns have fuelled the passing in NSW of legislation such as the *Community Protection Act 1994* and the proposed *Crimes Amendment (Mandatory Life Sentences) Bill 1995*. It is also used to justify the construction of more prisons, now almost exclusively through private foreign-owned contractors who will also manage these institutions. The recent exposure, late last year, of a NSW Department of Corrective Services performance review of Junee Correctional Centre in NSW found management of the prison, Wackenut Corporation, to be 'prejudiced against inmate education programs' (*Age*, 26 December 1995, p.2). A competitor, Corrections Corporation of America, won the tender for the proposed new women's prison at Melton in Victoria. In the context of overwhelming privatisation of corrections in Australia, it would seem very naive to think that market forces will lead to better facilities being offered by a rival company.

Privatisation is only one of many issues discussed in *Women and Imprisonment*, a collection of papers, personal accounts, poetry and artwork highlighting the issues which women experience in their contact with policing, prison

and post-release. Many of the contributions are papers from *The Changing Agenda: the Women, Imprisonment, Law and Order Conference* held in Melbourne in May 1992. While some of the papers have previously been published, their inclusion meets the ongoing need for comprehensive discussions of women's experience of criminal justice. This book also provides those who were unable to attend the conference with an opportunity to read the papers and acts as a reminder that the issues at stake have remained the same: the disproportionate representation of Aboriginal women in custody; the fact that the vast majority of women are convicted of victimless, drug and/or poverty-related crimes; the overwhelming proportion of women prisoners who have been victims of incest, sexual assault or domestic violence; the discriminatory way in which women are punished, consistently having less access to educational, health and vocational facilities; the highly sexualised way women and their families are punished, including routine strip searching; increasing incidences of self-mutilation, overdoses and suicide; lack of recognition of the specific needs of women, especially in their relationships with children; and the crucial need for adequate housing and support services post release.

A broad feminist analysis is used throughout the book, not only providing the only viable and comprehensive account of women's experience of the criminal justice system but also showing how these institutional structures operate as an extension of the forms of social control operating in the community generally. As Jude McCulloch highlights in one of her contributions 'Women, Prison, Law and Order', men's experience in prison closely resembles women's experience in society: as a rule, men live free from the fear of rape except in prison; in prison, mood altering drugs are used as a means of control but in the general community, women are twice as likely to be prescribed tranquillisers as men; in prison, men experience a form of violence which resembles domestic violence,

hidden, with little chance of escape and with the unlikelihood that the perpetrator will be punished.

Aboriginal women experience the extreme weight of the criminal injustice system through their vast over-representation in custody and highly discriminatory treatment. Helen Corbett and Marian Paxman point out in 'Aboriginal Women and the Law' that the ratio of Aboriginal women sent to prison is increasing dramatically, despite the findings of the Royal Commission into Aboriginal Deaths in Custody. They also show that, in an environment where non-custodial sanctions are tending to be used for low risk offenders (mainly women), the recidivism rate for Aboriginal women is almost three times as high as for non-Aboriginal women, concluding that Aboriginal women are being recharged and re-incarcerated.

The relationship between women and their children is often not discussed in literature on imprisonment, yet in the personal accounts contained in *Women and Imprisonment*, this separation is one of the most significant issues. Without family or partners able to take on the responsibility, women lose their children, who are themselves placed in state 'care', creating a cycle of poverty and generational institutionalisation. Evelyn Robson's description of being placed in a children's home and separated from her brothers and sisters is vivid and moving.

A number of the contributors highlight the importance of maintaining a women-only prison environment as a form of protection against the high incidence of male violence within police cells and in prison. Rikki Dewan's contribution 'In and Out of Prison' is an account of her experience of doing hard time in men's prisons — in the B annex in Pentridge, in Jika Jika and in G division — where women are routinely beaten and strip searched by male officers.

Amanda George's 'Strip Searches: Sexual Assault by the State' exposes the way in which increasing use of strip searching by police and prison officers (justified as a way of detecting drugs) is a state-sanctioned form of sexual assault. Given the established correlation between women's experience of sexual abuse and incest and drug use and the proportion of women who are impris-

oned for drug-related crimes, she points out that practices such as strip searching and enforced urine sampling create a perfect scenario for women's further abuse.

Using the work of women both inside and outside prison walls, *Women and Imprisonment* provides a theoretically rigorous, cohesive and accessible contribution to the growing literature about women's experience of imprison-

ment. We can only hope that it will assist in demystifying one of the most blatant sites of injustice and lead to the eventual dismantling of the walls of confinement.

TRISH LUKER

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In the Shadow of the Law The Legal Context of Social Work Practice

edited by Phillip A. Swain; Federation Press, 1995; 300 pp; \$35.00, softcover.

Many of the 'law for non lawyer' seminars I have run have been for social workers, on the issue of their legal liability. The demand for the topic is substantial and persistent, and the character of the seminar, when I begin it, is often one of fear.

A 'law for social workers' course could be about the law with which social workers work, or the law that holds social workers accountable for the way they work. In my experience, the topic is invariably taken to be about the latter: attendees are there to learn of 'The Law', giving it the same forbidding characterisation that some of their own clients give to 'The Welfare'.

Invariably these social workers have an inchoate feeling that The Law is a threat — that it will pry into their written records, it will require them to attend court, it will forcibly breach the confidence of their clients, it will cross-examine them, it will set them up against their peers and their clients, it will accuse them of negligence, it will challenge their professional conduct. The theme of my presentations is one of reassurance through rational analysis, showing how little a bogie the law really is, and how easy it is to practise social work responsibly with little likelihood of incurring the wrath of The Law.

As for the law with which they work — law relating to families, youth, criminal justice, housing etc. — social workers learn it as they go: they read books and materials, they attend subject-specific courses, and a disconcerting number of them actually undertake law degrees. In doing so (particularly in a law degree) they are rarely able to study law from their own professional

perspective; there is as great a need for course on law-with-a-social-work-bent as there is for a course on law-as-it-governs-social-workers. No single book could sensibly provide the reading for the former, and there are a few books around that cover the latter. *In the Shadow of the Law* tries to be a bit of both.

The title *In the Shadow of the Law* carries for me an air of foreboding, hinting that the book is about the legal governance of social work practice, rather than about the law that social workers work with. Editor Phillip Swain attaches some importance to the title, discussing it under its own heading before the Preface. He believes that the shadow metaphor aptly 'portrays . . . practice reality for social workers', although in his conclusion he sees social work and law in 'useful partnership'. Although it has been 'part of [Swain's] vernacular for years', there might have been a more apt occasion to use it as a book title because, while the legal governance of social work practice seems to be Swain's concern, it is not in fact the principal theme of the book.

Swain's Preface tells readers that the book raises issues of social work practice in a variety of legal settings, that is to say it is about the law that social workers work with. I agree that that seems to be the theme of most of the essays in the book, but not of Swain's own.

In his introductory chapter 'Why do Social Workers Need an Understanding of Law?' Swain explains a social worker's need to understand the law by reference to 'the influence of the law on social work practice and obligations', to 'acceptable practice', to 'account-

ability' and to 'legal constraints upon practice'. His own chapters in the book are on the same theme, and constitute the full extent to which the book is about law as it governs social work practice: confidentiality, record keeping, and administrative review.

Swain's chapters are indeed about the 'shadow' that law casts over social work, and they constitute a good if brief account of the legal issues that govern social workers' practice. Referring to himself as a 'social worker-cum-lawyer', Swain certainly knows the issues, and summarises them clearly. He also outlines answers, giving a general statement of recommended practice that should hold good for most situations. Even so, punctuating the chapters with numerous unanswered hypotheticals is not particularly helpful; social workers can provide plenty of their own anecdotes — they want the answers.

These hypotheticals appear in boxed text — an annoying device because it is used inconsistently in form and content, and often, apparently, irrelevantly throughout the book. In Swain's chapters the boxes might be useful overheads for a lecture when trying to generate discussion, and perhaps that's their origin.

Swain's chapters almost constitute a nicely partitioned second part to the book, but the lie is given to any such plan by the non-sequential appearance of a chapter on 'Social Work Practice and Indigenous Australians' by John Wilson.

Wilson's chapter is a thoughtful reflection on the challenges for a social worker's professional role that are generated not by the operation of The Law, but by a particular legal and social context. As a chapter it belongs earlier in the book, where its theme fits both with Swain's statement about the book's purpose and with the other 13 chapters that cover the diversity of social work practice, from child protection to working with the elderly, from the Family Court to foster care.

To review the dominant thematic strand of the book would be to review 14 different essays, which I do not do here. Many of the essays will be of interest to workers in or students of the particular practice context. To help a prospective reader/purchaser decide, they are listed, for another purpose, in the following paragraphs.

Each essay in its own way is interesting and informative — as a collection they lack coherence of approach, with

no pattern to the issues that are analysed. It seems that no particular brief was given to the authors other than to write about their practice experience and its legal context. The approach taken in each instance was quite different.

Thus some essays include a potted summary of the relevant law and procedure — child sexual assault, corrections, social security appeals, sudden infant death, adoption, and indigenous Australians; some offer an account of underlying principles and philosophies — violence against women, juvenile justice, substitute care, adoption, intellectual disability and indigenous Australians; and some use case studies to analyse the particular area of practice — child protection, the Family Court, social security appeals, schools, and the elderly.

While the essays are jarringly different in their form and focus, they have features in common that are really just overlap. Many of the authors do spend time offering their own, often similar views on the interaction of law and social work. A particularly good analysis is in Jan Breckenridge's chapter 'The Socio-Legal Relationship in Child Sexual Assault'. In the context of a book, repetition of such a discussion is unnecessary, and compounds the sense that the collection lacks an overall cohesion. The essays do not together lead to any suggested thesis on the interaction or partnership between law and social work; Swain's own conclusion is the unremarkable statement that 'some knowledge of law and legal principles is essential for competent social work practice'.

Spencer Zifcak's essay 'Towards a Reconciliation of Legal and Social Work Practice' is alone in its concentration on the meaning of the law and social work. It comes last, before Swain's conclusion, but does not read as if trying to draw together threads from the preceding chapters. Perhaps it should have come first, to impose a pattern before rather than after the event. Zifcak's essay is a concise, clear and authoritative analysis of the vexed question of social work/law, and gives some points of reference for the more subjective accounts that precede it. I wonder if Zifcak intended to contrast his chapter with the rest of the book when he wrote that his purpose was to explore the issue 'more analytically than anecdotally'.

The suggestions for further reading that Zifcak offers are a small, solid collection of the best of the socio-legal

practice analyses, particularly ones that appear often in footnotes in Swain's book: for example, 'Lawyers, Social Workers and Families' by Charlsworth, Turner and Foreman (Federation Press, 1990). It is unfortunate that there is no reference to the substantial and unique empirical study of socio-legal practice undertaken by Mick Hillman and Jane Hargreaves, *A Question of Balance* (Law Foundation/UNSW School of Social Work). The omission may be because it was only released in late 1994.

As a contribution to the debate and analysis of the interaction between law and social work, *In the Shadow of the Law* is scarcely more than the sum of its parts. Perhaps the most constructive way to approach the book is as a 'reader' — a collection of accounts of social work practice to dip into from time to time, or from which to read the one chapter that relates to a particular interest.

However the book is read, its production is disappointing and often frustrating. The boxes I mentioned above pop up erratically, for different reasons in different chapters. Sometimes the chapters are headed with quotes, sometimes not, and occasionally quotes appear above subheadings. One such quote is from an article by the book's editor. The editor's introduction fea-

tures a footnote that refers to the 'eloquent' argument in another chapter — by the editor.

On the issue of 'notes' to the text, they are curious and inconsistent mix of numerical endnotes and alphabetical footnotes. Some references to books and reports include page references, and some do not. The notes use the archaic 'op cit' and 'ibid', but the op cit don't say where in the op is the cit. The text has some typos, and the sort of errors a spellcheck will not pick up: a particular phenomenon is more likely to exacerbate than 'exasperate' injustices in the criminal justice system.

The back cover states that the book is 'essential reading for any practitioner in the human services or social welfare sector'. Zifcak's chapter probably is, and the references he gives certainly are. The rest of the book is a collection of essays, some of which are good enough to be useful reading for people working in the same field. I often wonder whether the exhortation to read such material might better be made to lawyers, who need a much more informed understanding of how social workers see the law. That could be the real contribution of this book.

SIMON RICE

Simon Rice is a Sydney lawyer.

The New Industrial Relations in Australia

edited by Ian Hunt and Chris Provis; The Federation Press, 1995; 182 pp; \$45.00 softcover.

Perhaps what exists in practice is the 'old industrial relations' and a great deal of talk.

Listening to the great deal of talk surrounding the widespread changes to industrial relations laws across Australia, both at a State and federal level, the casual observer could be forgiven for thinking that there has been a fundamental shift in the way Australian employees and employers go about regulating workplaces and resolving disputes. This would, in some respects, be a fair impression. The *Industrial Relations Reform Act 1993* (Cth) has seen the introduction of new mechanisms for creating workplace agreements which exclude unions; the Australian Industrial Relations Commission has undergone structural changes to accommodate a new focus on bargaining and the formation of enterprise agreements; and the Industrial Rela-

tions Court of Australia has been constituted, in part to administer an unprecedented judicial regime of remedying 'unlawful terminations'. The *Reform Act* has also amended the *Federal Industrial Relations Act 1988* to include anti-discrimination provisions.

These reforms at a federal level have been matched, although not necessarily complemented, by reforms at a State level. In particular, the programs of industrial reform adopted by the Kennett Government in Victoria and the Court Government in West Australia have radically affected the extent to which workers in those States are protected by a system of award regulation. The developments from State to State have not been uniform. However, most reflect a decentralisation of employment regulation and a move towards negotiating

employment problems at the enterprise, rather than the industry, level.

However, despite these changes, there remains doubt as to whether we really can talk about a 'new industrial relations'. *The New Industrial Relations in Australia* is a collection of essays and reviews which explore the impact of recent changes to the industrial relations system. The essays present legal, philosophical and economic perspectives on the impact of the changes and the question of whether they really do amount to what could be called a 'new' system.

The question is raised by Malcolm Rimmer in the quote which heads this review. Examples of this new talk abound. Typical of the emerging language of industrial relations is the substitution of 'employee relations' for 'industrial relations' and the use, especially by politicians, of key words such as 'representation, democracy and choice'. This phrase was recently used by the West Australian Minister for Labour Relations in defence of the program of reform adopted by the Court Government. Although made by a proponent of industrial and political reform largely opposed to that of the Federal Government's *Reform Act*, the statement is broadly consistent with the policy of labour market flexibility, especially in relation to non-union Enterprise Flexibility Agreements, which undoubtedly underpins amendments to the *Industrial Relations Act* (Cth) and indicates the extent to which the new language has been adopted across the political spectrum.

Is this 'new'? Malcolm Rimmer in his article 'The New Industrial Relations: Does it Exist?' suggests that although the language may be new, industrial relations is not. He argues that despite the language of reform, which focuses on the decentralisation of regulation and on employee participation, there is little evidence that the system of state-sponsored collective bargaining has undergone any real structural change. Secondly, he argues that little has been achieved in the area of employment contracts, particularly in addressing the persistent problem of the unequal power relationship between the contracting parties. For all the talk of individual choice, the underlying tensions between employers and employees have not been addressed. Finally, Rimmer suggests that the widespread adoption of a 'best practice' style of management has had little success in

creating an industrial milieu in which the parties are able to negotiate win/win outcomes. He suggests that the managers charged with the implementation of these policies are themselves captives of economic prerogatives which undermine 'best practice'.

A further aspect of change is the emphasis on 'representation' as an objective of industrial reform. Although one of the principles claimed by the Minister for Labour Relations to underpin the reforms in WA, it is also a concept which is central to the *Reform Act*. In 'Law and Feminism in the New Industrial Relations,' Rosemary Owens examines the impact of the *Reform Act* on women, particularly in relation to women's representation in the industrial system. Her paper is particularly telling of the gulf which is emerging between the rhetoric and the reality of industrial reform. Although the *Reform Act* is clearly guided by a policy of participatory democracy, especially in allowing for non-union agreements, and although it for the first time makes federal awards subject to anti-discrimination provisions previously to be found in the *Sex Discrimination Act 1984*, Rosemary Owens demonstrates that the federal system of industrial relations is still one which fails to meet the changing needs of women in the workplace. Although the legislation in its present form preserves a safety net designed, in part, to protect women's interests, the *Reform Act* diminishes the operation of the 'public interest' test. The consequence for women is that their interests are only taken into account at the level of the safety net and not at the level of negotiating substantive elements of industrial agreements. This is so because, in Owens' view, legislation assumes a

level of participation and democracy at the enterprise level that simply does not exist in practice.

Finally, the notion of choice in industrial relations is one that is recurrent in modern debate. The emphasis on decentralised regulation and enterprise bargaining brings with it the suggestion that the 'new' model of industrial regulation allows, or should allow, choices and freedoms to the individual participants in the system that were not available under the 'old' system of centralised wage fixing and awards. Choice is often promoted as the ingredient which proves that workplace agreements must be mutually beneficial, as the employees have 'chosen' them. Ian Hunt, in 'Are choices Always Liberating? Dilemmas of "Freeing Up" the Australian Labour Market' attacks the philosophical and scientific assumptions about the operation of free markets. His conclusions suggest that the language of choice, although seemingly radical in terms of Australian industrial relations, does nothing to resolve or change the perennial tension which exists between labour and capital. In philosophical terms, there is nothing 'new' about choice in industrial relations.

It is difficult to resist the conclusion suggested by the contributors to *The New Industrial Relations in Australia* that the cause of the underlying conflicts in industrial relations, namely the unequal power relationship of the parties and the desire of management to make its employment arrangements a source of competitive advantage, persist despite the language of reform.

JAMES HMELNITSKY

James Hmelnitsky is a Sydney lawyer.

Public Interest Perspectives in Environmental Law

edited by D. Robinson and J. Dunkley; Chancery Law Publishing, 1995.

There has been considerable growth in both the volume and complexity of Australian law relating to the environment over the last 25 years. Currently, there are approximately 180 statutes directly concerned with environmental protection and an additional 150 statutes which contain provisions relating to the environment. Under these statutes, there are hundreds of subordinate regulations, environment protection poli-

cies, planning policies, and countless guidelines and other policy documents.

The driving force for the development of this area of the law is the growing consensus that continued patterns of growth, resource consumption and waste disposal are having a serious and perhaps irreversible impact on our environment. Even though it retains a small and sometimes useful role, by and large, the common law has failed to

protect the environment. New issues continue to emerge that warrant urgent legislative action. Recent legislation in the area has attempted to tackle coastal planning, Aboriginal heritage, land clearing, groundwater quality, biodiversity, endangered species, contaminated land and climate change.

An emerging feature of environmental law is the formalisation of a greater role for the public in strategic planning, actual decision making and the enforcement of the legislation. This has not been without resistance. In certain jurisdictions, such as New South Wales, the role of the public is well established. However, in other States, such as Victoria, recent amendments have seen the public's role limited and in some cases removed entirely. In other jurisdictions, the role of the public is *ad hoc* and dependent on the policy of the relevant decision-making authority and the nature of the issue.

With some notable exceptions, the potential role of the public in both the administration and enforcement of environmental and planning law has received scant academic analysis. Even more uncommon is a comparative analysis of international approaches to public interest environmental law. Indeed, books, monographs and major articles undertaking a comparative analysis of environmental and planning law are rare. While some international conferences examine various issues, they lack a rigorous approach to analysis, have a poor theoretical and philosophical understanding of subject matter and, too often, fail to provide a sense of where the law ought to be heading.

In part, this book seeks to address these deficiencies. *Public Interest Perspectives in Environmental Law* is, as the editors acknowledge, a random and incomplete introduction to the characteristics of public interest environmental law in countries from both hemispheres. It seeks to provide a 'public interest perspective' which the editors define as a perspective which seeks to vindicate causes, in particular, human and ecological interests, rather than advance the interests of government, property or capital. This perspective argues that no longer should government have an exclusive role in protecting the public interest. Rather, the complexity and importance of the task warrants a complementary role for the public. This role is to assist the government in upholding the public interest, stopping public nuisances and compelling the performance of public duties.

The book evolved from a conference held in London in October 1993. Essentially, it draws from experience and identifies ways in which the legal system can introduce into decision making a greater awareness of community and environment.

The book is organised into three sections, following the general format of the conference. The first examines international experiences and draws upon the knowledge and experience of various public interest lawyers from South Africa, India, Brazil, the European Community and the United States. The second part examines the position in the United Kingdom on the themes raised in the first part. Part 3 examines the appropriateness of a specialist environmental/planning tribunal or court, largely from the experience of Justice Stein of the New South Wales Land and Environment Court.

As with most conferences and edited conference proceedings, the chapters are of an uneven quality. Some chapters are simply outstanding, while others fail to offer insight or depth of understanding of the subject. In the former category, is the opening chapter by Robinson which details the history of the various public interest environmental law firms in the United States and their contributions in protecting the public interest. Another is a chapter by a South African advocate and lecturer, Francois de Bois, who examines the scope of the constitutional rights for access to environmental justice in the constitutions of South Africa and India. This chapter is particularly relevant for Australia given the refusal of the 1988 Constitutional Commission to consider including a new head of 'environment' power within s.51, the former Government's

recent Access to Justice policy statement, and the recent review by the Australian Law Reform Commission of its 1985 findings on standing in public interest litigation. De Bois argues that the reservations concerning the procedural innovations adopted by Indian courts, and the rights granted by the interim South African constitution allowing greater access to the courts for environmental cases can be addressed by a comprehensive approach to the competing interests concerned. This requires a major commitment to environmental and planning legislation which provides for a significant role for the public. South African and Indian public interest lawyers can thus learn much from the Australian experience.

Part 2 of the book is concerned with the position in the United Kingdom and while this is interesting, it offers a more limited diet of ideas. Part 3 is important for it contains the wealth of experience and practical assistance the Land and Environment Court of New South Wales has provided in matters of public interest litigation for over 16 years. This is relevant for Victoria, Western Australia and the Territories which are yet to see the benefits of a superior court of record for all environmental, planning, building, valuation, compensation and rating matters.

In summary, this work is a timely and important contribution. It should be of interest to students, public interest groups, lawyers, community activists and government. With its comprehensive table of cases and legislation it should also provide an important reference for future work.

NICHOLAS BRUNTON

Nicholas Brunton is an environmental lawyer practicing in Sydney

References continued from Patel article, p.71

5. For example, *Fuduche v MILGEA* (1993) 117 ALR 418; see Allars, M., 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law', (1995) 17 *Sydney Law Review* 204.
6. For a detailed discussion of the increased use of statutory rules and associated problems see, 'Rule Making by Commonwealth Agencies', ARC Report No.35, AGPS, 1992.
7. Section 10, though note s.10(b) provides that children born in Australia after August 1986, who reside here for 10 years will be citizens.
8. Duignan, J. and Staden, F., *Free and Independent Immigration Advice*, BIPR, 1995, p.49.
9. Section 52 *Disability Discrimination Act*. The only other exemptions are in relation to the defence forces, Australian Federal Police, and Telstra with respect to public phones.
10. Unlawfuls are no longer deported, but removed. The only determinations to be made before a person can be removed are that they are unlawful and any visa applications have been finally determined (*Migration Act*, s.198).
11. Cronin, above, ref. 2, p.102.
12. Unauthorised arrivals who are either under 18 or over 75 can be released on a bridging visa E Subclass 051, Schedule 2 Migration Regulations 1994. Unauthorised arrivals must be released if detention exceeds 273 days; however time taken for, among other things, matters outside the control of the DSEA is not counted (*Migration Act*, s.182(3)).
13. See Poynder, N., 'Marooned in Port Hedland', (1993) 18(6) *Alt.LJ* 272.
14. DSEA MPMS Data, Overseas Client Services Division, 24 November 1995.
15. Cronin, above, ref. 2, p.104.

Uniform Evidence Law

by Stephen Odgers; Federation Press, 1995; 353 pp; \$50 softcover.

Annotated Commonwealth Evidence Act

by Philip Sutherland; LBC Information Services, 1995; 516 pp; \$55 softcover.

A Guide to the Evidence Act 1995 (Cth)

by J.D. Heydon; Butterworths, 1995; 211 pp; \$50 softcover.

The law of evidence has been under law reform review for so long that it seems amazing that something has finally come of it all. The New South Wales Law Reform Commission first received a reference on the law of evidence in 1966. The Australian Law Reform Commission received its own reference in 1979, and eight years later submitted its final report, recommending that the law of evidence be comprehensively restated in statutory form. Eight years further on, the Commonwealth and New South Wales Parliaments did just that, passing substantially identical legislation based, in the main, on the ALRC's draft Bill. The Acts came into force on 18 April and 1 September 1995 respectively. The Standing Committee of Attorneys-General has agreed to consider following the Commonwealth and New South Wales lead, so it is not inconceivable that by the end of the decade uniform evidence legislation could apply in all Australian jurisdictions.

The reforms brought about by the Acts are far too numerous to list, but their general thrust is to introduce a greater degree of flexibility into the law of evidence, and to place more discretion in the hands of the trial judge. In the long term this will hopefully result in more attention being given to the probative value of a particular piece of evidence, in light of the use to which it can permissibly be put; and correspondingly less attention being given to the question of whether the evidence in question meets the technical definition of a particular rule of exclusion. The new law of evidence will no doubt take some getting used to, so it should come as no surprise that the publishing industry has collectively spotted an opportunity. Writing this review feels a bit like writing for *Choice* magazine: each of the books is intended to serve the same purpose, two of them follow the same format, and many of the annotations refer to precisely the same material. So which one is the best?

The least useful it seems to me is Heydon's *Guide to the Evidence Act*. This is an odd book with no real cohesion between its constituent parts. Those parts comprise Heydon's commentary on the Act, together with the legislation. The commentary seems designed to serve two purposes: first, to summarise the various provisions of the Act; and secondly, to expose shortcomings in its drafting. But unlike the other two works where the commentary is integrated with the legislation, in Heydon's book the commentary and legislation are kept separate. This means that when referring to a section of the Act one is unaware of whether or not there is any commentary about that section; and when reading the commentary, one is unable to look at the relevant section at the same time. No doubt this format is explained by the fact that the commentary has also been produced for inclusion in the looseleaf and bound editions of *Cross on Evidence*. If you have access to either of these works — as you should — then the works under review here are redundant. If you do not, then I would suggest that the article by Mr Justice Smith, 'The More Things Change the More They Stay the Same? The Evidence Acts 1995 — An Overview' (1994) 18 UNSWLJ 1 provides a more accessible summary of the Act, and that Odgers and Sutherland both provide a more detailed and useful section by section analysis of the legislation.

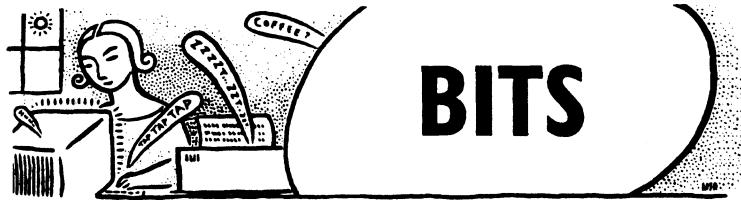
The choice between Odgers and Sutherland is a more difficult one to make because the two works have such similar formats. Both contain a brief introductory overview of the Act and its aims, and then reprint the Act and related legislation together with a section by section commentary. Even the commentary has much in common, for both list the references to the relevant paragraphs of the two ALRC reports on which the Act was based and to other institutional material such as the ex-

planatory memoranda. Although Sutherland's references are probably more exhaustive, when one looks at the quality of the commentary each work offers, it becomes clear that Odgers' is by far the superior work. His analysis of each section is clear and to the point, and succinctly places the new law in the context of the old. Sutherland's commentary is far less helpful. For example, when discussing the new hearsay rule, Sutherland digresses into a lengthy analysis of the High Court's decision in *R v Benz* (1989) 168 CLR 110. *Benz* no doubt provides an example of the kind of 'unintended representation' (to use the terminology of the Act) or 'implied assertion' (to use the terminology of the common law) which is no longer to be considered hearsay, but why it was thought necessary to discuss each judgment in that case is beyond me.

The quality of the commentary is enough on its own to give Odgers victory; but there are several other advantages to Odgers' work. First, the paragraph numbers in *Uniform Evidence Law* correspond to the section numbers of the Act; those in the *Annotated Commonwealth Evidence Act* do not. Secondly, *Uniform Evidence Law* covers both the Commonwealth and NSW Acts, whereas Sutherland has written separate volumes for each Act (the *Annotated New South Wales Evidence Act* is due out in March). Thirdly, *Uniform Evidence Law* is a little bit cheaper. This is, no doubt, because it is a good 150 pages shorter. The difference in length is mainly due to the fact that the *Annotated Commonwealth Evidence Act* reprints a flotilla of legislation omitted from *Uniform Evidence Law*, including the *Acts Interpretation Act 1901*, the Foreign Evidence (Foreign Material — Criminal and Related Civil Proceedings) Regulations and the International Covenant on Civil and Political Rights. Whether or not all this additional legislation is necessary will no doubt depend on the individual reader; but in my view the additional legislation is the sole advantage that the *Annotated Commonwealth Evidence Act* has over *Uniform Evidence Law*. Finally, *Uniform Evidence Law* has a much more attractive cover. The best choice? *Uniform Evidence Law* by a mile.

ANDREW PALMER

Andrew Palmer teaches law at the University of Melbourne.



BITS

Bones

by Gabrielle Lord; Penguin 1996, 479 pp; \$14.95.

Gabrielle Lord seems to have a thing about violence against children. The plot of *Bones* is based around a hunt for a child serial killer. Her previous novel, *Whipping Boy*, dealt with paedophilia and corruption. Despite her interest in this invariably horrific subject, Lord is never ghoulish or gratuitous.

Bones deals sensitively and believably with aspects of child abuse and its treatment, including repressed memory syndrome and the value of hypnotherapy. Lord writes in a fluid, gripping style and her characters are solid and engaging. *Bones* is a chunky crime novel that is definitely worth getting to gulp down on holidays. ● FW

Dead Man Walking

Directed by Tim Robbins; Rated MA; Screenplay adapted by Tim Robbins from the book by Sister Helen Prejean.

In the last few months I've spent a lot of time watching films about prisoners. The first instalment was *Murder in the First* about a prisoner who was placed in solitary confinement for three years in Alcatraz. Kevin Bacon gives a strong performance but the film is harrowing in a very Hollywood way: all flashy description and no depth. Then came *Captives*. Again the lead actors, Tim Roth and Julia Ormond, are good but the plot strains credibility in parts. Both of these films were scoring a comfortable A minus until I saw *Dead Man Walking*.

Dead Man Walking is an intelligent exploration of the morality of punishment and revenge. The horror of murder is juxtaposed against the sterile brutality of execution as director, Tim Robbins, raises important questions about redemption, love and the role of Christian spiritual guidance.

Robbins has done it the hard way. The film focuses on one death row prisoner who clearly played some part in two unprovoked, vicious murders. We are not given the comfort of doubting his conviction but must instead concen-

trate on thinking about what kind of punishment is fitting. Both lead actors, Susan Sarandon and Sean Penn, give measured, flawless performances perfectly complemented by the original soundtrack. This is the most compelling film I've seen in a long time.

Dead Man Walking deserves instant membership of the great films about (in)justice hall of fame, alongside *Twelve Angry Men*, *To Kill a Mockingbird*, and *In the Name of the Father*. Believe the hype. ● FW

Police Leadership in Australasia

edited by Barbara Etter and Mick Palmer; Federation Press, 1995; \$45.

The launch of this book in February 1996 must have been a marketer's worst nightmare. How do you promote a book about police ethics in the middle of a Royal Commission into the NSW Police Service? What's more it is book about police management, about police professionalism (many of them certainly look good on camera) and about policing beyond the year 2000. Oh dear.

As if the NSW Royal Commission is not showing us enough about how good police management is, it also revealed in passing a bit of corruption among a number of AFP officers. Victorian police have their own corruption problems, involving, at last report, about 100 officers as well as persecution of a whistleblower. Such matters might be kept in mind as one dips into the chapters in the book by the various police chiefs.

The barely more than descriptive chapter on the success of civilian oversight of police in NSW via the Ombudsman raised a chuckle given that the Royal Commission's Interim Report recommends the creation of a new Police Corruption Commission to have ultimate authority over the investigation of all complaints against police.

Bravely the Introduction to the book says it '... is very much focussed on future directions and challenges. It does not dwell on the deficiencies of the past.' As events in NSW are showing, the 'deficiencies of the past' are the

deficiencies of the present and would have remained the deficiencies of the future but for the Royal Commission.

Whatever good material is in the book the problem seems to be the authors are trying to build a house from the roof down. ● PW

Blasphemy

NSW Law Reform Commission Report No. 74, \$10.00.

The first thing that strikes you about this report is how very very seriously the Commission took the whole thing. Why should a crime like blasphemy be taken seriously when it comes to law reform? The report could have said: 'The criminal law has no place dealing with opinions expressed about one specific religion and the state has insufficient interest in the supernatural to justify expanding such a crime to cover any other religions'. See, only 34 words instead of 63 pages with two appendices.

One only need remember that Galileo was accused of blasphemy in 1616 for certain views about life and the universe but while he was let off with a caution he couldn't help himself and in 1632 was fitted up for continuing to espouse his views. It took until the 20th century for the church to decide it had got it wrong and quash the conviction. There is no place for such a crime in this century.

The Commission favours the abolition of the common law crime of blasphemy and as long as it does not re-emerge under any vilification legislation of any sort good riddance to it. I do not think the Almighty will mind. ● PW

BITS was compiled by Frith Way and Peter Wilmshurst.



NOTICES

PUBLICATIONS

Law in Context Call for papers 1997

Law in Context is the journal of the School of Law and Legal Studies at La Trobe University. Academics who have not published in the Journal before or who are unfamiliar with its style are welcome to contact the Editor, Christopher Arup, tel 03 9479 2284, fax 03 9479 1607

Children and the Law

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recently launched their Issues Paper, *Speaking for Ourselves: Children and the Legal Process*. The paper is part of a two-year national inquiry into children and the legal process which aims to ensure that court processes and wider government decision-making systems respond to the needs of children. The Commissions will begin holding public hearings and consultations between April and August. For details contact Rita Shackel on (02) 284 6350.

HAPPENINGS

Motor Accidents Inquiry (NSW)

On 12 December 1995 the Legislative Council (NSW) referred the Motor Accidents Scheme to the Standing Committee on Law and Justice. The terms of reference for the inquiry are:

1. That the Standing Committee on Law and Justice inquire into and report on the Motor Accidents Scheme and compulsory third party insurance and in particular:
 - (a) examine and report on the role of insurers participating in the scheme;
 - (b) examine the accountability and oversight mechanisms of insurers and the Motor Accidents Authority under the scheme; and
 - (c) examine the concerns of insurees, levels of claims and compensation as well as legal fees and other such matters as the committee finds appropriate.
2. That the committee obtain such expert advice as may be necessary to assist the committee with its inquiry.
3. That the Government provides such resources as the committee feels is necessary to undertake the inquiry.

4. That the committee give a progress report within 12 months of the date that the House adopts this resolution.

Submissions should be addressed to: Director, Standing Committee on Law and Justice, Legislative Council, Parliament House, SYDNEY NSW 2000, tel 02 230 3311, fax 02 230 3371

Scholarship up to \$30,000

The Banking Law Association Ltd announces the Banking Law Association Scholarship to contribute to the costs of undertaking post graduate study in law at the university of the successful applicant's choice. Applications close 11 June 1996. Enquiries to Ms F. Stewart, tel 07 5533 1339.

CONFERENCES

National Conference of Community Legal Centres

Date: 27-30 August 1996
Venue: YWCA, Elizabeth St, Melbourne

Contact: Gillian Wilkes and Trudi Brunton
Federation of CLCs (Vic.)
Secretariat
tel 03 9602 4949

The Threatened Species Conservation Act 1995... in Action

Date: 31 May 1996
Venue: Australian Museum, Sydney
Contact: Tessa Bull
tel 02 261 3599, fax 02 267 7548

Making the Connections

Training pathways to secure employment
Organiser: ACOSS Linkages Project
Date: 22 May 1996
Venue: Lyceum Theatre, Wesley Conference Centre, 220 Pitt St, Sydney
Contact: Susan Newell
tel 02 332 4355, fax 02 332 151

Immigration and Australia's Population in the 21st Century

Date: 20-21 May 1996
Venue: ANU, Canberra
Forum to discuss the role of immigration and Australian population change in the next century.
Contact:
tel 06 249 2247, fax 06 249 0182
email:
ceb302@coombs.anu.edu.au

Second Women in Migration Conference

Date: 3-4 June 1996
Venue: Wesley Centre, Sydney
For those interested in the place of migrant women in contemporary Australia. Three themes: the

changing family context; employment, training and business; rights, power and participation.

Contact: tel 03 9819 3700
fax 03 9819 5978

Citizenship, Accountability and the Law

Date: 17-21 June 1996
Venue: Melbourne
Contact: Sarah Biddulph, tel 03 9344 6200 or Sandy Cook, tel 03 9479 2284.

Community Work, Youth Work and Popular Education Conference

Date: 24-26 June 1996
Venue: Haymarkets campus of UTS, Sydney
Contact: Karen Vaughan
tel 02 330 3807, fax 02 330 3939

Australian Society of Legal Philosophy Annual Conference

Date: 7-8 July 1996
Venue: Brisbane
Contact: Adrian Diethelm
tel 07 3365 2120,
fax 07 3365 1466, email:
a.diethelm@mailbox.uq.oz.au

The Australian Institute of Criminology will host the following conferences this year:

Australian Law and the Diplomatic Community
3 June 1996, Canberra
Superannuation Fraud
21 June 1996, Melbourne
The First Australasian Women Police Conference
29-31 July 1996, Sydney

Preventing Property Crime: New Strategic Directions
2 September 1996, Sydney
Family Violence
October 1996, Adelaide

For details contact Conference Administration on (06) 260 9200.

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*Police thrust their batons at protesters at a Melbourne demonstration.
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Photo courtesy of *The Herald and Weekly Times*

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OPINION

The rhetoric of arms in the Australian colonies

Reverend Newett said Tasmanians had a right to own guns and that while the Port Arthur massacre had provoked immediate action, problems such as abortion and AIDS were ignored.

'Who's banning the sex guns of the homosexual lobby groups?' Mr Newett asked.

*The Saturday Mercury, p.9
15 June 1996*

Australians appear to have a distinct penchant for the second-hand. Anti-queer law reform groups in Tasmania have for some years been parading about the public stage in the theoretical hand-me-downs of our Big Brother the United States, one prime example being the counselling-and-conversion-therapy strategy characteristic of the US Exodus program which came to be deployed by our very own For a Caring Tasmania. Now the gun lobby, too, appears content to array itself in the US's drab 'colours'.

Since the horrific events at Port Arthur we have seen a rapid proliferation of classic discursive strategies of the US right, such as the vehement assertion of a putative (I reflect with sullen pleasure that at least in this country they cannot claim it to be 'constitutional') right to bear arms. A supposed rationale for such a right is the defence of the individual against despotic government, and the defence of the Family from, *inter alia*, rampant Crime, such as the 'home invasions' which were so topical a short time ago.

On the basis of the foregoing the naïve observer might be forgiven for believing we presently exist in some sort of post-apocalyptic war-zone. There is no doubt that the rhetoric of the gun-bearing right in this country betrays a feeling of being under siege — betrayed by a conservative federal government, the Family disintegrating about its ears, and, at least in the view of Reverend Newett, the homosexuals firing their 'sex guns' (a delightfully phallic metaphor, I rather think) left, right and centre.

Why is it that US political rhetoric is so popular in Australia? Why do we appear destined/doomed to ape the discourse of our American cousins? And further,

why do these transplants appear so depressingly successful? How is it, to come to the point, that an argument for gun ownership which is so local, so specific to the legal and historical context of the United States, can flourish so successfully in foreign soil?

Without any extended reflection, three possibilities leap to mind. One, perhaps we are simply witnessing (what are hopefully the last) vestiges of the much-maligned 'cultural cringe', that is, 'all good culture comes from Europe' has become 'all good theory comes from North America'. Two, perhaps it simply reflects the insidious /all-pervasive influence of US culture. We are increasingly a Global Village and its name is Microsoft/ Foxtel/ [insert megacorp of your choice here]. Or the third possibility — perhaps these transplants are not in fact successful. After all, it appears, despite the protestations of the gun lobby, that a fairly stringent regime of firearms regulation is in the offing. I wonder whether the far right occupies the public's attention not so much because their rhetoric of rights makes any sense in an Australian context, not because it rings true in the average Australian ear — as I have suggested, I rather think it does not — but simply because the media, expressing its characteristic love of the odd-ball, gives them 'equal time', that is, time disproportionate to their appeal. This does public debate no service; nor does it aid the cause of those moderates such as farmer groups who counsel caution in our legislative response to the massacre.

I wonder whether it is not time that Australia came of age and public discourse in this country finally gave away trying to equate the Eureka Stockade with the American War of Independence. Guns are not core cultural constructs here. It is to be hoped that they shall never become such. The impending legislation is one step in this direction.

Myke Dobber

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VICTORIA on the *Move! Move! Move!*

Jude McCulloch and Marcus Clayton

The military-style training and ethos of police was alarmingly apparent at two Melbourne demonstrations.

Reproduced with permission from *The Age* and Ron Tandberg.



Q: See now the consequences of your agitation?

A: No, but see the consequences of impolitic coercion.

Commissioner of the Ballarat Goldfields and digger involved in the Eureka uprising.

On 13 December 1993 shocked Victorians saw television news images of protesters outside Richmond Secondary College in Melbourne attacked by baton-wielding police. The protesters were maintaining a Trades' Hall endorsed picket line outside the inner suburban college in order to thwart its attempted closure by the Kennett Government. In the immediate aftermath of the incident, Assistant Commissioner Church warned that police were upgrading their 'public policing policy' (*Age*, 14 December 1994). Only two months later, on 10 February 1994, Victorians were again shocked by media images of police applying obviously excruciating pain compliance holds, including pressure point neck holds, to citizens engaged in a peaceful protest outside the Department of Conservation and Natural Resources in East Melbourne. That protest was over the Government's old growth forest policy.

The police operations at these two protests were criticised in a special report by the Deputy Ombudsman (Police Complaints).¹ The report about the Richmond incident concluded that the police tactics amounted to a 'radical departure' from those previously used and that 'the standard of reasonable force was exceeded' (pp.74 and 78). In relation to the behaviour of police at East Melbourne it was concluded that 'the evidence clearly indicates that the action was grossly excessive and without justification' and the police tactics 'had the potential of causing serious injury and even death' (p.101).

The events at Richmond and East Melbourne provided the impetus for a freedom of information request by the Western Suburbs Legal Service, a community legal centre and active member of Victorian legal centres' long standing Police Issues Group. The request, made under the Victorian *Freedom of Information Act 1982*, sought access to documents relating to the squads involved in the two incidents and police planning. The police refusal to release all requested documents resulted in a hearing before the Administrative Appeals Tribunal (AAT) in June 1995 where the legal service argued, among other things, that the public interest required the release of the documents. In the lead-up to the hearing the police released many documents they had previously claimed were exempt under the Act. A decision was handed down by the Tribunal in August 1995 to vary the decision of the police and grant access to a number of documents in dispute. The freedom of information request and subsequent Tribunal hearing proved highly successful in gaining access to information and documents not formerly available to the public.

The behaviour of police at Richmond and East Melbourne raises a number of concerns. Included amongst these are the role of specialist

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squads, the influence of military philosophy and training on police response to demonstrators, and the importation of policing methods from countries with vastly different social and political conditions. Documents released by police in the lead-up to the AAT hearing and evidence given by police during it highlight these concerns.

Police response to criticism

In the aftermath of the controversy surrounding the events at Richmond and East Melbourne and the release of the Ombudsman's critical report, police command indicated that crowd control methods would be reviewed. Although originally defending the use of pain compliance techniques at East Melbourne the (then) Deputy Commissioner for Operations, Mr Falconer, issued a media release, three days after the event, indicating that the police action at the demonstration had been inappropriate and that police training in crowd control, including pressure point tactics, would be reviewed.² On release of the Ombudsman's findings the Deputy Commissioner for Operations, Mr Church, described the tactics used as 'radically different from normal police policy' and said he was now 'quite satisfied' that other tactics should have been used. He said '... I accept totally that there were some errors of judgment and some of the actions were totally inappropriate'. Mr Church also said that individual members of the police criticised in the report would be investigated and 'depending on the outcome of those investigations appropriate action will be taken' (*Age*, 30 November 1994, pp.1 and 4).

Subsequent to the Ombudsman's report and the comments of police command it was (understandably) widely accepted that the events at East Melbourne and Richmond would not be repeated. The *Herald Sun*, for example, reported that:

Demonstrators can be almost certain police will not use those baton-wielding tactics again... Why? Because the deputy Ombudsman (police complaints) Dr Barry Perry in his reports to State Parliament has told them not to do so. Such is the reputation of the man and his office, that police put up their hands immediately after the critical reports were released and admitted they got it wrong. No whingeing, no buts, just a promise to implement the accompanying recommendations. [3 December 1994, p.5]

However, within weeks of the release of the Ombudsman's report there was an indication that not all police agreed with his findings. Inspector Mawkes, Officer in charge of the Force Response Unit (FRU), and the 'venue commander' at Richmond Secondary College, told the Magistrates Court, during proceedings against several people arrested at the college, that police had no alternative but to use batons against demonstrators (*Age*, 16 December 1994, p.3).

Evidence given by Inspector Mawkes and other senior police at the AAT suggests that the Ombudsman and his office do not enjoy the reputation among police that the *Herald Sun* suggested. Inspector Mawkes said of his interview with the Ombudsman's staff that:

It's probably one of the most shabby interviews I've ever been involved in, and the two people concerned I would say had no experience as investigators. [p.99 transcript]

Inspector Mawkes told the Tribunal that he did not accept the Ombudsman's findings and did not understand why he had to give weight to the report (pp.156 and 159). He was asked:

So, whatever the Ombudsman said about the use of it [level 4 — 'baton drill' used against demonstrators at Richmond], as

far as you are concerned, it's still a matter that's available to be used by you?

He answered:

It's available now and there's been a separate inquiry into it and I know for a fact that the inquiry results were that there's nothing wrong with the method we use. [pp.144-5]

Inspector Mawkes also told the Tribunal that subsequent to the Ombudsman's report there had been no change to the training of the FRU (the unit responsible for the baton charge). Moreover, he said that not only had the FRU training not been modified but that training specifically designed for the squad had been adopted across the police force as a training package that was taught in regions and to recruits (p.64).

The officer responsible for the training in relation to the pressure point holds told the Tribunal that he did not believe that the application of the holds at East Melbourne had amounted to excessive force [p.333]. He did say, however, that above the shoulder pressure holds were no longer taught or used (p.350).

On 23 May 1996, more than two years after the event, senior police finally announced that eight former and serving police faced disciplinary action over their behaviour at Richmond. Before any action is taken, however, the police involved will be given the opportunity to respond and no criminal charges will be laid against any police (*Herald Sun*, 24 May 1996, p.9). On 27 May 1996 the *Age* newspaper reported that, two weeks after the Richmond baton charge, a district commander recommended that ten of the police officers involved be commended for leadership, 'control of resources, and devotion to duty'. At least four of these ten officers are amongst those current facing disciplinary charges.

Given that the tactics at Richmond and East Melbourne arose out of training programs designed for special squads for use at demonstrations, they are not likely to go away unless the squads trained in their use are disbanded or significantly modified. Commenting on the impact of the use of the special squads at the demonstrations the Ombudsman reported that:

In each demonstration, the action complained of by the demonstrators of excessive force or that tactics used by the police were disproportionate to their objectives, followed the introduction of 'specialist' units of police specifically trained in newly adopted techniques for crowd and demonstrations control. By their nature those techniques were a radical departure from previous tactics adopted by police in Victoria. The actions of the specialist units were generally in accordance with training but were implemented in the absence of both adequate intelligence and crowd behaviour of such a nature which would have required such force. Yet such actions had the potential for creating riotous behaviour and for causing serious injury or death. [p.103]

Special squads

The FRU and the Protective Security Group (PSG) were represented in the greatest numbers and took the most active roles at the Richmond and East Melbourne incidents. Of the 177 police present at Richmond Secondary College on 13 December 1993, 70 were members of the FRU and 30 were members of the PSG. The FRU was responsible for the baton charge and PSG members made up arrest teams at Richmond. Of the 66 police present at East Melbourne, 12 were from the FRU and 12 were from the PSG. The PSG was responsible for the application of the pain compliance holds.

VICTORIA ON THE MOVE! MOVE! MOVE!

The PSG is divided into two divisions. The Special Operations Group (SOG) is one of the units in the first division. The SOG was established in 1977 primarily in response to a perceived terrorist threat. It is a paramilitary squad based on the Army's commando regiment, the Special Air Services (SAS). The group trains with the SAS, includes former members of the SAS and other Army units, regularly conducts joint exercises with the military, and is equipped with military equipment including sub-machine guns, M16 rifles, Australian Army standard issue Steyr point 223 rifles, chemical weapons, stun guns, electrified shields, and four wheel drive assault vehicles.³ The group is referred to in one police annual report as 'police army units'.⁴ International links form an important element in SOG training. A Chief Inspector with the SOG told the AAT hearing he had travelled overseas to study paramilitary-style groups such as G-9 in West Germany, the Royal Canadian Mounted Police, and groups in England and the United States (p.241-2). Although the group's existence and training are predicated on its counter-terrorist function, the actual operations of the group are in more conventional areas of police work. As a result of a recent review, the SOG's operations are to be extended even further into everyday policing (*Herald Sun*, 30 August 1995, p.3).

Jenny Hocking, author of the book *Beyond Terrorism: the Development of the Australian Security State*, gave expert evidence at the Tribunal on behalf of the legal service. She submitted that police exposed to counter-terrorist training regard protesters and demonstrations as potential sites for politically motivated violence and are therefore at risk of developing negative attitudes towards citizens who participate in protest actions, regarding them as subversives or quasi-terrorists.⁵ The SOG provides 'a containment, dispersal facility for civil disorder'.⁶ Giving evidence at the AAT, the SOG's Chief Inspector said that members of the group were not present at the Richmond or East Melbourne events but they may have been involved in other demonstrations. A photograph in the *Australian* newspaper in 1992 shows a number of police dressed in riot gear, including long shields and helmets, in the basement of Parliament House ready to be used outside at a student demonstration taking place over proposed changes to AUSTUDY (*Australian*, 16 April 1992, p.4). A news item in the same paper the next day states that police were concerned that members of the SOG might have been identified from the photograph. The Chief Inspector could not confirm or deny the newspaper's assertion that it was the SOG featured in the newspaper photograph (pp.303-4).

Although the SOG is relatively small in numbers, currently comprising 40 members, it has had a marked impact on the culture of the police force, undermining the traditional philosophical, social and legal distinctions between police and soldiers. The group has had an effect disproportionate to its numbers partly because its members and former members are heavily involved in training of other police.⁷ Members of the SOG also move laterally within the PSG and are regularly temporarily seconded to other parts of the police force. The officer in charge of the controversial raid on a Melbourne gay night club in August 1994, where 463 people were strip searched, was an SOG officer on temporary secondment.⁸ Despite the group's intensive military-style training, no debriefing is given to members when they leave the group to take up regular police duties.

The other unit in the first division of the PSG is the Counter-Terrorist Intelligence Section (CTIS) (which has

recently been renamed the Protective Security Intelligence Unit). The responsibilities of the CTIS include:

The collection, assessment, collation and dissemination of information concerning individuals and groups of individuals or organisations likely to engage in criminal terrorist activities and/or acts involving politically motivated violence within Victoria and elsewhere.

The section is also responsible for:

Maintaining previously established links, and developing further contacts with other security agencies and government departments.⁹

The CTIS was active at the Richmond protest. A police document reveals that extensive video footage taken by the police of the protesters was examined by members of the section who identified 'International Socialists and others' in the crowd. The names of the people identified and described in the CTIS document as 'urgers' were passed onto the Assistant Commissioner of police.¹⁰ It is likely, given the functions of the unit as set out above, that the names were also passed on to other agencies such as the Australian Federal Police and the Australian Security Intelligence Organisation. The activities of the CTIS at Richmond demonstrate the tendency of those in police and security circles to slide between terrorism and activism, and confirms that Special Branch type police are still functioning in Victoria, albeit in the service of counter-terrorism rather than anti-communism. The characterisation of protesters as terrorists lays the foundation for SOG involvement in future demonstrations.

Number two division of the PSG includes a squad of 130 members called (confusingly) the Protective Security Group (PSG2). One of the PSG2's functions is to provide 'a riot response' at demonstrations and to this end the group is equipped with long and short shields and helmets. The members responsible for PSG2 crowd and riot training for the previous nine years are former SOG members. One of the police documents obtained in the AAT case indicates that the group and their riot gear were on stand-by in December 1993 at a march opposing the closure of Richmond Secondary College organised by teacher unions. There is no history of secondary school teacher unions being involved in violence at protest actions. That riot gear is apparently so readily deployed in anticipation of its use suggests that it is only a short step to its actual use, a possibility made more likely by the negative characterisation of demonstrators and the tendency among police to overstate the potential for violence at demonstrations, issues taken up below. The FRU was set up in 1993 and consists of 120 members trained in crowd control tactics. The officer seconded to set up the group and in charge of its training is a former SOG member. The baton charge at Richmond Secondary College is described by police as a 'level four' response. 'Level four' is part of the training specifically designed for the group. FRU baton training instructs members to hit people between the shoulder and the waist, although a document produced by Victoria Police Office of Forensic Medicine indicates that the abdomen (an area above the waist) is to be avoided, as a blow in that area can cause sudden collapse and rupture of internal organs.¹¹ That the tactics of the FRU represent a departure from previous police tactics is well illustrated by the military style precision evident in the execution of the 'baton drill' used at Richmond. A FRU Senior Sergeant agreed with the Deputy Ombudsman that the group had taken a 'militaristic' approach, running down the street to form a cordon in front of

the protesters (p.51). After forming the cordon the members of the FRU stood in the 'reverse at ease' position. After warnings were read to the picketers, the FRU advanced towards them. The movement was 'slow and deliberate and commenced about 10-12 metres from the picketers'. The advance was made one step at a time. Taking steps in unison the police set up a chant; with every step each police officer yelled 'MOVE!'¹² On reaching the picketers, FRU members continued to advance jabbing those in front of them with their batons. Picketers at the front of the crowd were unable to move because of obstructions behind and thus bore the brunt of the 'advance'. Some picketers were hit over the head with batons, eight required treatment from ambulances called to the scene, and three were taken to hospital.¹³

In the lead-up to the AAT case, sections of some of the crowd control training manuals used by the squads described above were released to the legal service. Sections referring to tactics and equipment were not released.

Australasian and South West Pacific Region Civil Disorder/Dissent Manual

The legal service obtained parts of the 'Australasian and South West Pacific Region Civil Disorder/Dissent Manual' (ASWPCD/DM). The Deputy Ombudsman's report refers to the manual as one of the two sources of instruction to police for controlling demonstrations and crowds (p.65). The document, dated 1986, was the initiative of a Police Commissioners' conference held in Papua New Guinea the previous year and its objective is 'to provide common policies and guidelines to all forces throughout Australasia and the South West Pacific Region in the control of civil disorder'. That the document exists at all is testament to the priority police in Australia give to public demonstrations particularly as the Chief Commissioners' conference, according to police who gave evidence at the AAT, has not initiated any other manuals of a similar regional nature (pp.368-9).

The document was written for application in a range of countries including Fiji, which in recent history has undergone a military coup, and Papua New Guinea, parts of which are in the midst of a civil war. It is extraordinary that Australian Chief Commissioners believe that policing methods thought suitable by the authorities in Fiji and Papua New Guinea are appropriate in Australia. The concern that Australian police are importing methods designed in countries with much higher levels of social conflict is underlined by the very first paragraph of the ASWPCD/DM which refers to the situation in Northern Ireland and the Brixton and Birmingham 'riots' in England during the 1980s.¹⁴ The PSG2's training officer told the AAT that training given to Victoria police draws heavily on British methods (p.359). The tactics adopted by British police towards demonstrators and disturbances have been criticised for escalating disorder.¹⁵ The possibility of police escalating disorder is heightened if the methods used by British police, designed for much higher levels of conflict, are used in the Australian context. By importing crowd control tactics adopted in different social contexts, Australian police are likely to create the very disorder they are purporting to prevent.

The title of the document, including as it does a reference to dissent, as distinct from disorders, suggests a police preoccupation with matters outside what is supposed to be their legitimate sphere of operation. Dissent, according to the dictionary, means 'to think differently: to disagree in opinion: to differ'.¹⁶ Opinions, whatever their content, are not the

proper concern of an agency that espouses crime prevention and detection and keeping the peace as its major functions. That a manual which provides guidelines for police forces throughout Australia suggests that opinions are legitimate police concerns is an issue with obvious and alarming implications for civil liberties.

The tone of the document suggests a hostility to public protest and those who participate in it. Le Bon's 1895 theory of crowd psychology is outlined in the introduction of the manual, part of which reads:

individual members of the crowd tend to lose their identity, or it becomes weaker, and they share it with others around them. Those elements of the human personality which control the usually latent but none the less powerful feelings of aggression, which in ordinary lay language we term 'Conscience' and 'Discipline', are weakened and if excited by oratory, by rumours injected into the crowd, by fear, by voices from unofficial leaders within the crowd, may be violently released.

Le Bon's theory, and the manual by repeating it, fails to acknowledge that overwhelmingly crowds are not violent. Australia has a tradition of non-violent protest. By emphasising the potential for violence in crowds the manual exaggerates it and creates an atmosphere conducive to pre-emptive police violence. The manual also fails to acknowledge the contemporary research on conflict, both in Australia and overseas, which demonstrates that police action itself is frequently the trigger to disorder and that once disorder has started, police responses have the potential to escalate it.¹⁷

The manual's glossary includes the following definitions:

Activist: These are the 'Voices in the Crowd' supporting the 'agitator'; they are impulsive people whose behaviour while in a 'mob' is not unlike the behaviour they display in their daily lives.

Agitator: A person responsible for the initiation of violence within a crowd disturbance.

Young leaders: Are recognised as impulsive and are the most excited, violent members of the 'mob'.

These definitions illustrate a hostile attitude towards demonstrators.

Attitude to demonstrators

This hostile attitude to demonstrators is repeated in crowd control training manuals produced by Victoria Police. The training document used by the FRU, for example, states that demonstrations have a potential for violence and disorder and provide:

an excellent vehicle for dissidents, activists, agitators, subversives and those with a resentment of constituted authority.

The document, similar to the ASWPCD/DM, creates the impression that there is something illegitimate and even criminal about people thought to belong in the listed categories.

Another Victoria police crowd control training document describes 'aggressive crowds' as follows:

In this type of crowd, the people are under positive leadership and display strong emotions. They engage in some type of aggressive action. Ordinarily, these people have assembled because of strong feelings about some issue and show definite unity of purpose. Their actions may become highly emotional, impulsive or even destructive. An example of an aggressive crowd is a group of protesters who decide to march with banners to a stated location and stage a demonstration.¹⁸

The description and example fail to distinguish between opposition and aggression, creating a context in which police may feel justified responding violently to expressions of opposition.

Police comments recorded after the events at Richmond indicate that while lip service is paid to the right to protest, police maintain for themselves the power to determine who and what are legitimate protesters and protests. The Ombudsman's report records a Chief Superintendent as stating a belief that the protest at Richmond changed from 'a protest against a school closure to an anti-government, anti-authority type protest' (p.36). These comments are echoed in a senior police debriefing document where it is stated, with regard to the ongoing protest, that 'this is more than a demonstration against the closure of a school'. The police debriefing document records that 'few of the demonstrators seemed interested in the issues at hand and there seemed to be a "them vs us" attitude amongst the protesters'. The Ombudsman's report and the debriefing document are replete with police references to 'professional protesters', 'professional agitators' and International Socialists. The police comments suggest that people belonging to certain political groups, engaging in protest action over a range of issues, or who are 'anti-government' have no right to protest. In the case of Richmond the presence of a number of 'non-genuine' protesters was sufficient, in police eyes, to render the protest action illegitimate and ripe for pre-emptive police violence. Given that protest actions will almost always include people who have been to other protests, members of non-party-political organisations, and activists who believe that it is not only their right to protest but their duty as citizens, there will be few protest actions which, according to police, are legitimate.

The law and the role of the police

The legal basis for police use of force at Richmond and East Melbourne is unclear. In both instances, protesters were arguably committing minor breaches of the law as part of their protest action. At Richmond, the protesters were engaged in a picket line designed to prevent non-union labour entering the school grounds. In taking such action they could have committed the summary offence of besetting premises. At East Melbourne protesters blocked a drive way and in doing so possibly committed the summary offence of obstruction.

Protesters at both actions understood they may have been committing offences and were prepared to be arrested for so doing. Instead of arresting the protesters, however, police chose to engage in action designed to force them to disperse and cease their protest activity.¹⁹ Only five of the 40 to 50 picketers at Richmond were arrested and no arrests were made at East Melbourne.

The Victorian *Crimes Act 1958* (s.462A) empowers police to use force to overcome resistance to lawful arrest or 'to prevent the commission, continuance or completion of an *indictable offence*'. The *Crimes Act* does not empower police to use force to prevent people from committing *summary offences*. The *Unlawful Assemblies and Processions Act 1958* empowers police to disperse 'riotous and tumultuous crowds' after they are read the modern day equivalent of the riot act. There is no suggestion that the crowds at Richmond or East Melbourne were 'riotous or tumultuous'. There was never any suggestion that the protesters at East Melbourne were anything other than passive and the Ombudsman was

told that prior to the police commencing the 'baton drill' at Richmond, the crowd was standing with linked arms, singing songs and appeared to be passive (p.43). The FRU's commander at the Richmond event, Inspector Mawkes, confirmed, in evidence at the AAT, that he was *not* purporting to act under the authority of the *Unlawful Assemblies and Processions Act* on 13 December 1993 (p.133). The Ombudsman's report indicates that the police did not seek legal advice in relation to the baton training developed by the FRU for use in crowds and likewise no legal advice was sought in relation to the use of pain compliance techniques (pp.67 and 90).

The dubious legality of police action at Richmond and East Melbourne is underlined by the civil actions being contemplated by some of those present at the protests (*Age*, 30 November 1994, p.1). A number of the Richmond protesters have also lodged applications with the Crimes Compensation Tribunal.

Under the principles of the separation of powers the courts and police have distinct functions: the police bring those suspected of committing offences before the court and the courts determine whether the police suspicions are well founded and, if so, what punishment should be borne by the wrongdoer. The importance of this distinction is underlined by the large number of charges that magistrates dismiss against protesters, a fact demonstrated by recent court decisions. A magistrate dismissed the besetting charges brought against the five people arrested at Richmond on the day of the police action (*Age*, 12 January 1995, p.2). Likewise hundreds of people arrested and charged during protests against the Grand Prix in Melbourne's Albert Park, had their charges dismissed by magistrates (*Age*, 5 August 1995, p.10).

In using force against passive demonstrators, who were prepared to be arrested to highlight their cause, police undermined the distinction between the police function of arresting suspected offenders and bringing them before the courts, and the military function of defeating an enemy.

The media

In the aftermath of the action at Richmond, the police attempted to justify their action by suggesting that the protesters were violent. Two police media releases were put out on 13 December 1993. One states that 'eleven police members have been injured as a result of scuffles with the protesters, including one policewoman for [sic] injuries consisting of bruising and cuts . . . [I]t is believed a number of protesters have also received minor injuries.' A later release maintains that 'Fourteen Police officers and three protesters were injured in a violent demonstration at the Richmond Secondary College this morning'.

In contrast to the media releases, which were used as a basis of reports in the print and electronic media, an Inspector told the Ombudsman that only seven police reported receiving minor injuries and that he believed 'that most of the injuries were probably caused by contact with the barricade either during the incident or when the barricade was hurriedly removed'. Despite viewing extensive video coverage of the incident, the Ombudsman was unable to find any evidence to support police claims that they were 'punched, kicked or spat at by the picketers' (p.78).

The police media releases, which suggest picketer violence, were unable to counteract the publicity generated by images of baton-wielding police assaulting non-resisting protesters, some of whom sustained obvious injuries such as

bleeding head wounds. The police debriefing on the 14 December 1993 includes the following discussion about the media's role at Richmond:

The 13/12/93 morning events portrayed by the media were 'anti-police', indicating an overreaction by police... Reports had reached the USA and England, with the English reports suggesting that our members were trained by Korean officers... Following discussion regarding the best way to keep media out of the way, Loomes [the police media director] suggested that he send a release to all media advised [sic] them to keep clear. A/C (O) [Assistant Commissioner (Operations)] suggested that could be open to some misinterpretation. Media Liaison should be used to keep media out of the way. They could shepherd them out of the way — that is their role.

Subsequent events suggest police are experimenting with ways of keeping the media 'out of the way' at demonstrations where their tactics may cause public disquiet. During a 'Save Albert Park' protest, police twice threatened to arrest journalists and camera crews filming protesters being forcibly removed from a pit building. Police also used black plastic to screen protesters from the media. A police Inspector at the action denied that police were trying to suppress reporting of the incident and said police screened off the area and threatened arrests because protesters were 'playing up to the cameras' (*Sunday Age*, 9 July 1995, p.3).

Police comments about the media in the debriefing document and their subsequent attempts to limit media coverage of their actions at protests fuels the suspicion that police command's comments after the release of the Ombudsman's report were a public relations exercise rather than evidence of a commitment to change.

Conclusion

Demonstrations form an integral part of Australia's democratic tradition and provide an important outlet for expression of opposition to government policy. Many protest movements have been successful in changing government policy in a positive way. The Vietnam war moratorium marches were part of the process that led to the end of the war in Vietnam, an end which is now generally considered to have been long overdue. On a smaller scale the protesters at Richmond, after a year-long struggle, were successful in obtaining concessions from the Kennett Government. The East Melbourne protesters are still engaged in action to protect old growth forests. Oscar Wilde said:

Disobedience in the eyes of anyone who has read history, is man's original virtue. It is through disobedience that progress has been made, through this disobedience and rebellion.

Police are entitled to take a different view of history; they are not, however, entitled to cast those engaged in protest actions and civil disobedience as the 'enemy within'.²⁰ The military-style training and ethos of specialist squads was alarmingly apparent at Richmond and East Melbourne where police tactics, in breach of the police mission to keep the peace and protect life, were directed at defeating protesters by use of overwhelming force. That senior police apparently believe the major lesson from these events is that the media 'should be kept out of the way' suggests a disregard for public accountability and the rule of law.

Postscript

Stephen Jolly has written a book — *Behind the Lines: Richmond, the School that Dared to Fight* — about the struggle over the Kennett Government's attempted closure of the school. The 300-page book, published by Global Press,

includes 60 photographs and makes extensive use of documents obtained under Freedom of Information by the Western Suburbs Legal Service and Friends of Richmond Secondary College. It will be available through bookshops by the end of June 1996.

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Admission rules

Sam Garkawe

Uniformity of rules governing the right to practise law: a retrograde step for legal education?



The Uniform Admission Rules (the Rules) govern the right to practise law in Australia. The Rules largely dictate what constitutes the compulsory core of all law school curriculum in the 26 law schools around Australia. It is argued in this article that the Rules constitute an unwelcome and dangerous attempt by the judiciary to impose their limited and conservative view of legal education on all Australian law schools. They encourage conformity and a very narrow vision of legal education. The Rules are thus not only inadequate to meet the critical, reflective, and scholarly goals of a university education, but at a time when law graduates are finding employment in an ever increasing variety of occupations, they are also inadequate to meet law graduates' future vocational needs.

Furthermore, the content and approach of the Rules has serious implications for the likely social and political values of law graduates. This in turn directly affects the future of the legal profession, and given the power of the legal profession, ultimately the type of society we will live in. Thus, the issue of the Rules goes beyond legal education; it is in fact of vital importance to what kind of future Australian society we will live in.

Impact of the Rules on legal education

The Rules were introduced as a response to the national move towards uniform professional standards advocated by the Hilmer Report.¹ This resulted in the enactment of the *Mutual Recognition Act 1992* (Cth), s.3 of which aims to promote 'freedom of goods and service providers in a national market in Australia'. The implications for the legal profession are that a person admitted to practice in one jurisdiction in Australia must be eligible for admission to practice in any other jurisdiction.

Despite there being little debate and consultation with the legal profession and the community, the Rules were promulgated in April 1992 by the 'Consultative Committee of State and Territorial Law Admitting Authorities' (CCSTLAA).² This Committee was drawn up from nominees of each Chief Justice of the States and Territories. The Rules specify that an applicant for admission must have satisfactorily studied, as a minimum, 11 largely traditional 'areas of knowledge': Criminal Law and Procedure, Torts, Contracts, Property (Real and Personal), Equity (including Trusts), Federal and State Constitutional Law, Civil Procedure, Evidence, Company Law and Professional Conduct (including basic trust accounting).³ These required areas of knowledge are accompanied by a list of topics that must be offered within each subject.

The study of these 11 subjects may be completed during law school or at any other stage prior to admission, such as during an applicant's practical legal training. While it is true that law schools do not have to offer all the 11 subjects in their core curriculum, there is nevertheless strong pressure for law schools to do so. This pressure is particularly

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strong for the smaller and newer law schools. As a majority of these schools have been operating accredited LLB programs only in the last two or three years, many have been acutely aware of the Rules in planning their LLB curriculum. Given their strong need to maximise the employability of their graduates, most, if not all, have ensured that their compulsory curriculum includes the requisite areas of knowledge.⁴ Eleven compulsory subjects quite clearly detract from the diversity of courses these law schools may offer. While the newer law schools could have added considerable innovation to legal education, to date this has generally not been the case, and the Rules must be regarded as a significant negative factor in this regard.

The larger and more established law schools are more likely not to consider themselves bound to include the 11 subjects as part of their core curriculum. However, even in law schools which do not require all students to complete the 11 subjects, the reality is that 'optional' subjects that are required for admission effectively become 'quasi' compulsory subjects. This is because even students who are not intending to practise law are aware that, should they change their minds at some later stage, they would be required to pass additional courses after obtaining their university education. In order to avoid this, most students prefer to take the necessary 11 subjects during their university education. Thus, a direct result of the Rules is that the 11 subjects have a privileged status in law schools. This sends out a powerful message to students — these are the subject areas that are important and anything else is peripheral. Students thus characterise subjects as 'soft' options in contradistinction to the 'hard' (i.e. 'real' law) compulsories.⁵

The other important aspect of the Rules that has a large impact on the curriculum of law schools is the specified descriptions of the topics that are required to be covered within each subject. On one view, these are not onerous nor difficult to satisfy, and teachers of any of the 11 subjects retain considerable flexibility. There is nothing in the Rules that prevents lecturers from adding whatever other topics or approaches they want, such as feminist, critical, indigenous and multicultural perspectives on the law. However, by specifying a certain minimum content, which consists of black letter rules of law for each subject, the Rules privilege the black letter law above and beyond any other approaches or other considerations. Once again, there is a subtle but powerful form of pressure for law schools to adopt the approach contained in the Rules. That powerful message is that all other approaches to the subject are peripheral to what is really required to become a lawyer.

Critique of subjects listed in the rules

The 11 subjects laid down by the Rules are problematic. The decisions of the members of CCSTLAA were dictated by their own perceptions and values, and by the content of their own legal education. What this Committee saw as 'important' were the traditional subjects taught in their legal education, with an emphasis on the type of matters that are likely to reach the Supreme Court.

The most glaring omission from the list is family law. The family is a central institution in our society, and family law plays a large part in determining the nature of relationships between men and women, between parents and children, and between families and the state. From a practical point of view, more Australians are involved in family law proceedings than any other area of the law.⁶ Furthermore, family law involves

some of the most important decisions in the law that a court can make, such as decisions about the care of children, and whether a child should undergo invasive or irreversible medical treatment (*Re Marion* (1992) 175 CLR 218). From an academic point of view, family law raises significant contemporary issues, such as feminism, multiculturalism, the rights of gays, lesbians, bisexuals and transsexuals and children's rights. The exclusion of family law from the 11 subjects also has the consequence that it is possible to complete a law degree and not have studied one of the most important issues in society today — that of domestic violence (this would include child abuse).

The omission of family law can perhaps be explained by the common perception of it being 'soft law', involving 'feminine concerns', such as relationships and the caring dimensions of the law. In this regard, it should be noted that there is not a single woman on CCSTLAA; one can only speculate if there was a woman on the Committee whether family law would have been omitted.

Another important oversight from the 11 subjects is a subject based on poverty law, welfare law or employment law. These are areas of the law which are of vital importance to the less powerful members of our society, and make up a significant proportion of the work of many lawyers in community legal centres, the public sector and some private law firms. From an academic viewpoint, the study of these areas of the law also involves critical questions about the role of the legal system in society, and the role of the State. Such a subject allows law students to think about issues of class, whether the supposed principle of 'equality before the law' is simply rhetoric, and the role of the law in the capitalist system. The fact that the Rules include company law and property law, areas of the law associated with the corporate and business side of the law, shows again how dependent the Rules are on the values of the members of CCSTLAA.

A further omission from the Rules is human rights and/or civil liberties. The continuing debate over whether Australia should, like most western countries, have its own domestic Bill of Rights, is a vital issue for future lawyers (this is apart from the question to what extent Australia already has a Bill of Rights). Furthermore, many of the rules of criminal procedure, administrative law and evidence cannot be fully appreciated without an understanding of human rights or civil libertarian perspectives. The omission of a subject based on human rights makes it possible for a student to graduate from law school without ever having considered the law in relation to critical issues such as freedom of speech, the right to vote, freedom of assembly and association, and other basic civil liberties questions.

It is possible to make many arguments in relation to whether these and other areas of the law should be part of the core curriculum. Although the writer's opinions are just as subjective as those of CCSTLAA, the obvious question is should this small elite group be able to dictate to all law schools in Australia the subjects which are 'important'? Do the perceptions and opinions of this elite, who were trained many years ago, match what is happening in legal practice today? Why is there no mention of modern developments in the law, such as the use of computers and environmental law? Furthermore, are subject areas chosen on the basis of what is necessary for legal practice compatible with recent trends which indicate that many law graduates, for a variety of reasons, do not find employment in the private legal profession?

Critique of topics listed in each subject

Leaving aside the question of which subjects should be part of the compulsory core, one can critically examine the list of topics that must be taught in each of the 11 subjects. Time does not permit a detailed examination of each subject area. Rather some common themes will be discussed.

The main overall criticism is that the approach of these topics is black letter law oriented, concentrating on the 'knowledge' of rules, and ignoring broader theoretical concerns. Much has been written on the importance of theory in the study of law. Recent enquiries into legal education⁷ have stressed the need for theory to be included in the curriculum, and that legal education cannot be limited to teaching legal principles and rules.

From a practical point of view, an education based on rules of black letter law is inadequate. Wesley-Smith argues:

mere acquisition of legal knowledge in law school is of little value to a practitioner because that knowledge:

- (a) can only be a tiny portion of the whole,
- (b) can be understood only superficially,
- (c) is easily forgotten or only partially or inaccurately remembered,
- (d) is rarely needed in practice in the form in which it is learned,
- (e) is likely to be quickly outmoded and thus dangerous to rely on, and
- (f) is of little use when new problems arise to be solved.⁸

The mutual recognition legislation adds another very important reason to those listed above. As graduates will be able to practise in any jurisdiction following admission in a particular State or Territory, what is the point of teaching the detailed laws of one particular State or Territory?

From an academic point of view, the black letter law approach of the list of topics means that the Rules ignore all critical perspectives on the law. One of the rationales for training lawyers at a university rather than a technical college is that they will be exposed to critical perspectives of legal institutions and the role of law in our society. Many graduates will become lawyers involved in the reform of the law and legal institutions, and without a critical perspective they will be inadequately equipped for these roles.

The lack of theoretical perspectives in the Rules is also problematic from a number of more specific points of view. First, there is no reference to any areas of the law that are especially important to women, who now make up about half the law student population. For example, there is no mention of issues relating to domestic violence, marital rape and other gendered harms, equal pay, the sole parent pension, abortion, tortious remedies for people not in paid employment, sexual harassment or pornography. While the inclusion of family law and welfare law may help to remedy this situation, many of these issues could have easily been mentioned in the existing 11 subject areas. These omissions fly in the face of the Australian Law Reform Commission's Recommendation that: 'Law schools should ensure that the curriculum includes content on how each area of the law in substance and operation affects women and reflects their experiences. The curriculum includes the core curriculum and elective curriculum'.⁹

Second, there is no mention of the concerns of indigenous Australians. It is incongruous that a body set up in the 1990s to examine a uniform curriculum in Australia can completely overlook such concerns. Issues relevant to indigenous Aus-

tralians could easily have been included in the topics listed in property law (native title), criminal law (customary Aboriginal law), constitutional law (autonomy for indigenous Australians), evidence (the rules in *R v Anunga* (1976) 11 ALR 412), equity (fiduciary duties owed to indigenous Australians), and just about all the remaining subjects. The complete failure to even acknowledge the existence of Australia's indigenous peoples makes the Rules the *terra nullius* of Australian legal education.

Furthermore, there is a lack of any perspectives in the Rules on issues relevant to modern Australia being a multicultural society. The Australian Law Reform Commission found:

... a general perception that there is widespread cultural insensitivity in the operation and administration of the law. Perceived problems include stereotyping and the failure of the courts and lawyers and other staff to acknowledge the role of culture in a person's behaviour and to deal with it adequately in decision making.¹⁰

If the Australian legal system is to address seriously the multicultural nature of Australian society, then clearly issues relating to multiculturalism need to be part of the core curriculum at law schools.¹¹

An exclusive black letter law approach is also of concern in so far as it concentrates on the 'knowledge' of legal rules and ignores the importance of legal skills. It is conceded that the traditional teaching of legal principles and rules derived from cases and legislation has been largely successful in teaching students skills such as legal research, legal analysis and problem solving, and to a lesser extent oral and written communication. However, it can be argued that this does not go far enough, and skills such as interviewing, communication skills, drafting, advocacy, negotiation and other forms of dispute resolution should be included in the compulsory curriculum. Such skills can provide students with a more sophisticated comprehension of the nature and context of law, as well as an understanding of the essential interrelationship between facts, evidence, the reliability of witnesses, legal principle and costs which must exist before a superior court has the opportunity to hear the case. Writers such as Goldring¹² deny that placing skills into the curriculum will turn an academic program into a trade course; rather it ensures that the subject matter of the academic law program is not artificially abstract and thus distorted. He stresses that the introduction of skills will strongly benefit even those students who never intend to practise law.

In summary, the lists of topics found under each subject in the Rules are deficient from both a theoretical/critical perspective, and a legal skills perspective. Again, while it is possible for individual lecturers to include such considerations in their courses, the emphasis on 'knowledge' in the Rules sends a powerful message that theoretical/critical perspectives and legal skills are not as important as mastering black letter law. A further consequence is that the 'areas of knowledge' (the traditional law subjects) are kept in their separate 'boxes', despite the many changes in the law which mean the boundaries between them are not natural, inevitable or even logical. Theoretical perspectives and skills cut across all the 11 subjects, and the failure to include them in the Rules exacerbates the tendency towards keeping the subjects artificially distinct. Although the Rules stress that 'there is no magic in these titles',¹³ an examination of the subjects taught by most law schools reveals a high level of conformity. Law schools basically retain the same or similar names as the

'areas of knowledge' laid down in the Rules: another indication of how the Rules contribute to the lack of diversity in legal education.

A question of values

It is understandable that members of CCSTLAA should reflect how they themselves were educated in the law. It is not surprising that they see the imparting of rules as the primary method of teaching law. In this way the law is seen as neutral and autonomous, free of its social, political, cultural, gendered, economic and racial context. When all these contexts are taken out of the law, the 'objective' rules that remain can be said to be 'known' by the transmitters of that knowledge (law academics) or by those who decide the law (judges). These people can thus claim a legitimacy as professionals who have something that others in the community do not have. This justifies their professional standing and self-image. However, if one recognises that the law is shaped by social, political, cultural and other values, then clearly there is far less that makes one person's views any more valid than the next person's.

Applying a set of rules, just like applying a mathematical formula, can be as a value-free operation. This is a viewpoint that many conservative lawyers try to convey. However, there is a growing realisation that the supposed neutrality of the law is in fact a myth. The law is a reflection of the values of those who make it. These are predominately privileged white, middle or upper class, Anglo-Saxon and male, as is reflected by the membership of CCSTLAA. It is quite logical that their prescriptions for university legal education reflect their values. It is thus not surprising that subjects such as family law, welfare law and human rights are omitted from the 11, but subjects such as company law and property are included. It is also not surprising that feminist, Aboriginal and multicultural perspectives on the law are omitted from the list of topics in all the 'areas of knowledge'.

Changing the subjects in the compulsory core and including theoretical perspectives would seriously question the supposed neutrality of the law, and bring into clear focus the question of values. The law cannot really be understood without attention to the values of those who make the law. Bringing discussions of values into lectures challenges the traditional perceptions of legal academics as conveyors of knowledge.

The values of future lawyers will be derived to a large extent from the way in which they are trained during their university days, which in turn depends on the values of their lecturers. To a large extent, present day legal education still remains conservatively oriented. The Rules continue to give preference to certain types of subjects and a black letter approach. The inculcation of these conservative values allows the process of legal education to play a central role in what Duncan Kennedy terms 'training for hierarchy'; he criticises law schools as being 'ideological training for willing service in the hierarchies of the corporate welfare state'.¹⁴

The concept of hierarchy is a crucial one. The Rules are a product of legal hierarchy. They are made by representatives of Chief Justices of the Supreme Courts, the top of the hierarchy within the Supreme Courts. They naturally focus on the role of the higher courts, being hierarchically superior to lower courts, other types of decision-making bodies, and alternative methods of dispute resolution. CCSTLAA is predominantly white, middle/upper class, Anglo-Saxon and male, the type of 'benchmark' person at the peak of society's

hierarchy. Their values are derived from hierarchical notions of the law, and by the hierarchical way they were educated. The transmission of 'knowledge' is a methodology which places the lecturer/student relationship in a hierarchy. The Rules further privilege corporate law practice over practice that deals with poorer sections of society, another hierarchical aspect of the Rules. The Rules also privilege men over women. White over black. Anglos over 'others'. Heterosexuals over homosexuals. The list goes on.

Conclusion

Only by a transformation in the values and perceptions of legal educators can the historical, political, legal and psychological forces which created this hierarchy in the legal profession be changed. Hierarchy and justice are opposite concepts. A continuation of hierarchy means justice can never truly be found. Women, Aboriginals, people from a non-English speaking background, the disabled, cannot find justice in a hierarchical society.

Changing the Rules so as to reflect a more appropriate core curriculum for university legal education would be a step in the right direction. One obvious reform is to alter the membership of the present CCSTLAA, which would broaden the spectrum of people deciding the core curriculum. At least some representatives of legal academia should be involved, as well as a more expansive base of those said to represent the legal profession, such as representatives of community legal centres, legal aid commissions, and other public interest professionals. The inclusion of some lay people could also be considered, and there should be a reasonable proportion of women, people of a non-Anglo-Saxon background, and at least one indigenous Australian. Such a broader-based committee would surely come up with a very different prescription for what is necessary for legal education.

Given the inbuilt conservatism of the legal profession, any reform of the Rules is bound to meet much resistance. The Rules represent a continuation of traditional Australian hierarchical society, and therefore the battle to change them is an important issue for those who share the writer's desire for a more just Australian society.

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Beyond the bottom line

Craig Johnston

Pro-competition law reform and consumer welfare.

The Competition Principles Agreement requires review of all Commonwealth and State/Territory legislation by the year 2000, to reform legislation that restricts competition 'unless it can be demonstrated that: (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition'.

The Agreement also requires that the principle of competitive neutrality be applied to the business activities of government agencies only 'to the extent that the benefits to be realised from implementation outweigh the costs'.

These requirements bring concepts of public benefit, public interest, and benefit assessment centre stage.

In trade practices legislation the 'public benefit' can be seen, broadly, as 'anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal aims the achievement of the economic goals of efficiency and progress' (*Re QCMA and Defiance Holdings Ltd* (1976) ATPR 40-012 at 17,242).

In practice, however, the matters constituting 'public benefits' that have been recognised in authorisations of anti-competitive conduct by the (former) Trade Practices Commission and in decisions of the (former) Trade Practices Tribunal have not wandered far from matters of economic policy. They include:

- fostering business efficiency, particularly to achieve international competitiveness;
 - industry rationalisation providing for more efficient allocation of resources and lower or contained unit production costs;
 - the expansion of employment in efficient industries;
 - assistance to efficient small business;
 - the enhancement of quality and safety of goods and services and the expansion of consumer choice of the range of goods and services that are available;
 - the provision of better information to consumers and businesses to enable them to make informed choices in their dealings;
 - the promotion of equitable dealings in the market;
 - the promotion of cost savings in industry and the consequent containment or reduction of prices at all levels in the supply chain; and
- steps to protect the environment.¹

This list of matters captures the 'public interest' in productive and allocative efficiency and in overcoming key aspects of market failure (concentration of market power, asymmetric information, environmental externalities). It does not, however, address any 'public inter-

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est' in having governments resolve potential conflict between allocatively efficient outcomes and equitable outcomes.

In contrast, the 'public interest' matters listed in s.1(3)(d)-(j) of the Competition Principles Agreement require a broader review of the advantages of competition than is required by s.90 of the *Trade Practices Act 1974* (Cth).

The Competition Principles Agreement specifies a number of matters which 'shall, where relevant, be taken into account' when governments balance costs and benefits of a particular policy or action, determine the merits or appropriateness of a particular policy or action, or assess the most effective means of achieving a policy objective. Those relevant matters are indicated in s.1(3). They are:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

As a group, they are commonly referred to as the 'public interest tests' of the Agreement.

Why are they significant? The inclusion of the tests in the Agreement followed lobbying by the Australian Council Trade Unions, the Australian Federation of Consumer Organisations (now Consumers Federation of Australia) and others, over the draft Agreement. They met a concern that the policy package (taking its cue from the 1993 Hilmer review whose brief was to consider competition in Australian markets) could focus on moves to promote greater competition as a strategy for more efficient economic outcomes, and in so doing would be unbalanced. Efficiency would be seen as an end not a means, and other important factors relevant to good public policy would be ignored. The tests, therefore, allow an opportunity for consideration of alternatives to pro-competition reform, and give a status to a range of non-economic issues in public policy making that previously appeared to have little.

This paper deals with two of the tests only:

'the interests of consumers generally or of a class of consumers', and

'social welfare and equity considerations, including community service obligations'.

It focuses on how they might be considered in an assessment of the merits of pro-competition policies. It backgrounds similar assessments in environmental impact assessment and regulatory impact assessment. It outlines relevant matters raised during the course of a House of Representatives inquiry into implementation of the policy, in the second half of 1995.

Social impact assessment in environmental impact assessment

Social impact assessment is an integral, if underdeveloped, aspect of environmental impact assessment. Its inclusion in environmental impact assessment flows from definitions of the environment; that in NSW referring to 'all aspects of the surroundings of man whether affecting him as an individual or in his social groupings' (s.4, *Environmental Planning and Assessment Act 1979* (NSW)).

Social impact assessment can be linked to other processes for consideration of social issues in environmental planning, such as planning for social infrastructure and human services, and social needs assessment. Social planning is sometimes used to refer to planning for the provision of social infrastructure and human services and in many cases needs to be linked with land use planning. Social needs assessment is the process of data collection, research and analysis that identifies key social issues and ways of addressing them: the basis for social infrastructure and human service planning. Social impact assessment is a more specific form of social needs assessment that focuses on the changes that are likely to occur as a result of a particular development, event, planning scheme or government policy decision.

The NSW Department of Planning describes environmental impact assessment as a process comprising:

- identification of issues,
- analysis of the extent of impacts,
- analysis of the nature of impacts, and
- evaluation of the likely environmental significance of impacts.

The Department's guidelines provide for explicit consideration of 'community impacts'.²

These guidelines were prepared for proponents of major developments. Over the last two years there has also been encouragement of better consideration of social impacts in the development assessment process, including in the local government sphere.

Social costs and benefits in regulatory impact assessment

New South Wales

The *Subordinate Legislation Act 1989* (NSW) requires that, before a regulation is made, there be an evaluation of the costs and benefits expected to arise from alternative options to it, compared with the 'costs and benefits (direct and indirect, and tangible and intangible) expected to arise' from the regulation. Implementation of a regulation should not normally be undertaken unless the anticipated benefits outweigh anticipated costs to the community, 'bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected' (Schedule 1, para.3(b)).

The instrument for impact assessment of regulations is a Regulatory Impact Statement (RIS). The Act specifically provides that this must include an assessment of the costs and benefits relating to 'resource allocation, administration and compliance', and more generally, that 'economic and social costs and benefits, both direct and indirect, are to be taken into account and given consideration' (Schedule 2, para.2(1)).

It indicates that costs and benefits should be quantified, 'wherever possible', and if this is not possible, that the anticipated impacts of the proposed action and of each alternative should be stated and presented so that costs and benefits can be compared.

The *Regulation Review Act 1987* (NSW) provides for a Regulation Review Committee of Parliament. Its functions are to consider regulations that are subject to disallowance by Parliament, and to consider whether Parliament's attention should be drawn to a number of factors, one of which is explicitly a social impact, namely 'that the regulation trespasses unduly on personal rights and liberties' (s.9(1)(b)(i)).

The Committee undertook a review of the first three years of the operation of RISs. Out of the 80 RISs received by the Committee during 1991, 1992 and 1993, only four were found to fully comply with the RIS requirements in Schedule 2 of the *Subordinate Legislation Act*. (These requirements primarily indicate how net cost benefit analysis should be done.) It concluded that the majority of the regulatory proposals in those years went ahead 'without any satisfactory evidence that they would produce a net benefit to the community'.³

The Commonwealth

Similar mechanisms for regulatory review exist in the Commonwealth sphere. Guidelines for Regulation Impact Statements issued in August 1995 require a Commonwealth RIS to consider, among other things:

the impact of legislation/regulation on 'groups with different age, language, physical, cultural, gender, family or income/wealth characteristics'; and

the impact of legislation/regulation on 'within the consumer category, groups with different levels of information and/or abilities to process information'.

As with the NSW approach, the guidelines suggest impact analysis should not be restricted to tangible or monetary items, but also include non-monetary outcomes (for example, environmental amenity, health and safety outcomes). They also suggest separate identification of groups and sub-groups likely to be significantly affected, for example, consumers, groups in different geographical areas, or groups with different age, language, physical, cultural, gender, family or income/wealth characteristics.

The Industry Commission has indicated that it will use RISs to provide a framework for assessing legislation and regulation to fulfil the Commonwealth's obligations under the Competition Principles Agreement.⁴

The House of Representatives inquiry

An Inquiry into Aspects of the National Competition Policy Reform Package was begun by the Standing Committee on Banking, Finance and Public Administration of the House of Representatives in June 1995. Its role was to consider the appropriate means for applying the public interest tests of the Competition Principles Agreement, and the impact of competition policy reforms on the efficient delivery of community service obligations (CSOs) and the efficient delivery of local government services. Submissions were invited in July and at least 58 were received between then and November 1995.

The Committee was put on hold and the Inquiry is currently in limbo because of the federal election and change of government. The fate of the inquiry will depend on whether it is given a new reference by the Treasurer.

The work of the Inquiry might be considered, therefore, as part of the ancient history of competition policy reform in Australia. Nevertheless the Inquiry was significant at least for the reason that it gave a formal opportunity to 'the public' to present views about competition policy and its implementation. This opportunity seemed to be particularly important for local governments, who were not a formal party to the Competition Principles Agreement and contributed, as a group, the single biggest number of submissions.

Another significance was in the opportunity to advance the conceptualisation and application of social impact assessment techniques in a microeconomic reform context, and to consider how promotion of competition fits with other public interest agendas.

A profile of submissions by agency type shows that local governments and business interests submitted the most: combined, they submitted half of them. In contrast only two were from consumer interests (one household, one commercial), three from welfare organisations, and one from an environmental organisation (the Australian Conservation Foundation — included in 'others' in the following table).

Profile of submitting agencies to the Inquiry

Local governments and peak bodies	17
State governments (Tasmania, Victoria)	2
Commonwealth government agencies	9
Businesses (including GTEs) and industry bodies	12
Unions and peak body (ACTU)	6
Consumer organisations (PIAC/CFA, Victorian Gas Users Group)	2
Welfare organisations	3
Others	7
	58

What did they say about social welfare and equity and consumer interests, and how to trade off or balance competition and other public interest matters?

Social welfare and equity

Equitable access to government services and 'essential services' was raised in many submissions, including those from local governments, especially in rural Australia. (The only metropolitan government to submit was Brisbane.) A common concern was that commercialised management of government agencies and corporatisation of government trading enterprises (GTEs) could involve reduced access (vertical, horizontal). Impacts on service delivery to particular sub-populations were raised in relation to older people and Aboriginal and Torres Strait Islander communities in rural and remote locations.

While the term 'community service obligations' has been used by 'insiders' to refer specifically to social programs provided by GTEs, its unqualified mention in the Inquiry's terms of reference helped to give a twist to the way that some submissions used the term: they understood it to be that 'government has an obligation to provide services to the community', without any necessary reference to GTEs. Thus the Community and Public Service Union referred to public

sector services — including by budget sector agencies — as CSOs. A number of local governments also used the term in this way. Others used it in the more common sense of social programs delivered by GTEs (for example, Brisbane City Council, PIAC and Consumers Federation of Australia).

Otherwise the discussion was on the merit of identification and costing of CSOs (for example, Australian Local Government Association) and the appropriate means of costing (for example, Australian Chamber of Commerce and Industry, Department of Communications and the Arts). None of this discussion was new compared with that in 'orthodox' texts, or canvassed matters not canvassed in previous Commonwealth parliamentary inquiries.

Consumer interests

The submissions that addressed consumer protection matters were those from the Federal Bureau of Consumer Affairs and a number of consumer affairs/fair trading ministers. The latter stressed the importance of consideration to demand side issues for consumers, especially regulation of quality standards, pricing and CSOs, information, and redress mechanisms.

The PIAC/Consumers Federation of Australia submission focused on consumer protection and consumer welfare issues in utility reform, in the areas of cost-reflective pricing and cross subsidies, equity implications of market failure, and the need for special-purpose protection of household consumers in monopolistic and oligopolistic markets.

Approaches to the 'public interest tests'

Comments on the public interest tests related to the content of issues to be considered and the processes with which to do this.

A key dilemma was how much emphasis should be put on each of the various factors, especially in efficiency and equity trade-offs.

The National Farmers Federation suggested the Inquiry establish a number of broad framework principles within which the public interest tests be addressed, on the basis these would assist in balancing the competing interests and simplify the fundamental nature of the test. It recommended those framework principles be:

1. A public interest test should always support outcomes which give Australian consumers more choice rather than less and which achieve an output with fewer resources and inputs rather than more.
2. A public interest test should be based on productivity and economic efficiency and should not be influenced by equity or distributional outcomes which may be addressed by other policy actions.
3. A public interest test should give equal weight to all Australian individuals or market participants.
4. A public interest test should be based on long-term assessments of costs and benefits.⁵

Unions and local governments proposed greater emphasis on consideration of social equity issues, however.

One submission noted that, 'An overall social cost-benefit analysis of such competition-driven changes, taking account of secondary and externality effects, could well indicate a net negative income'.⁶

The ACTU argued that some legislation 'which is in the public interest, in such areas as environmental protection, industrial relations, health and safety, equal employment

opportunity and consumer affairs' be exempt from review altogether.

Telstra proposed a broad approach to assessing the public interest, based on three principles:

- consideration of net benefit: this would involve a reasonable assessment of economic costs and benefits. In relation to social impacts, notwithstanding quantification difficulties, for example, positive externalities, Telstra suggested it is possible to identify the goals of a policy, the beneficiaries, and the incidence of associated costs;
- explicit processes to evaluate policy: this would involve consideration of goals, underlying policy rationale, funding and implementation responsibilities;
- consideration of alternative policies.⁷

A number of submissions suggested the processes of applying public interest tests be open and participatory (for example, Brisbane City Council, National Tertiary Education Industry Union, Community and Public Sector Union PSU Group, PIAC and Consumers Federation of Australia).

In relation to development and application of appropriate methodologies — a key rationale for the Inquiry, the submissions were not very helpful to the Inquiry.

Some stressed the difficulty of doing this in relation to nonmarket impacts. The Federal Bureau of Consumer Affairs suggested:

Just how the public interest is weighed against the objective of removing anti-competitive measures or implementing major structural reforms to public utilities remains unavoidably problematic. The simple reason for this is that the decision of whether or not to allow an anti-competitive measure to remain in the public interest, even after a rigorous and thorough assessment of what the 'public interest' represents, is at the end of the day, largely a matter of judgment to be based on perceptions of prevailing community values . . . In most cases, it is not possible to accurately quantify in dollar terms the 'cost' of the public or consumer interest.⁸

The Victorian Government indicated it was 'yet to formulate explicit criteria for applying a public benefit test, and the methodology that would be used to establish relative costs and benefits.'

The Industry Commission advised that application of public interest tests to review Commonwealth legislation would be done in a manner consistent with guidelines for regulation impact statements. It indicated this process required consideration of the impact of legislation on 'groups with different age, language, physical, cultural, gender, family or income/wealth characteristics', which it suggested corresponded to the Competition Principles Agreement provision 1(3)(e) — social welfare and equity, and on, 'within the consumer category, groups with different levels of information and/or abilities to process information', which it suggested corresponded to the Agreement's provision 1(3)(h) — the interests of consumers or a class of consumers.

PIAC and the Consumers Federation of Australia suggested that identifying and measuring social benefits was a 'risky enterprise', because there are some things that have existence values or intrinsic values (the measurement of which, in dollar terms at least, offended the community values of Australians), and because appropriate and agreed methodologies were lacking. They recommended that the Inquiry acknowledge the need for testing of various techniques for valuation of non-market costs and benefits, and that the Inquiry propose that Commonwealth and State agen-

cies undertake a series of pilot studies to review the techniques in practice.

Comment

The first major piece of legislation to be reviewed in NSW within a Competition Principles Agreement framework was that establishing the Rice Marketing Authority — statutory marketing authorities being one of the key areas identified for review of anti-competitive arrangements by the 1993 Hilmer report. The review considered whether the statutory powers of the Board should be extended beyond January 1999.⁹ It found that current arrangements result in a total loss in *consumer surplus* of about \$6 million, including a transfer of wealth from consumers to producers ('producer transfer') of about \$5 million a year. It considered the benefits from the central aspect of the arrangements, that is, single desk export selling, to be in the range of \$26-32 million (in 1996-1997), compared with costs from this and other aspects of the arrangements in the \$2-12 million range. It concluded there was a net public benefit: the benefits from the export arrangements significantly exceeded the costs borne by domestic consumers and the economy. It recommended maintenance of some form of regulation, to maintain single desk export selling, but deregulation of the domestic market to provide an opportunity for competition in provision of rice storage, transport, processing and further value adding activities.

The Minister for Agriculture rejected the latter recommendation, including because deregulation of rice marketing would provide no significant public benefit and because the rice industry needed stability to continue its market development programs in Australia and overseas.¹⁰ The premier was quoted in the media as saying, 'The message I've got for rice farmers in NSW is we're not going to subject them to an ideologically driven experiment in deregulation'.¹¹ Of the more than 250 submissions received by the review, 95% were from rice growers, a big majority of them supporting current arrangements.

In general, a reading of the rice review points to three main aspects of pro-competitive reviews:

- there will potentially be a number of diverse costs and benefits across the range of public interest tests, and the benefits from restricting competition might be concentrated (for example, among organised producers) and the costs diffused (for example, among indifferent consumers);

the conclusions will not always be clear cut;

the choice of public policy option will be discretionary and depend on values.

The complexity of decision making can follow from a number of aspects of a problem — multiple objectives, intangibles, long-time horizons, many impacted groups, risks and uncertainty, value trade-offs, sequential nature of decisions.¹² As well, many decisions are characterised by:

high stakes — there are big differences in perceived desirability of alternatives;

complicated structure — it is often difficult to assess alternatives informally in a responsible manner;

there being no overall experts, because of the breadth of concerns; and

a need to justify decisions — including to the public.¹³

Value trade-offs are important when considering achievement of various objectives. Part of the 'solution' might be to

acknowledge subjective judgments in the evaluation of alternatives.¹⁴ Neutze argues that:

It is essentially a moral judgement whether one outcome is more equitable than another. Most modern economists regard themselves as incompetent to judge whether one distribution is better or worse than another, and therefore they ignore the distributional consequences of the policies they advocate. Since all policy changes benefit some people and make others worse off, this implies that no judgements should be made. One possible escape from that dilemma is to use the so-called Paretian criterion to judge the consequences of decisions, under which a policy is desirable if it makes at least one person better off and nobody worse off. That criterion, however, assumes that the existing distribution of income is desirable.¹⁵

There is nothing particularly novel in this line of argument. It also has resonances in modern business practice. In the measurement of corporate performance a balanced scoreboard approach considers financial measures and non-financial measures of performance. That is, it considers financial measures, such as costs and profits, and non-financial measures, such as customer satisfaction, quality, innovation, and employee development. It focuses the organisation on 'actionable' measures — things that managers can influence directly like yield, reliability and customer satisfaction.¹⁶

Conclusion

The Competition Principles Agreement and NSW and Commonwealth regulation review instruments require consideration of consumer welfare impacts, as part of a 'balanced scoreboard' approach.

- Where possible consumer welfare impacts should be quantified. But where they do not readily lend themselves to market or neo-market valuation techniques, they should at least be identified and described. Qualitative techniques are absolutely acceptable for this. These might be 'second best' but they are not second rate.
- The purpose of identifying social impacts is to take them into account. Qualitative information can be placed alongside quantitative. Consideration of the information will be more transparent if the values used in decision making are explicit.
- How best to incorporate consumer welfare impacts in microeconomic reform is, and will be, an iterative process and a learning process.

It is a challenge for microeconomic reform, not a nuisance.

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PROCEDURES FOR A TRIBUNAL'S PURPOSE

Jim Simpson

The development of the procedures of the NSW Community Services Appeals Tribunal.

The Community Services Appeals Tribunal was created by the *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) (the *CAMA Act*). The Tribunal can make binding decisions on merits review of a range of decisions in the community services area. These include, for example:

- a decision to refuse to terminate ministerial guardianship of a ward;
- refusing to place a person on a register under the *Adoption Information Act 1990* (NSW);
- funding a disability service that does not comply with the principles in the *Disability Services Act 1993* (NSW);
- revoking a licence of a childcare centre.

The legislation includes a capacity for the jurisdiction of the Tribunal to be extended over time, including coverage of decisions of funded non-government services.

The Tribunal is part of a package the other main element of which is the Community Services Commission. The Commission is an ombudsman type complaints body but with a strong emphasis on proactive monitoring and review of community services.

In its first year of operation, the Tribunal has tried to develop procedures suited to its role and suited to the people who are involved in its hearings.

Fundamental factors

Four main factors have influenced the Tribunal in choosing its procedures.

First, the procedures need to be appropriate for the people who come to Tribunal hearings — people who have appeal rights or are otherwise involved in cases, in particular, consumers of community services. These people often find the formal, adversarial approach of a court-room alienating and intimidating. They would be less likely to appeal to a court-like body or feel confident about participating in a hearing of such a body.¹

Second, there is the nature of the role of the Tribunal. This is to 'stand in the shoes' of the person whose decision is being appealed and decide afresh what decision should be made. Just like the original decision maker, the Tribunal will find the information and views provided by public servants and consumers very important inputs to its decision. Also, like the original decision maker, the Tribunal may have a host of questions to ask and enquiries it wants made to allow it to make the best decision. The wide ranging experience of Tribunal members helps equip it for this role.

Another aspect of the Tribunal's role is that it is making legally binding decisions on very important issues. Obviously then, the desire to provide an informal environment in which people feel comfortable

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has to be balanced against the need for a rigorous approach that acknowledges the seriousness of the matters for decision.

Third, there is the *CAMA Act* which establishes the Tribunal. Provisions of the Act take the above factors into account and provide a framework within which the Tribunal must operate. One of the objects of the Act is to 'provide independent and accessible mechanisms for . . . the review of administrative decisions'. The Tribunal has to try to avoid formality and legal technicality. The Tribunal may inform itself in any way it chooses so long as this is not at the sacrifice of a fair hearing. The Tribunal has to assist parties to understand the issues in a case and give them a full opportunity to put their points of view. Parties may question witnesses, submit documents and otherwise put their points of view. Parties can only be represented by a lawyer or other person with the approval of the Tribunal (ss.3(1)(e), 52, 53, 55, 58, 59 and 97).

Fourth, there is the experience of other tribunals. Much in the Tribunal's procedures derives from those developed by other tribunals that operate in a comparatively informal and investigative way, for example, the NSW Guardianship Board.

How a case is handled

The procedures of the Tribunal are evolving as it gains experience. The procedures also vary to some degree depending on the individual case. However, the procedures are generally along the following lines.

When an appeal is made, the Department of Community Services has to give the Tribunal all the relevant documents it has. The Department also provides a report explaining why it made the decision. The appellant gets a copy of the report and documents.

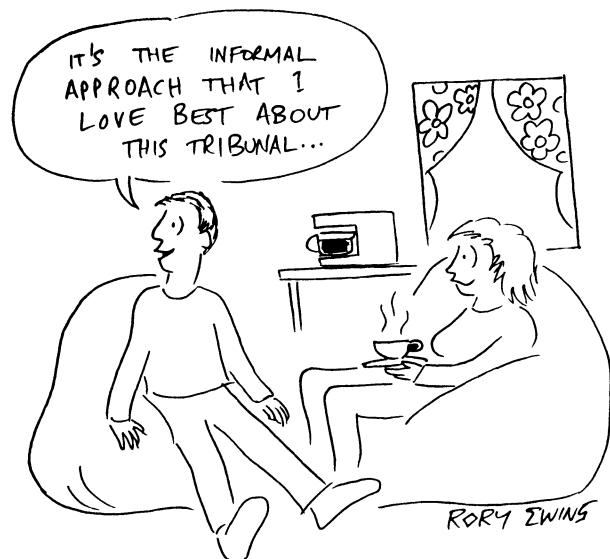
The President or Deputy President of the Tribunal then meets with the appellant and a representative of the Department to work out what the issues are, to explore compromise and to work out what needs to happen to prepare the matter for a hearing.

Tribunal staff and the parties then gather the information the Tribunal will need at the hearing. The staff act under guidance from the President or Deputy President. The Tribunal seeks to ensure that it has full and balanced information at the hearing. In some cases, the Tribunal investigator will conduct detailed enquiries on some issues and provide the Tribunal and the parties with a written report. The Tribunal quite often arranges for an independent expert to provide a report on some aspect of the case.

The Tribunal then conducts its hearing. This is as informal and non-legalistic as possible. The Tribunal has sought to achieve an environment in which people feel comfortable to put their points of view, but without sacrificing a rigorous exploration of the issues.

The three members of the Tribunal sit on one side of the table. The parties and other people who have information to provide sit on the other sides. If a party is represented, the representative sits next to the party.

The Tribunal members ask questions and discuss the issues with the parties and others present. This includes giving parties a specific opportunity to respond to material adverse to their case. Members seek to use plain English of a kind accessible to the people involved in the particular case, and to explain any legal issues that arise. Members generally



avoid an adversarial manner. The President or Deputy President presides at the hearing, explains the format at the beginning and reinforces or adds to this as the hearing proceeds.

The parties can also ask questions or provide information that the Tribunal has not covered. The Tribunal offers parties this opportunity at specific times but is also open to parties raising concerns at other times.

In some cases, people are questioned and have their say in turn or in groups. In other cases, the Tribunal has approached the hearing more on an issue by issue sequence.

Feedback on the Tribunal's hearing process has, to date, been largely positive. Two lawyers who have appeared for appellants have volunteered that their clients have been able to participate much more comfortably and fully than in court proceedings.

Representation of parties

Parties can only be represented by a lawyer or advocate with the approval of the Tribunal. People do not normally need to be represented because of the investigative and non-legalistic way the Tribunal conducts cases.

Where representation has occurred, its impact on the extent of formality and legal technicality has varied widely. In some cases, represented parties only personally participate in the hearing when specifically questioned. In others, parties have seen their representative more as a resource or support than a representative. The amount of questioning done by the lawyers has also varied but in all cases the Tribunal members have done the majority of questioning. When a party has brought along a particular person to provide information to the Tribunal, the Tribunal normally offers the lawyer for that party the opportunity to question the person first.

The Tribunal encourages unrepresented parties to bring a friend or other support person.

Listening to children

The Tribunal deals with many disputes about guardianship or custody of a child or young person. The Tribunal has been using a variety of approaches to allow children and young people to be heard in these cases and to protect their interests. In some cases, more than one approach has been used:

- tribunal investigations officer visiting the child, explaining the Tribunal's role, seeking the child's views and offering the child support or representation for the hearing;
 - two older children (aged 9 and 13) have attended a hearing, each with a support person, and actively participated in the hearing;
 - appointing a representative of the child whose task included obtaining the child's wishes;
 - obtaining an independent expert assessment of matters including the wishes of the child or young person.
- The Tribunal has been exploring this issue in detail through its Listening to Children Reference Group.

The role of the Department

The Tribunal has struck some uncertainty within the Department of Community Services about the Department's role at Tribunal hearings. A departmental officer or sometimes a lawyer has represented the Minister or Director-General in each case. In one case, the representative saw it as his role to fiercely defend the decision the subject of the appeal. The departmental representative does not need to take an adversarial role. The Tribunal is 'standing in the shoes' of the original decision maker. The correct role for the Department is one of assisting the Tribunal in the exercise of its function. This has been made clear by the Federal Court in relation to the Commonwealth Administrative Appeals Tribunal.²

Rationale for an investigative approach

The Tribunal is taking an investigative or inquisitorial approach to handling cases. The Tribunal takes an active role in gathering the information it will need for the hearing. In the hearing, the Tribunal rather than the parties takes the lead in identifying the important issues to be pursued and in how to pursue them. This can be contrasted with the traditional adversarial approach one finds in courts. In that approach, the judge takes a fairly passive role. It is for each party to decide what issues that party sees as important and how to pursue them. This approach tends to create a confrontational atmosphere in which opposing parties fight for a win.

The Tribunal is favouring procedures that are largely investigative on the basis of the factors discussed at the beginning of this article. To explain this in more detail, the Tribunal's rationale for this choice is as follows.

As an administrative review body, the Tribunal's task is to inquire into the matter and reach the best decision it can.³ The Tribunal should choose the procedures best suited to this task.⁴

The *CAMA Act* specifically allows the Tribunal to question witnesses, seek out documentary evidence and inform itself in any way it thinks fit (ss.52(1), 53 and 55).

The *CAMA Act* calls for the Tribunal's membership to have a wide range of relevant experience. For a particular case, the Tribunal is to include at least one member with experience directly relevant to the case. Thus, the Tribunal should be well equipped to identify and explore the key issues (ss.92(2) and 95(2)).

It cannot be assumed that it will be in the interests or knowledge of the parties to present all of the information or arguments that the Tribunal needs to make the correct decision. This is particularly important as there are often vulnerable people who are not parties but whose interests

the Tribunal should consider; for example, the child in a wardship case, or the consumers of a childcare centre or of a disability service. The procedures of a tribunal should serve the purpose of its jurisdiction, for example, ascertaining what is in the best interests of a ward.⁵ Also, a decision of an administrative review body on a particular case may affect similar decisions to be made by the primary decision maker in the future.⁶

- The Tribunal is obliged to pursue informality and to avoid legal technicality and form (*CAMA Act*, s.52(2)). An adversarial approach tends to promote formality and legalism. This issue is particularly important for this tribunal because of factors present in its potential appellants and others with an interest in appeals — factors such as youth, intellectual disability, limited education, Aboriginality, social disadvantage. These factors often lead to people feeling highly intimidated by adversarial models. This can hamper the capacity of a tribunal to determine the truth of a person's evidence,⁷ assuming the person is willing to participate in the tribunal's processes in the first place.⁸
- The Tribunal has to be 'accessible' (*CAMA Act*, s.3(1)(e)). Many potential appellants will not have access to a lawyer and would be daunted by being expected to present a case or by the atmosphere that can be created by legal representation.
- Representation requires leave (*CAMA Act*, s.58). This suggests that it is not meant to be the norm. The Tribunal's general procedures should be based on ensuring no disadvantage for an unrepresented party. This requires an investigative approach because of the nature of the client group and the common imbalance between an appellant and the Department in capacity to present a case. This imbalance is an argument against a normal adversarial approach even when appellants are represented.⁹
- The Tribunal is required to take reasonable steps to achieve a conciliated solution to cases (*CAMA Act*, s.46(1)). This calls for an interventionist approach and would be discouraged by an adversarial approach.

Compare the AAT

The Community Services Appeals Tribunal (CSAT) is obviously taking a much more investigative approach than the Commonwealth Administrative Appeals Tribunal (AAT). Is this divergence justified given that the legislative bases of the two tribunals are fairly similar?¹⁰

There are critics of the predominantly adversarial nature of AAT hearings who would prefer a more investigative approach. These include Professor Whitmore who was a member of the Kerr Committee whose recommendations led to the establishment of the AAT.¹¹

There seem to be two main barriers to the AAT taking a more investigative approach. These are its lack of investigative staff and doubts about how far the Federal Court would allow the AAT to go down an investigative path.¹²

The caselaw on this issue is equivocal. On the one hand, in *Ladic v Capital Territory Health Commission* (1982) 5 ALN N45, Fox J of the Federal Court said that as an administrative body, the task of the AAT is 'to inquire', even though it 'often finds it helpful to follow, in general, the course of proceedings in a court of law'.

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Also, in the High Court decision *Bushell v Repatriation Commission* (1992) 109 ALR 30 at 43, Brennan J made the following observations about the role of the AAT:

Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the board [Veterans Review Board] and the AAT is an administrative decision maker, under a duty to arrive at the correct or preferable decision in the case according to the material before it. If the material is inadequate, the Commission, the board or the AAT may request or itself compel the production of further material.

On the other hand there are the views of Deane J in the Federal Court in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 402-3. Deane J acknowledged that there are circumstances in which the AAT needs to raise matters that a party does not wish to raise. However, he felt that parties should generally be left to present their cases as they saw fit. Undue interference with the way an unrepresented party conducts a case might lead to a failure to extend to the party an adequate opportunity to present the case.¹³

Another concern that is sometimes raised is that an investigative approach detracts from the perceived impartiality of the Tribunal.¹⁴ Thus, the legal objections to an investigative approach are founded on the principles of procedural fairness. The requirements of procedural fairness of course depend on the circumstances, including the nature of the inquiry, the subject matter and the rules under which the decision maker is acting.¹⁵ The hearing rule generally requires that a party 'is entitled to know the case sought to be made out against him and to be given an opportunity of replying to it'.¹⁶ The rule thus does not automatically require that proceedings take the traditional adversarial form of the courtroom. If as Brennan J sees it, the role of the AAT is in substance inquisitorial, then it is logical that the tribunal should take the lead in identifying and pursuing issues, rather than leaving this to the parties.¹⁷

CSAT's approach does not mean that the parties are denied a chance to provide evidence, to ask questions and otherwise argue their point of view as allowed by s.59 of the *CAMA Act*. It rather means that the Tribunal generally takes the lead in identifying issues and asking questions, and then the parties are given this opportunity. Often, parties are satisfied with the Tribunal's questioning and have little they wish to add. The above concerns of Deane J frankly assume a quite unrealistic capacity of the average person to present and argue a case to a passive recipient in a forum in which that person will appear probably only once in a lifetime. Many appellants to CSAT would be daunted by being expected to do so.

Nor should an investigative approach, thoughtfully implemented, give rise to a reasonable apprehension of bias. A tribunal can avoid this apprehension by being even handed in its questioning and explaining why it is or is not probing particular issues.

In the circumstances of CSAT, it would seem to the writer that the factors discussed in **Rationale for an investigative approach** (above) are more than sufficient to justify a predominantly investigative approach.

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Towards a Sustainable Society

Alastair Iles

Environmental law and policy adapting to the future?

Environmental law and policy (ELP) has grown dramatically in recent decades, especially in the industrialised world. In response to a burgeoning range of environmental problems, environmental groups have become vocal in demanding greater protection, and many governments have created complex regulatory regimes and policies. Nonetheless, during the mid-1990s, ELP is undergoing a difficult period of sceptical questioning and re-appraisal. Despite some successes, many environmental problems have not shown marked improvement, both in Australia and elsewhere, and other problems still resist even basic understanding.¹

To a great degree, the failings of ELP can be seen as growing out of the field's relative lack of attention to how society needs to be reshaped, rather than merely mitigating environmental problems. To make more effective progress, ELP systems worldwide need to deal with two key, and interlinked, issues during the next few decades. One is the need to shift toward targeting the causes of environmental degradation. The other is the need to recognise and overcome the fundamental uncertainties present in natural and social systems. Yet these developments are currently hindered by predominant ELP approaches that are based on a kind of 'institutional settlement' characteristic of industrial countries (and increasingly, many developing countries). This settlement is a combination of a liberal democratic polity, a capitalist market economy, the individualistic concept of property ownership, and the liberal legal system.

Consequently, ELP needs to take much greater account of how social institutions can be designed, and to challenge the dominant institutions. While some 'deep ecologists' have highlighted the importance of questioning the capitalist market economy, their analysis tends to ignore the significance of causation and uncertainty, and seldom offers constructive proposals for reform of social institutions in this light. In this article, I briefly touch on some of the very complicated social theory issues raised by ELP's successes and failings, and try to illustrate how we need to think more about how social institutions, such as firms and the legal system, can give rise to a more truly sustainable society.

New visions of connectivity and complexity

Much debate currently centres on how environmental problems should be interpreted and tackled. This debate is greatly influenced by new insights in the natural and social sciences that show why more traditional approaches to environmental problems have tended to work less effectively. Since the legal system is an important social institution, and helps implement environmental policies, lawyers need to understand and draw on these new discoveries. As environmental lawyers have long understood, they must absorb a broad variety of non-legal knowledge to be able to make effective environmental laws, and this trend will continue.

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It is now recognised that environmental problems involve multiple social, political, ecological and economic factors interacting together over time and space.² These factors may directly cause environmental problems, or may contribute to these problems at more and more diffuse distances. It is no longer possible to divide social and economic factors from the policies developed to deal with environmental problems.

For example, land degradation in Australia is affected by the activities of farmers who remove soil or reduce protective features (such as natural wind-breaks).³ These activities, in turn, occur as part of a social context in which farmers seek to earn income from crops or livestock whose prices may fluctuate widely, to be able to repay bank loans and sustain themselves. The cultural knowledge and social attitudes of farmers also play an important role in the treatment of land. In many cases, access to land may be imagined as part of a highly individualistic property ownership system, and therefore to be preserved from external 'interference'. ELP needs to address these social, economic and political factors as well as the ecological aspects.⁴

In addition, the fundamental indeterminacy inherent in natural and social systems is being explored through contemporary research. Scientists had assumed that the world could be managed through top-down, mechanistic techniques and concepts, and that it was possible to predict fully the behaviour of natural and social systems. A classic example is the way in which engineering solutions have been used to control natural water flows. Dykes may be built to prevent occasional river flooding, as in the Mississippi River basin of the United States. But research is showing that complex natural and social systems are dynamic, non-linear and adaptive. Thus, the Mississippi dykes seem to have only intensified floods, when they did occur, into even more catastrophic events because of the non-linearity involved.⁵

One example of the new research is the so-called science of 'chaos'.⁶ Very briefly, this approach looks at how large-scale phenomena can arise from seemingly small and random events, following simple principles but developing unpredictably. Another new science, 'complexity', examines how complex features develop from the ways in which systems organise themselves. Historical accidents also can influence profoundly the subsequent development of a system, as with the new dominance of mammals following the mass extinction of dinosaurs some 65 million years ago. It is thus difficult to know precisely what may occur in a system in the future, as well as its past history in depth. These insights apply to both natural and social systems.

Still another example is the 'dynamic equilibrium' concept that has developed in ecology.⁷ This concept refers to the ways in which natural systems often undergo change through time and space, swinging to and from different levels of behaviour, but often in ways that maintain the system's overall dynamic stability. Systems are never static, but tend to be adaptive, responding to environmental changes with alterations in their nature and behaviour. While some understanding of the principles of change can be developed, it is very perplexing to foresee how a system may change.

The availability of information is another important limitation on our knowledge. As in particle physics, there will always be significant uncertainty present in any environmental problem. Detailed information can be collected only for some parts of natural and social systems, and the reliability of the data is vulnerable to errors of compilation and analysis.⁸ The complex interactions between the various ele-

ments in a system can only be glimpsed by researchers and policy makers.

Two important consequences flow from the nature of environmental problems. Policy makers must not only target the causes of environmental problem, but also adapt to the dynamic development of these problems through time and space in a setting that is uncertain.

Causation

Policy makers increasingly understand that often the most effective way to rectify environmental problems is to target the causes of these problems. Early environmental protection efforts tended to focus on the symptoms of environmental decline. For example, pollution laws initially prescribed the technology to be used in achieving specific ambient air quality standards, trying to control the composition and amount of polluting emissions. While these approaches have resulted in some improvements, their results often are reversed by increased overall production and consumption rates in a community. It would have been more effective to have redesigned the industrial processes generating the pollution, so that these processes used fewer resources or raw materials not giving rise to the pollution.

In response to such discoveries, policy makers now seek to come closer to the causes of environmental problems through their policies. Here, the diverse range of environmental problems is important. Some problems are more easily conceived in terms of relatively discrete and near causes (like industrial processes). Other problems, such as biodiversity losses or environmental health, involve an array of social, political, economic and ecological factors that are more confused, messy and remote in their interactions. This explains why policy makers have tended to adopt a more explicit 'causal' approach in the industrial waste field, whereas they have been much slower to approach other problems similarly.⁹

If policy makers are to target the causes of environmental deterioration, they must consider the role of social institutions. The structure and operation of a wide range of social institutions contribute to environmental problems. Social institutions vary greatly in their size and influence, and exist at a multiplicity of levels in a society. For example, from a macro-scale point of view, the market economy is a key social institution, helping set the terms of economic transactions and influencing broadly how businesses decide to exploit natural resources. It helps drive the dynamic of economic activities, which in its capitalist forms is essentially to extract as much surplus (or profit) from an activity as the market will allow.

At a lower level, individual corporations choose what products to manufacture, the industrial processes to be used, and the nature and quantity of resources to be used in these processes. It is revealing that the industrial activities of firms now generate by far the largest share of wastes and pollutants in developed nations. In 1990, for example individual households generated only 1% of the total solid wastes in the US even though they are far more numerous than firms. By contrast, corporations produced around 65% of the overall level.¹⁰ These figures are likely to have a similar trend in Australia.

As a powerful social institution, therefore, firms have a disproportionate impact on the environment. If the adverse effects of industrial society are to be prevented, it is imperative to deal with corporations. While there has been growing

attention to the need for firms to develop environmental management systems, there has been much less emphasis on how these firms may need to be redesigned.

Indeterminacy

Policy makers face many problems in developing and implementing environmental policies. Commonly, they lack adequate knowledge of the complex interactions in natural and social systems. They are less able to anticipate how a natural or social system may respond to changes made by a management measure (such as a new law). Assumptions made about the nature of a problem may turn out to be mistaken, but an extensive regulatory framework may have been erected on the basis of these assumptions in the meantime. The more elaborate and rigid a framework becomes, the more difficult it becomes to respond to new developments.

A government may decide to reduce the production of industrial wastes. Various policy instruments, such as traditional command-and-control approaches, market measures, or subsidies to firms for the purpose of installing improved technology, are available for use. Because the interactions between business decisions, consumer pressures, the broader economic setting, and government policies are inherently uncertain, the government does not know which policy instruments (or mixes) may work effectively in a particular situation. By choosing a specific approach, the government effectively invests significant resources in 'institutionalising' that approach — which may fail.

Despite the uncertainties of natural and social systems, policy makers can make progress in dealing with problems if they use an 'adaptive management' approach.¹¹ They can accumulate increasingly reliable and comprehensive knowledge about which policies are effective in what situations, by setting up experiments in diverse settings and testing hypotheses as to the effects of specific policies. For example, we do not know precisely what policies may effectively minimise waste, especially in the light of regional variations within a country. Policy makers could use a mixture of traditional regulation and education in one region, while using market measures in another region, and combining subsidies with education in yet another area. They can follow the impacts of these policies through time, and assess whether they work effectively enough to be applied more widely.

Trying out many different possibilities at once, with careful controls over their application to ensure the reliability of the information produced, is more likely to lead to progress than a uniform application of one standard policy approach. But this kind of uncertain experimentation requires a reworking of current social institutions, which need to be sufficiently fluid and learning to be able to encourage adaptive strategies.

The key role of social institutions

To better deal with environmental problems, ELP needs to target their causes and to promote adaptive strategies. This requires close attention to the nature and operation of social institutions. Not only are social institutions such as firms or the market economy deeply implicated in generating environmental problems, adaptive strategies also must be implemented through social institutions. It is crucial for lawyers and policy makers to look at how social institutions may be altered to better facilitate environmental protection. What has been missing to date has been a sophisticated analysis of the institutional factors underlying ELP, as well as constructive proposals for reforming these elements. Since the law is itself

a social institution, and tends to embody a kind of institutional settlement favouring environmental degradation, it may be that some of its features also need to be reconceived.

A number of approaches to ELP's perceived failings have emerged. Conventionally, these failings are attributed to the dominance of vested interests. Powerful actors, such as large corporations or politicians seeking donations, oppose efforts to strengthen environmental laws. This is seen in contemporary attempts by the Republican-led US Congress to 'deregulate' environmental laws, with proposed substitute laws allegedly being written by lobbyists. In Australia, the Bjelke-Petersen Government in Queensland often ignored environmental problems, such as the toxic waste site at Kingston in Brisbane.¹² It is claimed that ELP has become 'captured' by powerful interests.

Moreover, ELP is sometimes said to be liberal individualistic in its basic ideology, and to favour the rights of individuals and corporations to use resources extravagantly, while pretending to promote the greater community good. Thus, Matthew Alan Cahn argues (simplistically, in my view) that American ELP is based on a series of deceptions, in which ELP engages in the rhetoric of strong environmental protection laws while the practices of regulatory agencies, governments and corporations impair these laws from exerting their full impact.¹³ He asserts that policy makers do not challenge the primacy of individual rights and that the exercise of these rights leads inexorably to environmental decline.

Although these kinds of explanations do have some force, they fail to cover the full complexity of environmental problems. The failings of ELP are not wholly due to the dominance of interests and ideologies, but relate to a matrix of deficiencies ranging from an excessively top-down and static approach to regulation, a failure to target the causes of environmental problems, inadequate information, to the economic dynamics that drive contemporary market societies. Many deep ecologists, like Carolyn Merchant or Anne Naess, see that the structures and operations of a society have a profound impact on the environment.¹⁴ They are closer to what may be a strong analysis of the environmental crisis. Yet they do not emphasise a social institutional approach, in that they do not look at how social institutions are part of the problems and the solutions. They do not consider how causation and uncertainty affect social institutions in ways giving rise to environmental decline.

In short, we need to take a social theory approach to ELP, instead of merely treating it as part of the body of law that governs our society.¹⁵ A multi-faceted approach is required, one that looks particularly at how existing and alternative institutional forms can constrain or promote environmental protection. How do our social settings help produce, or rectify, environmental problems? We must question the social institutions that we now have, and assess how ELP can contribute to beneficial changes in these social institutions.

The institutional settlement and its effects

The industrial countries, and increasingly many developing countries, share a number of interlocked features that give them a distinctive institutional flavour pilfered through local conditions). This combination of features emerged gradually during the 18th century onwards, and has attained its most emphatic forms only in the late 20th century, with the rise of an international economic order based on multi-national corporations, international institutions, and capital flows. It

is a kind of 'settlement' aimed at sustained economic and political stability. The liberal democratic political system, the capitalist market economy, the individualistic concepts of property ownership, and the liberal legal system all are part of the institutional flavour.¹⁶ It is now difficult to imagine a developed world without these features, even though they have emerged comparatively recently.¹⁷

The features are not inevitably adverse in themselves, nor are they necessarily deliberately designed. They can generate significant benefits for people and the environment. Indeed, the market economy has the potential to produce innovations that help advance environmental protection. Democratic politics have the potential to lead to profound social changes through popular, environmentalist movements. The reality is that social institutions now exist in forms that help generate or exacerbate environmental problems. For example, the market economy now exists in a form that drives unsustainable economic activity. Present political systems do not clearly foster participatory democracy at the grassroots level, and thus may make the political process more impregnable to environmental concerns. The legal system may not readily allow the targeting of causation and uncertainty because of its institutional and conceptual nature.

ELP is currently made and applied within the institutional settlement. Despite the efforts of some radical environmentalists to challenge this reality, by asserting a biocentric viewpoint, ELP continues to be defined by, and to reinforce, the institutional settlement. Briefly, the institutional settlement tends to divert attention away from the ways in which the structures and operations of a society can help create pressures leading to environmental degradation. It tends to reduce the scope of alternative institutional forms that could be used.

The interactive links between institutional forms and environmental problems are very complex. Much work needs to be carried out to better understand the 'ecological economy' effects of changing social institutions in different ways. In this article, I can only touch generally on two examples of how social institutions may contribute to environmental problems, without discussing specific solutions.

First, business is increasingly seen as the most important arena for environmental policy in industrial societies, since corporations now consume most resources and produce most wastes. Why do they engage in their current consumption and production wastes? This is a question now being explored by policy makers, since the answers will help identify the most effective policies that can be adopted. To date, several answers have been proposed, all of which undoubtedly are part of the solution but which still are inadequate.

Environmental economists have long contended that firms do not adequately internalise the ecological costs of their activities, and that the community bears most of these costs as 'externalities'. Consequently, firms fail to make appropriate, cost-based decisions on resource use in the first place. To force firms to internalise the true costs, and change their practices, market-based measures such as taxes or tradable pollution permits could be used by policy makers.¹⁸ Other analysts argue that the better approaches are to be found in 'industrial ecology' and environmental management systems, which focus on how firms can change their corporate culture voluntarily.¹⁹ Firms can redesign industrial processes to reduce inputs and outputs, build management systems to better control decision making, and re-engineer the flow of data to highlight environmental effects.

Yet all these approaches do not alter the nature of the existing capitalist market economy. Market measures actually take advantage of the marketplace, capitalising on its dynamics even while purporting to modify these dynamics. Industrial ecology and management systems, while seeking to change the culture of firms, do not necessarily address the broader economic and social context. The general operations and structures of market economies and firms are largely left intact. It is not clear how far the institutional settlement can be changed by these approaches. It may be more fruitful, ultimately, to rethink the ways in which businesses operate so that they concentrate on social wealth generation rather than a narrow profit-making strategy. Shareholding, ownership, corporate democracy and community investment requirements may all be used to promote greater sustainability. The ideal of a capitalist market economy fixed on profitmaking has come to be powerful, and makes it difficult to experiment with alternative forms of firms and marketplace organisation, to see whether these forms are really better or not.

Second, the legal system may make it more difficult to target social institutions as a contributor to environmental problems. For example, as a social institution in itself, the law tends to shift environmental problem solving into a few specific directions. While capable of undergoing change through time, as shown by the development of regulatory regimes and law reform, the law is fundamentally unable to deal with the causation and uncertainty issues identified above.

The legal system allows only some kinds of actors and behaviours to be targeted, and provides a limited range of remedies. For litigation, there must be an accepted cause of action, there must be recognisable parties, and there must be a discrete dispute. These constraints tend to emphasise procedural issues (how to deal with disputes) over substantive issues (what is to be decided). Rather than ordering that a social institution undergo change to become more sustainable, or restraining environmentally deleterious activities, the law focuses on balancing the factors to decide who should triumph in an adversarial system.²⁰ The law seldom recognises the importance of targeting the causes of environmental problems, and struggles with the polycentric character of most problems, where numerous parties and factors interact simultaneously. The outcome is that the framework in which disputes occur is not itself brought into question.

In recent decades, the emergence of a regulatory regime in the environmental arena has brought about some changes in the relationship between the law and other social institutions. For example, corporations are now required to comply with legislative standards and can be affixed with liability for their behaviour that would not otherwise exist (as with contaminated land sites). The 'individual rights' of corporations to use their properties have been limited to some extent by the substitution of regulation for common law. Nonetheless, the regulatory regime shares the flaws of the broader legal system.

Environmental impact assessment (EIA) in Australia is an excellent example.²¹ While EIA purports to examine whether a particular project is environmentally sound, its framework is built in the form of an essentially procedural approach, taking account of the views of various parties, and then devising an 'acceptable' outcome. Too frequently, EIA is used as a conflict resolution procedure, and not as a means of sceptically reviewing the key assumptions and broader

social context underlying a project. EIA is seldom designed and applied in such a way in Australia as to monitor the continuing environmental impacts of a project, and tends to freeze legal and political attention at the time prior to the project's approval.

Moreover, the legal system provides an arena in which disputes are fought out over environmental issues. Both the debate and the actors may have become increasingly 'institutionalised'. Environmental groups, especially in the US, fight their battles within the terms set by the legal system, using legal concepts and discourse to resolve conflicts that are really about how social institutions may be redesigned. They expend sizable resources on this strategy that could be used to work on reconceiving social institutions. It is difficult to know to what extent environmental groups have become 'coopted' by such legalistic approaches, failing to challenge the dominant institutional forms. Australian groups such as the Australian Conservation Foundation tend to take a more consensual and non-legalistic tack, emphasising lobbying and policy-making work. Even so, this more policy-oriented approach likewise runs the risk of becoming merged with the institutional settlement, by failing to develop and promote alternative forms of social institutions.

Conclusion

ELP needs to undergo significant change in the next few decades, if it is to make meaningful progress beyond what it has accomplished thus far. As part of this project, ELP needs to target the causes of environmental problems, and deal with the uncertainties of natural and social systems. The links between environmental degradation and social institutions are very complex and reciprocal. Not only do existing social institutions help generate environmental problems, they also can help facilitate environmental protection.

To a great degree, the legal system can be used to help redesign our social institutions to be more environmentally sound (through dealing with causation and uncertainty). But what is missing is concrete debate over the alternative forms of social institutions that could be used. This is partly because the institutional settlement has come to dominate our imagination and makes it more difficult to experiment with alternative institutional forms, due to the entrenchment of dominant forms. It is crucial to not only reform ELP from within, but also to use ELP as a means of reshaping social institutions more generally. Lawyers and policy makers therefore need to see ELP in the light of society building, rather than a body of law independent of society. This is a complex and ongoing process, but one that is urgently needed to ease the transition of societies to sustainability.

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The real value of a cannabis plant

Carol de Launey

Report on a 1995 survey of cannabis crop growers in northern NSW.

Public debate on cannabis law reform is guaranteed to provoke passionate and often negative responses. This is somewhat surprising given that there has been a general relaxation of legal penalties across a range of cannabis offences since the 1970s, and two States have introduced expiation notice schemes for possession of small amounts of cannabis, without the world coming to an end. The current debate about the recommendations in a report of the Victorian Premier's Drug Advisory Council (the Penington Report) has spread beyond Victorian borders, with comments from experts, lobby groups, and both the Prime Minister and Leader of the Opposition in Federal Parliament.

The often ill-informed opposition to reform of cannabis laws among politicians is also surprising given Australia's drug policy, and a plethora of reports. Australian drug policy is embodied in the National Drug Strategic Plan 1993-1997, which has an overall mission to 'Minimise the harmful effects of drugs and drug use in Australian society'.¹ Harm minimisation (or harm reduction) is defined as:

an approach that aims to reduce the adverse health, social and economic consequences of alcohol and other drugs, by minimising or limiting the harms and hazards of drug use for both the community and the individual without necessarily eliminating use'. [p.4]

In 1985, following a meeting between federal and State leaders, the Ministerial Council on Drug Strategy was established, to co-ordinate a unified national response to drug problems (particularly HIV/AIDS). The active arm of the Ministerial Council, the National Drug Strategy Committee, included representatives of federal and State health and law enforcement agencies. In 1992 the National Drug Strategy Committee set up the National Task Force on Cannabis to produce a report on aspects of health, law and public opinion. This report was to inform the National Statement on Cannabis.²

The National Task Force on Cannabis produced the report as four volumes, including one prepared by The Australian Institute of Criminology which discussed past and current legislation as well as options for Australia.³ The report criticised the current 'total prohibition' model, concluding that 'Australian society experiences more harm... from maintaining the prohibition policy than it experiences from the use of the drug' (p.100). Furthermore, In a Preface to the report, Duncan Chappell, Director of the Australian Institute of Criminology, said of international conventions: 'Too much of Australia's drug policies reflect overseas policies and interests rather than contemporary local Australian circumstances'.⁴

McDonald and his colleagues traced the development of drug laws in Australia. During the last century opium was a commonly used drug, and was often included in children's medicines. Early drug laws (the colonies' *Poisons Acts*) were largely concerned with labelling to prevent accidental death, and with records to trace poisons such as arsenic, rather than with restricting the community's access to drugs.⁵ The first law to regulate against people was the Queensland *Sale and*

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The author thanks the 'technical' consultants who checked the accuracy of this paper. Most importantly, the author thanks the growers, especially the six brave souls who consented to personal interviews.

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Use of Poisons Act 1891, which restricted supply of opium to Aboriginal people. The first international convention to include cannabis was the 1925 Geneva Convention, with Australia proscribing the import and export of cannabis in 1926. States, however, were slow to enact legislation: Victoria was first to control cannabis use with the *Poisons Act 1928*, while Tasmania passed complementary legislation in 1959.⁶

During the 1960s, at federal (for example, the *Narcotic Drugs Act 1967*) and State levels, legislation expanded police powers and removed a number of basic legal and civil rights, including onus of proof. Drugs were removed from poisons to specific statutes. Both federal and State laws distinguished between traffickable and personal drug quantities, and penalties for all illicit drug offences were severe during this period.⁷

There was a reversal of this trend during the 1970s and 1980s, when State laws began to discriminate between cannabis and other illegal drugs. The first was the ACT's amended *Public Health (Prohibited Drugs) Ordinance* in 1975, followed by Victoria in 1981, where penalties were reduced for trafficking in cannabis compared to other illicit drugs. In South Australia, the *Controlled Substances Act* was passed in 1984, and discriminated between cannabis and other illicit drugs across a range of offences, including some trafficking offences. This was followed by the 1986 *Controlled Substances Act Amendment Act* which introduced an expiation notice scheme in 1987 for small amounts of cannabis. For a more detailed discussion of Australian and overseas legislation, refer to the paper prepared for the National Task Force on Cannabis.⁸

Based on seizures and estimated market, the Advisory Committee on Illicit Drugs for the Queensland Criminal Justice Committee concluded that most cannabis is grown for commercial rather than for personal use.⁹ Trafficking in cannabis is a serious offence, both in terms of penalties and social stigma. The gravity of the crime is determined from the weight of the seizure, often accompanied by an estimate of the 'street value'. Despite the lack of any serious justification for the 'street value' formula (\$2000 a plant in NSW), police estimates of the value of cannabis seizures largely remain unchallenged. Although only a small number of growers participated in this research, the results have widespread relevance in providing an alternative perspective on the value of cannabis plants.

Method

As part of a larger study, interviews were sought with people who grew cannabis crops for profit (growers). Sixteen questionnaires with stamped return envelopes were distributed by three key people. Only two of the sixteen questionnaires were returned by mail to the researcher, perhaps because people were worried about things like handwriting, or about providing information indirectly to the police. The research was conducted between April and June 1995, concurrent with the harvest season, and with a large scale police operation which focused on Nimbin. Six face-to-face interviews were conducted over the same period, using personal contacts and snowball referral. Participation was voluntary, informed and anonymous. Drafts of this paper, particularly weights and other factual details, were checked by knowledgeable contacts in the community. There was consistent agreement among those who were consulted that the details in this paper were accurate. The eight interviews provided a great deal of information about illegal cannabis cultivation.¹⁰ This report focuses on the differences hidden under the term 'cannabis plant' and on the value of cannabis plants to the grower.

Results and discussion

Of the eight respondents, six were men and two were women. Four growers were aged in their 30s, two in their 40s, and one each in their 20s and adolescence. All had grown large crops, although recent crop sizes ranged from 'a few' to 500 cannabis plants, with half growing 40 or less and half growing over 100. All had planted crops for profit in the last three years, most within the last year. Five had been growing for between 10 and 20 years, and three for 4 or 5 years.

Growers were asked to estimate the weight range and the average weight of a cannabis plant. These estimates, provided in *Table 1*, are for marketable cannabis only; that is, dried leaf and/or heads, not roots or stalks. Plant weights can fall within a wide range (1 oz to 10 lb) but the answers have several consistencies. There was general agreement that the average weight of the saleable parts of a plant was between 2 and 5 ounces (average around 4 ounces) and that weights above 4 or 5 lb from a single plant were rare.

TABLE 1
Estimates of the Weight of a Cannabis Plant

Grower	Weight range for single plant	Average weight of single plant
1	4 oz to 4 lb	4 to 5 oz
2	1 oz to 10 lb	3 oz
3	1 oz - 3 oz	2 oz
4	impossible to estimate	NA
5	NA	5 oz
6	2 oz to 16 oz (1 lb rare)	4 oz
7	4 - 5 oz leaf, 2 oz heads	NA
8	NA	NA

One grower refused to estimate, saying that weight was critically dependent on where they were planted, how much rain fell, and the time of year. Another said 'I've never got more than 2 oz from a plant because I can't care for them from a distance'. Another grower pointed out that what was 'average' for one person may not be for another: 'An amateur grower would get (an average of) 4 oz from a plant, a reasonable grower would get 8 oz, and an experienced grower 1 to 4 lb'. This respondent believed that many 'crops' were only yielding a few ounces, and stated that it took an expert to pull 10 or 20 lb (of high quality cannabis) from a crop.

Respondents were asked what different grades of cannabis were worth to them. The researcher was told that prices often fluctuated from one week to the next. *Table 2* provides estimates of the value of the lowest grade of cannabis (male plants or leaf-only) which ranged from \$0 to \$100 a plant. Comments indicated that generally males were pulled up, mulched in, thrown away, or eaten.

TABLE 2
Estimated value of male plants/leaf

Grower	\$ per plant	Grower	\$ per plant
1	200	5	20-30
2	50-100	6	30-50
3	under 50	7	0 (don't sell it)
4	20-50	8	0 (no value)

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Estimates for the value of cannabis leaf and tip ranged from \$100 to \$500 a plant. One grower commented that they left leaf and tip to mature into heads. Estimates of the value of female seeded heads ranged from \$400 to \$750 a plant. All the growers stressed that prices depended on the time of year, demand, and other factors. Some respondents did not discriminate between seeded and unseeded heads, and the prices which follow in *Table 3* (for top grade cannabis) sometimes apply to either. Some growers responded in ounces, which can be approximately converted by multiplying the value per ounce by 4 (an average weight of heads per plant across growers).

TABLE 3
Estimated value of sinsemilla/heads

Grower	\$ per plant	\$ per oz
1	1000-2000	—
2	3000	—
3	1000-5000	—
4	—	300
5	3000-5000	300-400
6	1000 (if 4 oz, more if bigger)	—
7	—	200-600
8	NA	NA

Police estimates of the 'street value' of a cannabis plant do not reflect the way growers assess the value of a plant. Cannabis growers, like produce farmers everywhere, speak in terms of quality. Growers stated that plants which were leaf or male were of little or no value. Police charges reflect the weight rather than the quality of the cannabis, and a grower caught with several pounds of cannabis leaf as opposed to a few ounces of female heads, risks higher penalties for substantially lower returns.

The growers had great difficulty in providing averages for prices, profits or plant weights. Respondents repeatedly said the equivalent of 'it depends . . .', and attempted to instruct the researcher in the vagaries of growing this illegal crop.

An inescapable picture of high loss emerges. The main factors which reduce the number and quality of marketable plants are: male plants, crop theft (rip-offs), and the difficulties involved in caring for the crop. One grower said that about one in every five plants reaches the market. Others echoed that ratio. As well, only around 50% of a crop will be female, although this also depends. One grower said 'There's so many factors involved, and they'll change sex so easily'.

Growers were asked to estimate their profit from their last crop. One said \$50,000, one said \$30,000 to \$40,000 if they hadn't been ripped off, another said \$500 (because they'd been ripped off), two others said \$300 for the same reason, and a sixth said 'not much' (because they grew fewer plants following repeated rip-offs). Crop theft was a common theme. Theft can range from crop loss while still in the ground (by 'professional' searchers, chance discoveries, or friends) to 'The guys with hoods and shotguns'.

A teenage grower commented: 'You face getting ripped off, that's probably the biggest one . . . other smokers, unpaid credit from friends, just neighbours ripping off . . . its rare for me, but for a lot of the growers it is a major problem, you're more likely to get ripped off than busted by the police.'

It's not surprising that crop rip-offs are such a common experience; the profits can be enormous, and not all thefts involve crops in the ground: '(I fear) the violent rip offs. Home invasions are the biggest fear, they're rarely reported . . .' Some growers suspect police involvement in crop rip-offs, and several described violent incidents experienced by themselves or friends.

Buyers prefer heads, rather than the much cheaper leaf which has low THC content. Female plants mature into heads, with high THC content. Cannabis heads sell 'on the street' for between \$300 and \$1000 an ounce on the north coast, depending on the time of year and the quality. Seedless heads (*sinsemilla*) generally attract the highest financial returns. Male plants in the vicinity will pollinate female plants and result in seeded female heads, so male plants are pulled out of the crop. Stalks, stems and seeds are not smokeable, add weight, and detract from the appeal of the product. Weight loss between a recently harvested and a dry plant was estimated at 3:1 by one grower and to be between 25% and 75% by another.

Following police seizure of cannabis plants, they are weighed, and the weight determines the gravity of the crime. The plants however, may be seedlings, male plants, or leaf-only plants, may contain stalks and stems, and may be recently harvested (wet).

Conclusion

It is extremely difficult to discuss an 'average' weight or price for cannabis. Again and again the growers mentioned the many variables which influence the weight and value of their crops. Weight is influenced by the weather, the growing location, and the grower's experience. Price is influenced by the time of year (harvest or dry season), by the grade (heads or other), and quality (potency and appearance). And always there are the risks, which include rip-offs, non-payment of credit, natural disasters (fire and localised flooding are common on the NSW north coast), pests and wallabies, and arrest and imprisonment.

It appears that even cannabis seedlings may be valued at \$2000 a plant. The number of plants seized, and the estimated 'street value' of seizures, influence public perceptions of the seriousness of the offences, and of the effectiveness of drug-related operations. Aside from the fact that street value itself varies with the geographic location and the season, it represents a simplistic notion of cannabis farming and marketing. The value of the plant, at all marketing levels, reflects the quality of the product, that is, potency (THC content) and appearance (very little leaf, stalk, or seeds). For the illegal farmers, the value of a plant depends on its sex, size, THC content, and ultimately, on whether they get to keep it.

There is a current trend towards reducing the penalties for personal use, and an historical tendency to concomitantly increase trafficking penalties.¹¹ It is therefore important to be aware of the botanical and economic realities behind cannabis crop farming. Given the variability of cannabis prices, and the factors which influence the value of a cannabis plant, cannabis seizures would be more appropriately valued by quantifying the THC content of saleable parts of the dry plant.

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2. Chappell, D., Preface to McDonald, D. and others, 'Legislative Options for Cannabis in Australia', Paper prepared for the National Task Force on Cannabis, National Drug Strategy Monograph Series No. 26, AGPS, Canberra, 1994.
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8. McDonald and others, above.
9. Advisory Committee on Illicit Drugs, 'Cannabis and the Law in Queensland: A Discussion Paper', Goprint, Brisbane, 1993, p.61 (*see also* 'Queensland Criminal Justice Commission Report on Cannabis and the Law in Queensland', Goprint, 1994.)
10. For example, de Launey, C., 'Commercial Cannabis Crop Growers in Northern NSW', paper presented at the 7th International Conference on the Reduction of Drug-Related Harm, Wrest Point Casino Hobart, 2-8 March 1996.
11. McDonald and others, above.

L etters

Dear Editor

Re: Responses of Mr M. Goode and Mr W. De Maria ((1996) 21(2) *Alt.LJ* 91) regarding Mr De Maria's article 'Whistleblowing' ((1995) 20(6) *Alt.LJ* 270)

In relation to the above, I direct my attention specifically to points 4 and 7 which refer to my role as Ombudsman.

Point 4 Disclosures of previous wrongdoing

It is apparent that Mr De Maria is the one who is truly confused about whistleblower retrospectivity in the SA *Whistleblowers Protection Act*. There is no divergence of opinion on this matter between my Office and Mr Goode, as suggested by Mr De Maria. (I must also remind Mr De Maria that the South Australian Ombudsman is not a creature of the South Australian government, as he wrongly suggests.) Indeed, my views and those of Mr Goode are entirely convergent, as Mr De Maria demonstrates in his very citation of my letter to the Senate Standing Committee.

In short, Mr De Maria confuses the timing of the events giving rise to the disclosure and the time at which the disclosure is actually made for the purposes of the Act. Mr De Maria would do well to examine the provisions of Section 4 of the Act to find that an appropriate disclosure relating to public interest information arising prior to the commencement of the Act is protected.

However, as a matter of statutory interpretation, the disclosure itself, in my view, must have been made subsequent to the commencement of operation of the Act.

Mr De Maria should not confuse engaging in technical pedantry with proper analysis of legislation.

I do not propose to enter the debate on the necessity or otherwise of a conferral in the Act of absolute privilege in a defamation action. However, I must say that I would have thought immunity from civil liability for the purposes of Section 5 of the Act quite readily embraces immunity from liability in defamation.

In his comments under this point, Mr De Maria mentions a complaint made to the Premier of South Australia that in the past I have too readily exercised my discretion not to investigate complaints made by a 'number' of whistleblowers who sought defamation protection from my Office.

I have no knowledge of the precise contents of the complaint to the Premier, and I also have not received a number of complaints from such whistleblowers.

Further, I should advise that my role under the Whistleblowers Protection Act is simply as a protective agency. Any discretion I may exercise to investigate a complaint is made in consideration of the provisions of the Ombudsman Act, and not the Whistleblowers Protection Act.

Whilst I appreciate that Mr De Maria purports to present only one perspective in his remarks, in the interests of presenting a more objective and balanced view for your readers, he could have approached my Office for comment as do other academic writers.

E. Biganovsky
Ombudsman
South Australia

Dear Editor

Re: Whistleblowing

It is a pity that, in his response to my letter published in the April 1996 edition of the *Alternative Law Journal*, Mr De Maria confuses pedantry with accuracy and substitutes colourful imagery and assertion for a discussion of the real issues.

I did not then and do not now desire to enter into a debate about whether the legislation 'works' or not. Mr De Maria is entitled to his views on that subject, whether they be correct or not. I was and am entirely concerned to ensure that those who read your journal are not misled by inaccurate information.

It is beyond argument that Mr De Maria has read the Act incorrectly. His summary of the requirements of the Act still omits the requirement that the information be 'public interest information' as defined by the Act; he still maintains incorrectly that the list of approved authorities listed in the Act is exclusive when the Act says in so many words that it is not; his interpretation of the retrospectivity of the Act remains erroneous; and he appears to be unable to comprehend the plain words of the Act which refer to 'no civil or criminal liability'.

No amount of reference to planes, refrigerators, Mack trucks or garden mulch changes these facts.

Given the legal errors to which I refer, it might have been thought appropriate to check with some other person before publication of Mr De Maria's response. As it is, I cannot allow errors to masquerade as truth without correction.

M. R. Goode
Senior Legal Officer, Attorney-General's Department,
South Australia



WHERE IS THAT FELLA

Pat Kavanagh

Patrick J. Buchanan, the early Republican primaries and the Washington Post. A view from a visiting observer.

On the evening of Monday, 12 February 1996, the Republican Party in the State of Iowa held precinct caucuses to begin its process of selecting delegates to attend the Republican convention in San Diego, California in August to nominate the Party's Presidential candidate in this election year. While not regarded as necessarily definitive in identifying the eventual candidate, the Iowa caucuses are regarded as reliable in sorting out the field.¹ On the morning of the same day the *Washington Post* ran a story of a 57-year-old Baltimore man who had recently contacted and met for the first time his 33-year-old daughter.² He had been aware of his daughter's existence since her birth and could at any time have contacted her through his sister who was and remained a friend of the mother. Except for one half-hearted attempt, he made no move to do so. Indeed, for 33 years he played no role in his daughter's life whatsoever: no contact, no support, nothing.

On Tuesday, 13 February 1996, the *Washington Post* published the outcome of the Iowa caucuses: Dole had 'edged out' Buchanan for the lead. Alexander came in third and Forbes, a fair way back, fourth. The same morning the *Post* ran a story on a women's basketball league in Fairfax, Virginia, composed of 60 'beyond thirty-something' women which functions without the players keeping score, and with no practices, no coaches, no fouls, no team standings and no playoffs. The competitive elements have been leached out as 'unpleasant' and male.³ On Wednesday, 21 February 1996 the *Post* reported that Buchanan had 'edged out' Dole in the New Hampshire primary. Alexander and Forbes again came in third and fourth but, for the moment, attention is focused on Dole and Buchanan who are shaping up as a two-person race. Specifically, attention is focused on Buchanan for his ability to put pressure on Dole, a respected and experienced senator who carries serious wounds as a memento of his courageous World War II service and who, at his third attempt, ought to have earned the nomination. Alexander's attempt to vault himself into Dole's position as a younger version of the same is both mean and lame. Buchanan has got there on the strength of his own appeal.

This article was written after the New Hampshire primary on 20 February 1996 and before the Delaware primary, held four days later.

Tales from the Republic

The *Washington Post* is an excellent start to one's day, for a mere 25 cents each morning. Apart from the human interest stories such as those mentioned above, the *Post* has well-written and extensive reporting, stimulating and intelligent political commentary. The coincidence of the above stories and reports is interesting because, in a curious way, it throws light on the source of Buchanan's appeal.

Take the 'Father' story. One is easily moved by this charming story of a 57-year-old Baltimore school teacher and his daughter; he a black activist in the 1960s and now a role model for male black teenagers in his school, happily married for 33 years with two sons, one almost

Pat Kavanagh teaches law at Macquarie University.

[Editor's note: Buchanan used the expression 'Where is that fella?' after he won in New Hampshire. He was gleefully observing that no-one can figure out where he's coming from (so he thinks).]

exactly the same age as his daughter; she a College graduate and successful businesswoman, also happily married but without children. But in what sense could he lift the phone after 33 years silence and say 'I'm your Father?' Ought he not at least have said: 'I'm your biological father'? The story in fact made plain the parties are aware of the problems in this, but one could say he appears to regard fatherhood as indicating a mere biological *fact* and therefore he can give it what *meaning* he pleases, become 'a father' to his daughter when and how it suits him. Would not one rather want to say he is *becoming* his daughter's 'father', as that term does not indicate a mere biological fact but draws its meaning from moral presuppositions which impose obligations on him he is only now demonstrating his willingness to fulfil? In short, one can argue that the term 'father' is a teleological term importing objectively binding obligations directed to that telos. Identification of a father then defers to both factual and normative criteria, the latter of which this undoubtedly remorseful Baltimore teacher is only now beginning to meet.

A similar analysis can be made of the women's basketball league. With the competitive elements carefully leached out, one can say the women are playing the game distelically.⁴ Of course, the women have their own end which appears to be exercise and a lot of laughs without 'unpleasantness'; but the self-chosen end justifies a self-chosen meaning to their activity on the court, a meaning which has no place for either rules or skill. Again, a fun story to read. But the interesting thing is the women regard their activity as 'basketball': they have a league. Their husbands also regard it as 'basketball': they umpire and apparently keep score. Both parties then feel able to identify 'basketball' and husband-umpires to identify 'goals' from matching factual activity to rules, which rules need not themselves presuppose an objective understanding of the game which gives meaning to the rules by organising them around an objectively justifiable end purpose. Remember, there are no fouls. In an ordinary game of basketball a player will accept the characterisation of his/her play as a foul because he/she acknowledges and accepts the end purpose of the game; the rules 'bind in conscience' for this reason.⁵ Of course, one could say this basketball league does have an end purpose, the self-chosen one of exercise and laughs, and so it does. And that purpose does explain why the umpires can identify goals and not fouls. But there is a crucial shift in here. In the traditional model one starts with an objectively identifiable end purpose which gives meaning to the rules which in turn give meaning to the activity. These basketballers are doing it the other way around: they start with their activity (running around a basketball court with a ball), direct it to a subjectively justifiable end purpose (exercise and laughs) and then select rules of 'basketball' to characterise their activity in such a way as to achieve their end purpose. Thus, the umpires can identify goals (pleasant, warming, female) but not fouls (unpleasant, competitive, male). All that's fine of course in a small, friendly local league in northern Virginia; but 'basketball' has been emptied of objective meaning, its rules available like cans of beans in a supermarket, which one can select or not according to one's self-chosen purpose. What if this sort of thing were done on a large scale? Do we give a gold medal to every participant and spectator at the 100 metre sprint in Atlanta in 1996 except for anyone prepared to admit he/she did not achieve his/her self-chosen purpose in attending?

Pat Buchanan: touching sensitive nerves

It seems to me that Pat Buchanan, in pursuing the Republican nomination, is directing his rhetoric to those Americans who fear that, in the law and government of their country, exactly this sort of thing is happening on a large scale. The interesting thing is that Buchanan finds it worth his while to make this appeal and that people respond to it. This sort of thing gives American electoral politics quite a different flavour from Australian electoral politics. In the latter, candidates are more likely to parade their managerial skills, ability to get things done, than their sensitivity to the corruption of an objective moral base to politics. Buchanan has touched a very sensitive nerve, not only in the midwest (Iowa) but in the (said to be) more sophisticated northeast (New Hampshire). The people supporting him cannot be dismissed as a Christian fundamentalist wing of the Republican Party. Apart from the fact only some Christian movements support a partisan intervention in politics, one does not have to be Christian to be concerned about the life and character of society.⁶ Nor can those people be dismissed as those who are easily led and who can be counted on to respond to simplification of issues and populist demagoguery.⁷ To what then are these people responding? I think they believe Buchanan understands their fears, and their fears are that American law and government have shifted ground. Instead of seeking a teleological justification by reference to a pre-existing and objectively verifiable good, law and government are justified on result-oriented utilitarian grounds. This perception causes concern for two reasons: first it tends to disintegrate the moral cohesion of society (by failing to respond to its normative character) and thereby runs counter to the American narrative of exceptionalism, which teaches that Americans created and defended whenever they were asked, a society built on the civic dignity and autonomy of the citizen and constructed around truths declared in 1776 to be self evident. Respect for this commitment must be the foundation of meaning in law and politics, which then become the constant public working out of the meaning of the self-evident truths. If it is not, we move into the second concern, namely, that the people will no longer be free because they will no longer be bound in conscience. Only a law and politics justified in this teleological fashion can bind them in conscience. A law justified in a result-oriented utilitarian manner will subject the people to the tyranny of an international economy administered by self-serving politicians and courts that have become confused and lost their way.

Crucial to this diagnosis is a loss of confidence in the courts. A common theme in recent American films is that the administration of criminal justice, from police to courts, has become marginal to the issue of crime in America. The elements in the administration of criminal justice connect with crime but do not engage with it morally. The reason for this is that the courts which should supervise that administration have lost their moral foundation and the simple ability to delineate right from wrong. The people therefore have to claim back moral vindication for themselves through any means available to them: vigilante activity and revenge taking. A leading example of this genre is the current film 'An Eye For an Eye'.⁸ Unable to obtain a conviction because of a procedural technicality, the police officer visits the rapist/murderer at his place of employment, knees him in the groin, and says 'get out of my city'. The rapist/murderer quite simply becomes a law unto himself. The courts are so knotted in procedural form that the law and its morality simply pass him by. For this reason the grief and anger of the mother of

the first victim become channelled into an obsessive demand for justice which, in desperation, spills over into vigilantism. The film underlines its message with irony as the mother achieves her justice precisely by exploiting the moral detachment of the formal legal system. This film specifically diagnoses the problem as one where the courts have descended from the olympian heights of maintaining a distinction between justice and injustice and interfered directly in the social context of crime and policing. The film is not an argument for a stronger state, for the courts to be tougher on crime. It is a plea for the courts to return the administration of criminal justice to a secure grounding in the moral certainties of right and wrong.

Buchanan, morals and marriage

Another moral issue where Buchanan has made his mark is same-sex marriage. One may be surprised to learn that this is an issue in the United States. Last year one State, Utah, passed a law banning legal recognition of same-sex marriages. Eighteen other States have similar Bills in train, or Bills which limit recognition to heterosexual couples and more are expected to follow. In 1995 similar Bills in Virginia and Alaska died in committee.⁹ What is the problem here? The law already limits marriage to union between a man and a woman does it not? Yes, but the law may change, in Nebraska and Hawaii to be precise.¹⁰ If that happens then gay people may go to such States, marry and then go home and demand recognition of their marriage.¹¹ Well so a few might, but this is hardly likely to be a significant social issue, especially in States like Alaska and Wisconsin. Furthermore, same-sex marriage is said to weaken heterosexual marriage.¹² It's hard to know what the evidence for this can be. Clearly these laws cannot be explained on utilitarian grounds. The explanation is more likely to be something like this: why would we want to recognise same-sex marriage anyway? Only as part of a distelic feel-good politics which identifies marriage as a legal shell which the parties can fill with meaning as they please. Within that perception of marriage what grounds could there be for *withholding* legal recognition of same-sex marriage? And such a perception is well under way: people look on marriage as not so much valuable in itself but as an arrangement justified by its ability to deliver them happiness, which they define for themselves. If it does not do so they are entitled to resign their commitment to it. Both at the creation of marriage and at its dissolution, the law plays more and more of a facilitative role and the creation of meaning is handed more to the parties themselves. Inevitably, this decline in the objective meaning of marital obligation will be seen by some as a moral decline which will dissolve society into its particularised members who know nothing but pursuit of their own satisfaction. Apart from moral decay, such a self-seeking society has always been seen as incapable of self-rule and ripe for subjection. Within this teleological model same-sex marriage is not so much the disease as the symptom of moral decay. It is in defence of a teleological view of marriage that the drive for prohibition of recognition of same-sex marriage makes sense.

If that analysis of the issue is correct, then how do we assess the stand of the candidates? On Saturday, 10 February, two days before the Iowa caucuses, a National Campaign to Protect Marriage Rally took place in Des Moines. A resolution identifying marriage as 'an essential element in the foundation of a healthy society' which 'government has a duty to protect' and concluding that 'the special sanction of civil marriage' should be reserved for heterosexual union,

was endorsed by all the Republican candidates with the exception of Richard Lugar, in person or by letter.¹³ However, there are interesting differences. Dole wrote that he supported the resolution but it did not go far enough. The resolution should positively promote heterosexual marriage with tax incentives as today's social ills are directly linked to the decline of the two parent family.¹⁴ Maybe Dole is here attempting to turn the resolution into positive support for heterosexual marriage to deflect gay bashing charges, but in his attempt to have it both ways (sue for the support of bigots without being open to the charge of bigotry himself)¹⁵ he quite misses the mark. If marriage has objective meaning and imposes objective obligations building in conscience, what role could tax incentives play? Dole is accepting the reality that people enter and leave marriage as they please. His solution: give them a reason for staying in! A solution that panders to the very selfishness that is the source of the problem. There was no such missing the issue for Pat Buchanan. Attending and addressing the rally in person, he called for a 'cultural war' against the 'false god of gay rights'. 'There is no equal rights between what is sanctified by God and what is morally wrong'. Any Congressional Bill that failed to respect that by promoting a 'gay rights agenda' would necessarily receive a Buchanan Presidential veto.¹⁶

What do we make of this? One can sympathise with concern over moral decay and dismay at observing foundation social institutions turned to private ends (whether of the mean or the oozy variety). But this would not direct attention to same-sex marriage without the intervention of some prejudice.¹⁷ Any legal recognition of same-sex unions at the moment is unsystematic and incidental, directed to the features of individual unions, rather than to the substance of the idea.¹⁸ One would think that, in these circumstances, commitment and moral courage are precisely what hold same-sex unions together. Same-sex unions can teach something about the solution, rather than being a symptom of the problem.

Pat's economics: conservatism of the heart

The views of Buchanan which have attracted a great deal of interest are his views on economic matters. Buchanan's message here has sought to focus on the human cost of America's participation in the global economy. The Clinton administration is concerned about this cost too, but its policy assumes the good and inevitability of global engagement and proposes programs to increase 'human capital': more 'investments in education and job training' indeed a 'lifetime of learning' to keep the US worker more skilled and more productive than his/her (cheaper) foreign counterpart. This plan is justified on specifically utilitarian grounds, wealth and expansion.¹⁹ The problem with this approach is that it treats the worker as a mere cog in the economic machine, and accommodates the human values of work within the economic values of expansion. The workers' pain becomes their private concern; and the solution? More pain: a 'lifetime of learning' things you don't want to know.

Against this Buchanan offers a 'conservatism of the heart' characterised by 'nativism, protectionism and isolationism'.²⁰ Nativism is Buchanan's focus on immigration: a security fence to keep out illegal immigrants and zero immigration for five years. Protectionism promises tariffs as high as 20% on imported goods and pulling the United States out of the World Trade Organisation and the North American Free Trade Agreements; generally speaking, rejecting all such international accords designed to open markets and allow economies to flow into each other and form a global

economy. Isolationism means shrugging off parasitic allies living off American protection and no longer having American troops overseas unless under specifically American command in pursuit of specifically American policy. These nationalist policies have enabled Buchanan gratuitously to attack Hispanics in the United States in sweeping generalisations ('break into our country, break our laws, and go on welfare').

In a series of erudite and interesting articles in the *Washington Post*, commentators have challenged Buchanan's presuppositions, both economic and historical, his understanding of the American economy, of what causes insecurity, his evaluation of 'the new world order' and America's role in it, and the likely effectiveness of his policies in achieving his objectives.²¹ These criticisms assume that Buchanan is diagnosing the problem and proposing solutions within economic discourse. Many of his comments, however, suggest he is operating within a more civic discourse within which he seeks to contain his understanding of the American economy. This could explain his frequent appeal to American constitutional history for justification. For example, Buchanan's attack on international market-opening trade accords reveals an understanding that a global economy is not neutral. It is normative, but its normativity is nothing other than its drive to its own objectives. Within a civic discourse, such accords are *prima facie* undesirable as they subject the free citizen to the logic of a system on which his/her own civic authority does not bear. The very celebration of such accords is a symptom of the decay of politics and of government's failure, with the complicity of large financial interests, to preserve space for the free, courageous and outward looking citizen to participate in the creation of meaning. A similar analysis can be applied to Buchanan's sensitivity to those who lose their jobs. The value of a job is more than economic. It brings the job holder respect and a feeling of usefulness, a feeling of contributing to the collective creation of value. In that way 'having a job' could be linked to the experience of political freedom in the American historical narrative to which Buchanan so often appeals and which he promises to re-deliver to the American people. Buchanan's views on academic matters could dictate a re-grounding of the American economy in the American people, which in turn dictates nativism, protectionism and isolationism. 'We're going to recapture the lost sovereignty of our country and we're going to bring it home' he said after his New Hampshire win, home to the 'legitimate and rightful heirs' of the Founding Fathers.²²

Buchanan's views on the power of property and capital are even more interesting. For example, in criticising giant pig feed lots for bankrupting family farms, he is reported to have said:

I think giant feedlots are immensely destructive of conservative values. I'm sure the economic guys think this is great, we get cheaper beef or cheaper pork. But that's where economic and the traditionalist conservatives come into conflict. I think the idea of all these little stores and shops that were close to neighbourhoods is a good thing.²³

He continued:

It was at one time probably true that what was good for General Motors was good for America. But what is good for General Motors is not good for America if General Motors is shutting down its plants in the United States of America and opening up in Mexico and Indonesia. The interests of corporations and the nation are going their separate ways.²⁴

These remarks could be interpreted as a criticism of the owners of capital for allowing the developmental power of capital to respond merely to the logic of the (global) economic system. Part of the civic philosophy is that the owners of property understand their ability to affect the lives of all who are somehow defined as a community by that property interest. Therefore, they should understand the value of their property as grounded in the good of the community defined by it. This is not an economic argument: it is an argument for the civic responsibility of property owners. Buchanan is arguing this has always been the American understanding and he wants to return America to it.

What do we make of it?

So once again Buchanan appears more complex than might have been thought at first sight. It seems to me that it is very possible Buchanan is turning to a civic tradition for his understanding of the American economy, to diagnose the problems and identify his solutions, but I am not convinced that he seeks to see the values of the civic tradition actually re-generated in American social and economic life. If this were so, one would expect the desideratum of his arguments to be the participation of 'citizens of the economy' in the creation of meaning. Perhaps he seeks to re-locate the power of property in the common good, but the 'common good' as he sees it actually looks more like a unified and sovereign national interest. This interpretation is, indeed, consistent with Buchanan's rhetoric. And his message to workers seems not so much a promise to enfranchise them as rather that he understands their pain and will redress it.²⁵ What Buchanan actually seems to have in mind then is a state-sponsored national economy which the state (representative of national interest) will require to be more sympathetic to the human victims of economic and technological change. The result would be a state far more interventionist and authoritarian than the Americans have now, a state which will claim a sovereign legitimacy by its ability to speak for all. Furthermore, such a state will do nothing to address the moral decay that so many people believe is eating away at America. Grounded in an objectively defensible conception of the common good, devoted to pursuit of the essentially private goods of security and wealth, excluding all from the creation of meaning and turning them into recipients of state sponsored largesse, such a state will encourage the very suspicion and greed it seeks to eradicate.²⁶ One would expect too that Buchanan would seek to use the same state power to sponsor his partisan position on moral issues such as abortion and 'gay rights' (his term) in the 'national interest'. Cultural and racial diversity will be expected to succumb also; Buchanan has called for an end to 'hyphenated Americanism' in support of 'one nation, one people,' and for English to become the 'official language' of the United States.²⁷ Such an authoritarian, homogenising program would put Buchanan at war 'not only against American reality but even more against American ideals'.²⁸

So, Patrick J. Buchanan emerges as a complex, interesting but unattractive figure. Few people expect he will actually win the nomination let alone the election, but stranger things have happened.²⁹ If Dole does not succeed in pulling Buchanan back in the March primaries, he could well be done for, especially if Alexander stays in, splitting the moderate vote. But, whatever happens, Buchanan has put his mark on this election year.

In my visit to the United States I have so far been fortunate to spend time at the Law Schools at Marquette University,

Milwaukee, Hamline University, Saint Paul and the Columbus School of Law at The Catholic University of America, Washington DC. At each institution I have been struck by the commitment of scholars there to the issue of meaning in law, and the facility with which they think legal knowledge is grounded in objectively verifiable moral principles. I have come to realise that this issue is still very much alive in American law and politics.³⁰ I know I have benefited enormously coming into contact with such scholars; I thank those who have made my trip possible: Macquarie University, the Law Foundation of NSW, and last but not least, my colleagues at Macquarie Law School.

References

1. Nine candidates went in to the caucuses. One withdrew his candidacy for the nomination the following day. After Iowa, only three and possibly four candidates appear to have any real chance of nomination. They are Robert Dole (Senator, Kansas), Patrick Buchanan (ex Nixon staffer, now commentator), Lamar Alexander (ex Governor, Tennessee), and the fourth, Steve Forbes (millionaire publisher).
2. Kyriacos, Marianne, 'I'm Your Father', *The Washington Post*, 12 February 1996, pp. A1, A6.
3. Tousignant, Marycon, 'Hoops and Hollers Without the Hype', *The Washington Post*, 13 February 1996, pp.A1, A13.
4. I heard this marvellously expressive term used by Professor R.F. Hittinger to his Jurisprudence class on Thursday, 22 February 1996 at the Columbus School of Law, Catholic University of America, Washington DC. Indeed, it is the insights of Professor Hittinger in his brilliant critique of HLA Hart that have led me to the analysis I seek to develop in this article.
5. This concept is a subjective participation in the objective meaning. Therefore, one chooses to play fairly and the recalcitrant can be coerced (e.g. by being sinbinned).
6. Hentoff, Nat, 'A Christian Nation', *The Washington Post*, 17 February 1996, p.A25.
7. These tempting conclusions are not supported by an analysis of actual exit polls: Harwood, Richard, 'People Behind the Numbers', *The Washington Post*, 23 February 1996, p.A19. The polls themselves are published, *The Washington Post*, 21 February 1996, p.A14. It is worth remembering too that New Hampshire, where Buchanan won the primary, is a State where the economy is growing: see McGroarty, Mary, 'Democrats' Dream Candidate', *The Washington Post*, 22 February 1996, p.A2. Also, one must remember the closeness of the vote in New Hampshire (Buchanan 27%, Dole 26%) which makes it difficult to see one's support as partisan and the other's as generalised: *The Washington Post*, 22 February 1996, p.A1. For a different reading of the exit poll figures see Edsall, Thomas, B. and Morin, Richard, 'Angry, White, Working-Class Voters Come to the Fore', *The Washington Post*, 21 February 1996, p.A14.
8. A John Schlesinger film with Sally Field, Kiefer Sutherland and Ed Harris.
9. *The Washington Blade*, Vol. 27, No. 7, 16 February 1996, pp.1, 27.
10. *The Washington Blade*, above.
11. It seems that the Bills typically seek to forbid such recognition: *The Washington Blade*, above.
12. *The Washington Blade*, above.
13. *The Washington Blade*, above. See too *The Washington Post*, 12 February 1996, p.B1.
14. *The Washington Blade*, above.
15. Dole fully deserved the charge of cowardice levelled at him for this letter: Cohen, Richard, 'A Pledge Against Gays', *The Washington Post*, 13 February 1996, p.A19.
16. *The Washington Blade*, above; *The Washington Post*, above. Buchanan has described homosexuality as 'an assault on the nature of the individual as God made him' and AIDS as a 'retribution'. See the summary of his views on the internet at www.electionline.com.
17. A poignant footnote is that the same issue of *The Washington Blade* as carried the report of the rally also carried a long report of a serial killer of transient men, operating in the Hampton Roads area of Virginia, who has claimed eleven victims in nine years, in murders with overtones of anti-homosexual violence. One wonders if the organisers of the Des Moines rally would like to organise a rally in Norfolk Virginia to express concern over this symptom of moral decay.
18. For example in 1995, in Newcastle NSW, two men obtained an order requiring a medical fund to treat them and the son of one of them as a family when calculating their contributions.
19. Rosenfeld, Stephen, S., 'Economic Resentments . . .' and Krauthammer, Charles, ' . . . And Political Power', *The Washington Post*, 16 February 1996, p.A21; Broder, David, S., 'As Workers Become Weaker', *The Washington Post*, 14 February 1996, p.A21.
20. Krauthammer, above.
21. For example, Rosenfeld, above; Krauthammer, above; Samuelson, Robert, J., 'Playing Politics with Job Fears', *The Washington Post*, 21 February 1996, p.A19; Will, George, F., 'Time to Take the Republican Party Back', *The Washington Post*, 22 February 1996, p.A25. For some doctrinaire criticisms from economists see Blustein, Paul, 'Economists Disdain Protectionism', *The Washington Post*, 14 February 1996, pp.D1, D6.
22. *The Washington Post*, 21 February 1996, p.A1.
23. Blustein, Paul, 'Patrick Buchanan . . . Liberal?', *The Washington Post*, 23 February 1996, pp.B1, B2.
24. Blustein, Paul, 'Patrick Buchanan . . . Liberal?', above.
25. Cohen, Richard, 'The Little Guy's Guy', *The Washington Post*, 22 February 1996, p.A25.
26. Raspberry, William, 'Why We're Losing Sight of the Common Good', *The Washington Post*, 23 February 1996, p.A19.
27. See the summary of Buchanan's views on the internet at www.electionline.com.
28. Will, above. For Buchanan's patronising unawareness of negro distinctiveness, see two sensitively written pieces by Kind, Colbert, J., 'Thanks Again Pat', *The Washington Post*, 17 February 1996, p.A25, and 'Buchanan's Slur on a Churchman', *The Washington Post*, 24 February 1996, p.A15. See also Gilliam, Dorothy, 'One's a Pariah, the Other Might be President', *The Washington Post*, 24 February 1996, p.B1.
29. Ward, Andrew, 'On the Trail with Eugene McCarthy', *The Washington Post*, 22 February 1996, p.A25, recalling Nixon's return from the dead in 1968.
30. The *Marquette Law Review*, Vol. 78, No. 2 (Winter 1995) contains papers from the First Conference of Religiously Affiliated Law Schools, held at Marquette University Milwaukee in 1994. For an example of a social reform model, formulated within a natural law tradition and more interested in pursuit of a telos than a social program, see William J. Byran, JJ 'The Future of Catholic Social Thought' (1993) 42 *Cath U L Rev* 557.

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

GLOBAL GIRLIES — GIRLIE OF THE MONTH

While Girlie enjoys getting stuck into the problems which face Australian girlies, she has developed a better global perspective after reading an article in the *Melbourne Age* (10 May 1996) on the work of PLAN International Australia in West Africa. PLAN has received a grant from AusAID, the Federal Government's aid body, to educate villagers in Burkina Faso about the dire and unnecessary consequences of female genital mutilation (FGM). It is estimated that 70% of young women in Burkina Faso are genetically mutilated in a variety of ways including infibulation, a procedure where the girl's labia are removed and her body stitched together. Not surprisingly, many girls die of infections or haemorrhaging after the procedure. The practice has been outlawed by the country's elected government but local women say that the legislation is hard to enforce. Tricia Caswell, the Executive Director of PLAN in Australia, recently went to Burkina Faso to see how the PLAN education project was going. She agreed to be 'Girlie of the Month' and have a chat to Girlie about her visit.

G: How long has PLAN been involved with the women of Burkina Faso?

TC: In relation to the FGM project about two years, however in relation to other projects, PLAN has been active in Burkina Faso for more than a decade. Women have always been our focus in any projects in that country.

G: What are the PLAN workers doing to encourage the villagers to stop female genital mutilation?

TC: The PLAN workers are Burkinans who travel throughout the villages and distribute written materials about the risks of FGM, facilitate discussions with the villagers, and play the video.

G: The *Age* article also mentioned the video that PLAN staff play to villagers and then use to facilitate discussions. What is in the video and how is it received?

TC: The video is produced by the Burkinan Government in a story form and the parts in it are played by local villagers. It is a graphic representation of all the issues surrounding this issue and has

much more impact than any other material. It is an hour and a half long narrative and has the villagers entranced whenever we play it. When I was there we played it in villages where there is no electricity so they were blown away to see this brilliant video. PLAN has employed two Burkinan women as articulators who introduce the issues, play the video and then facilitate discussion, and at times even video tape the reaction of the villagers to the video.

G: Who performs the procedure on the girls?

TC: The older women do it with a carving knife, without any anaesthetic. This is shown in the video. The result is that childbirth and menstruation are extremely painful.

G: What is the present rationale for the procedure?

TC: One is that it has always been done, and the men say that it helps control the women's sexuality.

G: What reaction have you had in Burkina Faso to the PLAN project?

TC: The project is very carefully done. The information and video are only presented in villages where the locals know and respect PLAN and we have helped to establish an economic independent base. The villagers trust PLAN and take the video seriously. The fact that the parts in it are played by locals and that it is a realistic story helps. The Committees of each village we go to are opposed to FGM so we are not showing them a piece of propaganda but rather a brilliant statement about everyone's point of view.

G: How do you respond to the view that PLAN is interfering in another culture and imposing so called 'western values' on it with no respect for the values already in place in Burkina Faso?

TC: Most of our workers are Burkinan and PLAN never introduces any project into a village where they do not ask for and endorse it. The whole philosophy of PLAN is that it will never do a project unless the locals are part of it. So the FGM project is not an imposition, PLAN offers options for support and

development. In this case the project is supported by the government and PLAN has been asked to do a national program on FGM. Our grant from AusAID has just been extended and we have great support from the Burkinan villagers and health department.

G: How do you measure the success of this project. Is it the aim to prevent all female genital mutilation or simply to inform people of the hazards?



TC: Our first stage goal is prevention. It is hard to measure success. I guess we want 'zero tolerance' to FGM. We are in the process of developing a data base and some techniques to assess the awareness and prevention of FGM in the regions PLAN has been working.

G: You mentioned in the *Age* article that there is a vigorous women's movement in Burkina Faso? How does the movement operate?

TC: Well actually I found out about it once I had returned to Australia. I didn't learn about it locally as the women are still very shy about talking about their activities. It is known internationally that the women of Burkina Faso took a very brave stance during the 60s and 70s about ancient anti-women rituals such as FGM and the killing of witches. In relation to the work of PLAN and the women's movement, if women are not on the committee of a village PLAN is involved in, then we will not commence any work there.

G: Is improving the lot of women and girls a focus of PLAN?

TC: Yes, very much so. In each of our five domains — growing up healthy, learning, crosscultural relationships, habitat, and livelihood — we have the all encompassing aims of gender equality and protection of the natural environment.

G: How can Australian girlies help?

TC: As we are an organisation which is seeking the best way to develop projects, we are open to new ideas. If any concerned Australian lawyers contact us we would welcome their input. We are not an organisation which has a pri-

ority of sending westerners to developing countries as we prefer to use local field workers. However, people can help PLAN by sponsoring children or by volunteering in the office here or just coming and talking to us about a different way of doing things. We welcome input.

G: *On a more personal note, you are a girlie who has held a number of influential positions, including Director of Australian Conservation Foundation and General Secretary of the Technical Teachers Union Victoria. Haven't you ever heard of the 'glass ceiling'?*

TC: Yes, but I have no respect for it! Girls just have to assume that they can do anything. My daughter who is 9, keeps asking me what qualifications from the university are required to be the prime minister.

Any Girlie reader who wants to help PLAN help women and girls in other countries can ring (03) 9482 5922 for more information.

A LAW UNTO THEIR OWN?

Interestingly, it was heard on the girlvine that some women involved in law societies around Australia are working on instituting 'Codes of Conduct' which will include references to the inappropriateness of sexual harassment. It is rumoured that in one State, the director of the law society is mulling that there is no such code of conduct because the women say they don't need it.

In New South Wales, the Law Society did not adopt the inclusion of the sentence: 'A legal practitioner must not, in the course of practice, discriminate against any person on the basis of sex, race, marital status, sexual orientation, age mental or physical disability . . . must not sexually harass a colleague, staff member client or other person' into its professional conduct rules (*Australian Financial Review*, 3 May 1996). It was too much for the Council to concede that their members needed this sort of guidance. As Sheryl Bagwell wrote in the *AFR*: 'you would think, in the sunset of the 20th century that rather than being voted down, such an amendment would be greeted with a resounding assent'. The solicitor and Law Society Councillor who has sought the rule change, Kylie Nomchong, deserves a Girlie gold star for her bravery in facing the angry mutterings of her learned colleagues. She has one fellow councillor calling for her resignation and another asking whether he can now

be struck off for pinching his secretary's backside (maybe he should also be struck at). The response from the female side of the profession has been positive. Bagwell writes that many women have rung to tell Nomchong about their own stories of harassment. The proposal Nomchong has made is in response to complaints made by female lawyers and legal staff to her and in surveys such as the 1995 Keys Young Report into gender bias. That Report found that one in five women it interviewed had resigned or changed jobs as a result of sex discrimination or harassment. Nomchong told *AFR* that she is under no illusions that the rule change would solve the problem but hopes that at least it may make the boys in the profession stop and think about the issue as a serious one.

The *AFR* reported that the Bar Association of New South Wales has done something about discrimination and sexual harassment by passing a resolution that this behaviour may be held to be professional misconduct. Bagwell laments: 'It seems amazing to me that the Law Society of NSW would not do the same thing'. Girlie thinks it amazing as well. It seems like it will be a long time before the wish of the newly formed Australian Women Lawyers, that all State bodies have a uniform policy of stomping out sexual harassment, is granted.

The need for such a policy has been demonstrated many times but is aptly reinforced by one girlie's complaint (overheard this week in a lawyer lift) that she was hassled to 'put out' for three of her colleagues at the local Bar Dinner and would never attend such an event again!!! This sort of behaviour is getting really boring and upsetting. When will the guys who do this sort of thing realise that we girlies will not put up with it any more!!!

A MATTER FOR REGRET

This is what the Northern Territory Police Commissioner called the incident where an Aboriginal woman who complained that she had been gang raped was locked up by police for 12 hours on a minor arrest warrant. Jenny Kiss writing in *The Australian Lawyer*, comments that when the incident was reported in the *Northern Territory News* on 9 January 1996 she felt as a woman and a lawyer, that she could not rest until she checked the story further. She found that when the woman told police that she had been gang raped by three

men she was not taken to hospital for treatment and a medical examination but instead was thrown into the police watch house at Berrimah and locked up for 12 hours. The reason for this, according to the police, was that they were following the 'normal practice' of holding people they think are drunk until they are sober for questioning. In this case, the police said that there was an outstanding warrant for the woman's arrest for failing to appear in court on a charge of drinking in public. The offence had at the time a penalty of a small fine. In the opinion of the woman's lawyer, the police would not have treated a non-Aboriginal woman in the same way. The Police Commissioner has entered the debate and vehemently denied that his force was racist and the officers would have taken the same action if the woman had been white. Does that make it acceptable then? Girlie doesn't think so!!!

Kiss doesn't either and ends her article with the following words:

In the Territory, the results of complaints and reports of investigations can disappear, sinking beneath the weight of official and semi-official silence and public apathy. And, by effectively muzzling the debate, the racism, injustice and selective application of the law are allowed to continue.

A WORD FROM OUR SPONSORS

A conference on 'Feminist Interventions in International Law — Reflections on the Past and Strategies for the Future' has been organised by Pene Mathew, Dianne Otto and Kristen Walker of the University of Melbourne Law School for 30 September 1996 at the University. The Keynote speakers are Professors Hilary Charlesworth and Christine Chinkin, both highly regarded feminists and international lawyers. For a registration form and further details contact the Development Office, Law School University of Melbourne on (03) 9344 6194.

Polly Math

Polly Math is a Feminist Lawyer.

STICKY BEAK

An irregular column of profiles

Jennifer Coate is Senior Magistrate of the Children's Court in Victoria.

Jennifer Coate began her professional life as a primary school teacher. Later, turning to law, she worked as a solicitor in private practice for a number of years. She has also worked for the Legal Aid Commission of Victoria, and in Policy and Research for the Attorney-General. In 1991 she was appointed to the Victorian Women's Consultative Council. In March 1992, she became a magistrate. In 1993 she was appointed to the Violence Against Women Taskforce of the Victorian Community Council Against Violence. In December 1995 she took up her present position.

In this interview with Michelle Schwarz, Jennifer Coate reflects on some of the complexities of gender and power which face women operating within key institutions such as the courts.

Q: Do you view the female response and the judicial response as mutually exclusive?

A: On the contrary, they should be one and the same thing.

Q: Do women bring to the judiciary an alternative way of looking at the crimes that women commit?

A: I think that women in the judiciary have an impact on general discussions among other members of the judiciary and can bring a different perspective to a number of issues.

Q: Do you agree that the criminal justice system has evolved in a way that sometimes ignores women's experience?

A: Yes. Our legal system has grown up in a male-dominated environment. It is evidenced by examples like the rules in relation to self-defence which contemplate male to male combat. A number of rules have been developed inside a male-dominated world where the gender differences have not been calculated. Terminology like the 'reasonable man', ignores the existence of women. In the last ten years the development of feminist legal thought has put the legal system under the microscope. My view is that this must benefit not only women but the entire community. I don't think

men can be disadvantaged by the equal treatment of women before the law.

Q: What other gender issues have you identified during your time in law?

A: One of the things that makes me quite sad and frustrated from time to time when I watch women in the courtroom, or on the floor of Parliament, is the realisation of how difficult it is to develop a successful 'female style' — one that doesn't require a louder voice than your opponent or a thick skin to withstand the jibes to prove your 'ability'.

Q: Can you think of any very successful women who haven't done that?

A: I think women like Joan Kirner, Cheryl Kernot and Carmen Lawrence, for example, have developed their own styles based on their personalities and individual capacity, rather than a capacity to shout down opponents and trade insults.

It is difficult in politics, as in the law, where the role models have traditionally been male, to develop a style that does not attempt to compete or 'tackle down' or 'annihilate the opposition'. It will still take some time for women to feel comfortable being themselves. It is pleasing to see some women practising in the legal system who have the maturity

and courage to develop a style far more suited to themselves as individuals.

It is not only refreshing, but important to the growth of women in the legal profession that this occurs to counterbalance the reports one hears of alienation and isolation, in particular from women at the bar who are reluctant to develop a 'warrior like' role.

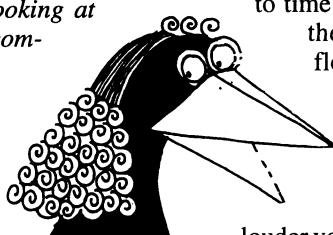
Q: Are there any issues you have been confronted with since you became a magistrate which were matters you had not previously contemplated?

A: There is no formal opportunity for debriefing and I think this is an issue that will have to be tackled at some stage. Whilst we, as disciplined and trained lawyers, deal with the facts at a professional level in a clinical fashion in the courtroom, it is impossible not to be affected at an emotional and human level by some of the horror and suffering we deal with. My impression is that this has not been dealt with in any open sense by either the judiciary or the legal profession.

I'd like to share a thought that I had when first appointed. I had previously puzzled over why some judges and magistrates were abrupt, abrasive and rude. I thought perhaps what was required was a level of distance and a gruff exterior to control the sometimes very strong personalities and tensions encountered in the courtroom. I have to say that within a short time I discarded the idea that a requirement of the judicial process and the courtroom, was to be rude or impolite for the purposes of control or authority and discipline. In fact, treating all with respect and dignity usually produces the best responses. The very necessary dignity of the courtroom is preserved fairly.

Q: You are involved in a great deal of voluntary community work. How does that help you as a magistrate?

A: First, it helps me to keep in touch with people and how they perceive the legal system. That's important because it's easy to become removed from people's thoughts and concepts when you're working in the environment that I am, and it assists me to remain aware of how best to communicate the sometimes difficult concepts of the court-





Jennifer Coate

room. Second, I am rewarded by the knowledge that I'm assisting people to understand the institution that's controlling them. I know understanding helps them to feel stronger, more powerful and more in control. It also means at a pragmatic level for me, that the litigant, especially the unrepresented litigant who comes into my court, who understands the process, will be a much easier person to manage, and ultimately less hostile.

Q: Do you find the position of power you hold at all daunting?

A: When I arrived at teacher's college aged 18, I had to reassess my view of power, money, privilege and authority. I realised for the first time where my

community fitted in the world of achievement and power, and it didn't even get a ranking. I have been haunted by this feeling from time to time and it can shake one's confidence and create feelings of alienation and isolation. On the positive side these realisations can also assist one to maintain a less rigid view of the world.

Q: Do you think that such a feeling is common among people in positions such as yours?

A: I think it's a regular response for women in positions of power in our community and I think it comes from the same sense of not coming from the traditional ranks of the power base. I've spoken to women in public positions

and positions of power who say that they regularly suffer from an attack which can best be described as 'they'll soon find out I don't really know anything and they'll get rid of me because I'm a fraud'.

Q: Do you think men in positions of power suffer from it as well?

A: Yes. I think some men do but I don't think it's as common.

Q: Can you identify any trends emerging in the criminal justice system?

A: In broad terms, I think we are becoming more sophisticated in our responses, in understanding the criminal offender and moving away from a brutal, vengeful, response to someone who commits a crime, to a more calm, thoughtful and intellectual response. I think Victoria's *Sentencing Act* is an example of a more intellectual and thoughtful approach. Now that's not to say that legislation changes all minds or attitudes. But language in law as in all things plays an important part in shaping attitudes and perceptions. There is a tremendous amount of thought and discussion going on, continuously, among criminologists and magistrates and the judiciary generally about sentencing, and a great deal of time is given to it.

Q: What are your interests other than the law?

A: It's interesting for me to think about what I do in my so called spare time. It feels as though almost whatever I am doing, I'm doing the same thing. When I say that, I mean I'm talking, listening and thinking, whether I'm reading a book or watching a film or talking with people. What I'm doing is listening to words and thinking about words and trying to fathom the meaning of things. I enjoy going to films and the theatre, and reading books.

Q: Do you have a favourite poet or author?

A: I have a few, but Dylan Thomas, was one of the first poets who added a dimension to my experience of words and imagery and poetry. When I first travelled to England I wanted to walk on that same ground. I went to the town where Dylan Thomas lived and wrote most of his work. It was a powerful experience that has remained with me.

Michelle Schwarz

Michelle Schwarz is a Melbourne lawyer working at AUSTEL



LAW REFORM

The battle for gun control

The massacre at Port Arthur has led to a historic breakthrough in the battle for gun control. On 10 May 1996, the Australasian Police Ministers' Council agreed to a plan for national uniform gun laws put forward by Prime Minister John Howard and Attorney-General Daryl Williams.

Numerous previous attempts by the APMC to achieve uniform gun laws have been thwarted by some States' refusal to adopt such basic measures as gun registration (see (1991) 16 *Legal Service Bulletin* 265). Thus Australia has persisted until now with a patchwork of laws which were confusing to shooters, frustrating for police, and hazardous to public safety.

Most significantly, the new agreement is for laws that are not only nationally uniform but also stricter than the existing law in any one jurisdiction. Even Western Australia and the ACT, which are the strictest at present, will have to tighten their gun laws.

Who will be able to own guns?

The most important principle in the APMC resolutions is that Australia's gun laws should be unambiguously restrictive rather than permissive, to use the distinction drawn by criminologist Franklin Zimring. A permissive scheme allows any adult to own a gun unless they are disqualified, for example, by a violent criminal record. By contrast, under a restrictive system, gun ownership is a privilege: no-one can own a gun unless they affirmatively establish a case for it.

The APMC has resolved that anyone who wants a gun must show they have a 'genuine reason'. A person who cannot show a genuine reason will not be granted a licence to own or possess guns.

People with a genuine reason to own guns will be members of an approved shooting club; hunters who have permission from a landowner to hunt; people with an occupational need for a gun such as farmers, security employees or professional shooters; bona fide gun collectors; and people with special permission, for example, a film producer.

'Personal protection' or self-defence is not legally a genuine reason for buy-

ing or owning a gun. This is already the case under the existing law.

What types of guns will be banned?

The APMC decided generally to prohibit the ownership, sale, transfer, import and manufacture of semi-automatic rifles, as well as semi-automatic and pump action shotguns. These guns will only be available in exceptional circumstances for the military, police and certain types of occupational shooters, including some farmers. Competitive shooting involving prohibited guns will be banned.

How will the licensing system change?

The existing gun laws already require people who wish to buy or own guns to be licensed. Under the new laws there will be five classes of licences:

- Category A for air rifles, non self-loading rimfire rifles, single and double barrel shotguns.
- Category B for single shot, double barrel and repeating centrefire rifles, and break action shotgun/rifle combinations.
- Category C is limited to primary producers and covers guns which are prohibited except for occupational purposes. Category C includes semi-automatic rimfire rifles with a magazine capacity up to ten rounds, semi-automatic shotguns up to five rounds, and pump action shotguns up to five rounds.
- Category D for weapons which are prohibited except for official purposes. These include self-loading centrefire rifles (whether military-style or not), self-loading shotguns, pump action shotguns with a magazine capacity over five rounds, and self-loading rimfire rifles over ten rounds.
- Category H covers all handguns, including air pistols.

What are the qualifications for a licence?

In addition to demonstrating a genuine reason, an applicant for a gun licence will need to be aged 18 or over, a fit and

proper person, with multiple forms of identification, and will need to have undertaken adequate safety training. Applicants will need to acknowledge the safe storage requirements and agree to an inspection of their storage arrangements if the police request it.

A 28-day waiting period will apply to all licence applications. The APMC decided the maximum term of a licence should be five years; however those jurisdictions which currently have a maximum of two or three years will probably stay with the shorter term. When licensees apply for renewal they will have to demonstrate that they still meet all the licence criteria. Failure to comply with licence conditions will incur serious penalties.

An application for a licence may be refused for general reasons (for example, not of good character or convicted for an offence involving violence in the past five years); specific reasons (for example, being the subject of a domestic violence order or convicted for an assault with a weapon); or reasons relating to mental or physical fitness.

What about farmers? Primary producers who require a gun will normally have a genuine reason for a Category A or B licence. They may also be granted a Category C licence if they demonstrate a 'genuine need' that cannot be met by Category A or B. A Category C licence allows a farmer to own only one self-loading rifle and one self-loading or pump action shotgun.

What about collectors? The APMC resolved that bona fide collectors should be allowed to keep a gun collection if they comply with safe storage requirements. Firearms manufactured before 1 January 1946 may be left in working order; however firearms manufactured after that date must be rendered inoperable. Prohibited weapons (Category C or D) may not be kept in a collection. Collectors will not be allowed to keep any ammunition for guns in their collection.

Buying a gun: Each purchase of a gun will require a permit, which will take 28 days to obtain. All gun sales must be conducted through licensed gun dealers. Mail order sales will be banned except between licensed dealers.

Continued on p.148

LAW REFORM

The offence of public drunkenness

MICHAEL MACKAY discusses a major cause of Aboriginal incarceration in Victoria.

In 1991, after two years of intensive investigation, the Royal Commission into Aboriginal Deaths in Custody handed down its findings and presented 339 recommendations aimed at reducing Aboriginal contact with the criminal justice system. The 99 deaths investigated by the Royal Commission revealed a number of important commonalities between individual deaths, with unemployment, low socio-economic status, and extensive criminal histories of offences typifying many of those who died.

Public drunkenness

One particular characteristic of 27 of those who died was particularly notable — all 27 were, at the time of their deaths, in custody for the sole offence of public drunkenness. Another eight of those who died had been placed in custody for being intoxicated in jurisdictions where public drunkenness was not an offence. In Victoria all three deaths investigated were of people in custody solely for this offence. Over half of those deaths in Queensland and over one quarter of those deaths in Western Australia were of people in custody for violation of those States' laws pertaining to this offence.¹

In response to this startling finding, the Royal Commission made a number of important recommendations about the offence of public drunkenness. Recommendation 79 urged:

That, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness.

The Royal Commission recognised that abolishing the offence was only part of the solution. Intoxicated people should be diverted to non-custodial facilities (such as sobering-up centres),² and local government by-laws prohibiting public drinking need close monitoring to ensure that non-payment of fines imposed for violation of such by-laws do not replace the offence of public drunkenness as a major cause of Aboriginal incarceration.

The case of Victoria

Despite these recommendations, public drunkenness remains an offence in Victoria under ss.13-16 of the *Summary Offences Act*.³ Just how seriously this offence impacts on the Aboriginal community can be gauged from statistics produced by the Statistical Services Division of Victoria Police. In 1993-94 there were 852 arrests of Aborigines for this offence across the State. While these figures do not relate to distinct people (that is, one person arrested three times for

Figure 1: Victorian Country Police Districts (Districts L to Q)

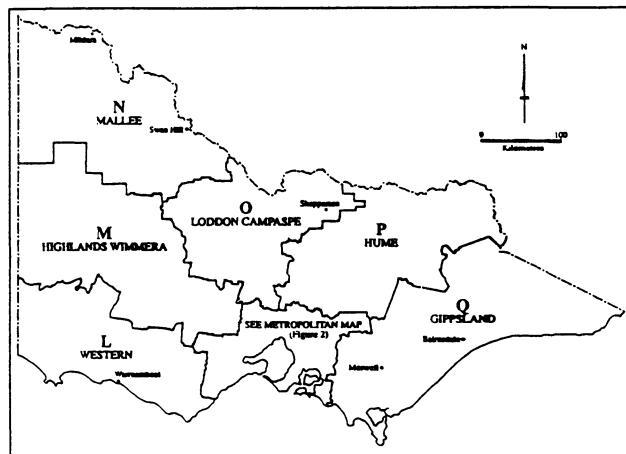
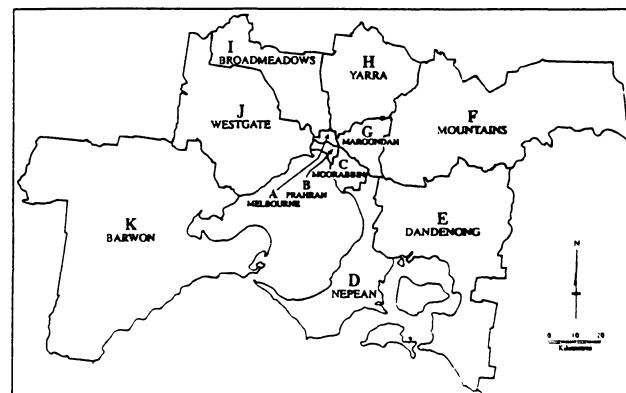


Figure 2: Victorian Metropolitan Police Districts (Districts A to K)



this offence would have been counted three times), they still indicate the enormity of the effect this one offence has on the level of contact that members of the Aboriginal community have with Victoria's criminal justice system. Using 1991 census population statistics, this is equivalent to a rate of 51 arrests per 1000 of the Aboriginal population. Assuming that the reported rate of arrest of the entire population for this offence in Victoria in the 1980s has remained fairly constant at around five arrests per 1000 population⁴ over the past decade, the rate of arrest of Aborigines for this offence is something like ten times that of the whole population. According to Magistrates' Courts' sentencing statistics for 1994, 8696 cases were heard across Victoria involving the sole offence of public drunkenness.⁵ This equates to a rate of around two per 1000 population (with the Aboriginal rate for 1993-94 being approximately 25 times that).

Interesting geographical characteristics of Aboriginal arrests for drunkenness in 1993-94 also emerged from the dataset provided by Victoria Police. *Table 1* shows the number of these arrests which occurred in each of the geographically distinct Police Districts outlined in *Figures 1* and *2*. N district stands out like a beacon, with 342 arrests for the year. The next highest was O district, with 126 arrests.

Table 1:
**Number of Aboriginals arrested for Drunkenness,
 by Police Districts, 1993/94**

Police Districts	Arrests	Police Districts	Arrests
A	76	J	7
B	111	K	16
C	5	L	20
D	8	M	15
E	8	N	342
F	3	O	126
G	1	P	8
H	18	Q	78
I	10	Total rate	852

Arrests of Aborigines for this offence in N district constituted around 40% of the total arrests of Aborigines for the offence. While these arrest statistics are compiled according to the station of the arresting police officer, using 1991 census population data it is possible to calculate a rate of arrest per 1000 population living in each Police District for this offence. The resulting figures, in *Table 2*, give a better indication of the geographical differences in arrests for this offence.

Table 2:
**Rate of Aboriginals taken into Custody for
 Drunkenness for 1000 Aboriginal Population
 by Police Districts, 1993/94**

Police Districts	Arrests	Police Districts	Arrests
A	178	J	7
B	407	K	21
C	11	L	29
D	11	M	15
E	8	N	232
F	3	O	56
G	2	P	11
H	12	Q	44
I	10	Total rate	51

The enormous rate of arrest for the offence in B district (see *Table 2*) reflects the popularity of the St Kilda area as a gathering place for many of Victoria's Aborigines. A district, which includes the CBD, is almost naturally a place of high arrest. The figure for N district, however, cannot be explained in these terms: 232 arrests per 1000 population is approximately 40 times the assumed rate of arrest for this offence for the whole population across the whole State. Unfortunately, figures for non-Aboriginal arrests were not available, so it is impossible to carry out any comparisons between Aboriginal and non-Aboriginal arrests within individual Police Districts. In a recent study it was found that

arrests for drunkenness constituted some 22% of all Aboriginal arrests in Victoria in 1993-94, and about 39.6% of all Aboriginal arrests in N District.⁶ Members of the Aboriginal community often attribute N District's high rate of arrest for this offence to local government's encouragement of police to 'clean up' the streets of Aboriginal drinkers. The visibility of Aboriginal public drinking is seen as detrimental to the wooing of the tourist dollar, and has also brought about the introduction of local laws prohibiting public drinking, violation of which often leads to the default payment on a fine and incarceration.

To its credit, the Victorian Government has provided capital funds for the establishment of sobering-up centres in Bairnsdale, Mildura, Morwell, Shepparton, Swan Hill, and Warrnambool which are run by local Aboriginal co-operatives. There is, however, no sobering-up centre in the metropolitan region, despite the fact that there were some 263 arrests for this offence in the metropolitan region in 1993-94. At the same time, while most of those arrested for this offence in country areas are being diverted from police custody, they are still charged with the offence before being placed in the custody of the sobering-up centre or the local Aboriginal co-operative. In some regional courts, a fine is often imposed on offenders, default of which often leads to time in police cells. In other regional courts, an offender may be discharged without conviction. Most of those arrested in the metropolitan region are detained in Police cells for some four hours — totally contrary to the recommendations of the Royal Commission, and effectively inviting deaths in custody to occur. While the severity of the punishment for this offence varies in courts across the State, the arrest of Aborigines for public drunkenness often begins or perpetuates a cycle of arrest which, the Royal Commission found, often leads to imprisonment.

The Kennett Government and law reform

Since its election in 1992, the Kennett Coalition Government has done its utmost to evade the issue of law reform in relation to public drunkenness offences, even though it claimed to support the Royal Commission's recommendations in principle. The Government's excuses for failing to deliver law reform are worthy of examination, particularly considering that, when in opposition, the Coalition had rejected legislation aimed at decriminalising public drunkenness. According to the Government, '[t]he offence of public drunkenness cannot be repealed without adequate alternative options for dealing with intoxicated persons'.⁷ The Government agrees that sobering-up centres '... may provide an alternative method for dealing with public drunkenness in cases where such a centre is available',⁸ but claims there are not enough such centres currently in operation for the decriminalisation of public drunkenness to be a successful proposition. Just how many of these centres the Government needs, and just how long it plans to 'monitor' these centres before embracing reform is unknown. It seems strange that the Government should use the excuse of not having enough sobering-up centres and then stall the establishment of any of these centres in the metropolitan region.

The main argument used by the Coalition in 1991, when in opposition and rejecting the government Bill decriminalising public drunkenness, is similar to the one it falls back on today in government — that the lack of sobering-up centres trivialises the problem. The Coalition, however, had other qualms about the Bill, including that it proposed that police be unable to question or begin other investigative

procedures concerning someone detained in a sobering-up centre or police cell for drunkenness. The notion of individual liberty was also a major part of the then opposition's rhetoric, with criticism that the Bill did not allow a person to seek release from detention on the basis of wrongful apprehension. At the same time, those apprehended would have been unable to complain about their treatment by police. The fact that the proposed legislation would have forced police to use the option least restrictive to a person's liberty also concerned the opposition, in that police would have to consider a series of options before locking an intoxicated person in a cell at the police station.

Other MPs argued that the legislation was '... looking after a minority of a minority . . .',⁹ suggesting that the interests of minority groups are not worth addressing. The then opposition also expressed its concern that the legislation would encourage more drunken revelries on the streets, a problem it visualised as having increased since the relaxation of sale of liquor legislation. According to one opposition member at the time, 'many people feel that this Bill is sending the wrong message to the community . . . People do not want a message going out into the community that says it is okay to be drunk'.¹⁰ Peculiarly enough, this is not the kind of response one would get today from a member of the Victorian Government if one was to inquire about the message sent out by the Government in its heavy promotion of gambling and the Melbourne Casino.

Conclusions

The high rate of arrest of Aborigines for the offence of public drunkenness can only be seen as a major obstacle in the path of reducing Aboriginal contact with the criminal justice system. Interestingly, evidence from Western Australia shows that after that State decriminalised public drunkenness the number of Aborigines detained in police cells declined markedly.¹¹ The very fact that the offence requires discretionary choices by police about the level of intoxication of alleged offenders is problematic, and leaves the state open to accusations that the laws it administers can be used by police to discriminate against one particular minority group. At the same time, the nature of this discretion is such that it is extremely difficult and time-consuming to mount a defence of not guilty. More importantly, the fact that so many of those Aborigines arrested for this offence are being detained in police cells for the mandatory four hours has left the Aboriginal community open to the possibility of a spate of preventable deaths in custody which, since the Royal Commission, it has been lucky enough to avoid.

It is not the drunkenness of Aborigines which is the target of ss.13-16 of the Victorian *Summary Offences Act*. Rather, it is the visibility of Aboriginal drinking behaviour which makes Aborigines more likely to be charged with this offence, and localised public order campaigns have tended to prod local police towards the use of the sections. Differing perspectives of public space and acceptable behaviours within such space are not acknowledged by the Act.

At the same time, it must be recognised that merely decriminalizing this offence is unlikely to have a great effect on incarceration levels. When the previous Victorian Labor Government attempted to decriminalise this offence in 1991, many local governments were quick to pass local laws prohibiting the consumption of alcohol in public places within their boundaries. More than one local government made it clear that the intention in passing such laws was to ensure

public drinking by Aborigines could continue to be controlled in the absence of any offence of public drunkenness.¹² While the present Victorian Government claims that '... legislation of this type is a matter for local government and should not be actively promoted by police officers',¹³ a representative from a local government which enacted such a law claimed that '[t]he police first approached council and asked council if we'd look to passing a local law [about public drinking] . . . This law gets you before you get drunk. The police reckon its the best law they've got'.¹⁴ Clearly, police have had a significant input into the introduction of such local laws. Violation of these local laws results in a fine. While imprisonment for violation of such laws is not possible, non-payment of fines often leads to a period of incarceration.

Of even greater concern is that the crime of habitual drunkenness remains on the statutes (s.15 of the *Summary Offences Act*). Four arrests for drunkenness in the one year means an individual can be charged with habitual drunkenness by police. Only in a minority of cases are offenders sent to a rehabilitation facility, and usually only after the offender has appealed to the County Court. Such legislation is quite contrary to the recommendations of the Royal Commission, and has been widely criticised by the Commonwealth's House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, which argues that '[i]t is highly inappropriate, as well as being ineffective and a waste of taxpayers' resources, to attempt to treat a behavioural or medical problem through the criminal law . . .'.¹⁵

Significantly, four Aborigines have died in custody in Victoria since the period examined by the Royal Commission. Two of these deaths were of people arrested for public drunkenness. Hopefully, it will not take another death in custody for the Government to change its stance and quicken its step towards decriminalisation of public drunkenness. If decriminalisation is to reduce Aboriginal contact with the criminal justice system, however, the Government must adhere more closely to the Royal Commission's Recommendation 82 concerning the monitoring of the effects of local laws which designate 'dry' areas.¹⁶

Postscript: Funding has recently been provided for the establishment of a sobering-up centre in East St Kilda.

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2. See RCIADIC Recommendation 80.
3. For convenience, the offences of 'drunk in a public place', 'drunk and disorderly in a public place', 'drunk behave riotously in a public place' and 'habitual drunkenness' are referred to as the one offence for the majority of this paper.
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16. Recommendation 82 of the RCIADIC states '[t]hat governments should closely monitor the effects of dry area declarations and other regulations or laws restricting the consumption of alcohol so as to determine their effect on the rates of custody in particular areas and other consequences'.

HUMAN RIGHTS

The 'loophole' in victims compensation

TIM ANDERSON argues for the rights of prisoners convicted of serious crimes

Bipartisan moves in New South Wales to exclude prisoners from the State's victims compensation scheme will most likely violate Australia's human rights obligations, and this will draw the Federal Government into an international legal challenge.

NSW Premier Bob Carr and Opposition Leader Peter Collins have both said they want to close the 'loophole' which allows, for example, a person convicted of murder to claim compensation for a serious assault suffered whilst in jail. Both politicians have said it is outrageous that Andrew Garforth, the convicted killer of Ebony Simpson, and former hotelier Andrew Kalajzich, should be able to make a claim. Garforth was severely bashed in jail by other prisoners, while Kalajzich, jailed for the killing of his wife, was stabbed at Lithgow Jail.

Undoubtedly many people will feel great sympathy with moves to deny ordinary rights to those convicted of horrific crimes. However the NSW Council for Civil Liberties has decided to support a challenge to the United Nations Human Rights Committee, under the International Covenant on Civil and Political Rights, if new laws entrench discrimination and

violate the principle of equality before the law. The Federal Government would then have to decide whether to support the State laws, or abandon them and protect Australia's reputation on human rights. When Tasmania's anti-gay laws were challenged, the Keating Government chose the latter course.

The Council for Civil Liberties will support a challenge, despite its unpopularity, because it recognises that human rights are often eroded with popular support. It is easy to support the rights of those with whom one sympathises; but human rights only have meaning when they are universal, and rights are easily corroded by populist attacks on unpopular citizens.

Are those convicted of murder entitled to be called citizens? If you support the international agreements on human rights: yes, certainly. The arguments against denying rights, and victims compensation, to those convicted of serious crimes are these:

- there is a popular but false dichotomy between 'victims' and 'criminals' — many people are both;
- when the state imposes punishment for a crime, it demands that a person accepts responsibility for his or her actions — yet no democratic society can demand responsibility without also protecting rights;
- the moral argument for rehabilitation disappears if those already serving prison sentences are also denied basic civil rights;
- just as there should not be 'worthy' and 'unworthy' rape victims, so making this distinction is dangerous in victims compensation.

The current political arguments against compensation for serious offenders parallel those run by the *Daily Mirror* in the late 1970s, when it defended a defamation action by the late prisoner and escape artist Darcy Dugan. The *Mirror*'s defence was not that it had run a true story, but that under the ancient English doctrine of 'attainder', Dugan, as a convicted capital felon, was of 'corrupt blood' and simply had no civil rights.

In 1978, the conservative majority of the High Court held that this ancient doctrine applied in Australia. Chief Justice Barwick argued that the merit of the doctrine was not for the court to decide. In his leading judgment, Justice Jacobs said there was 'no clear authority' on whether those convicted of a serious crime were to be denied civil rights, but that as Darcy Dugan was still serving a commuted death sentence, 'attainder' applied to him.

However, the lone and proverbial dissenter, Justice Lionel Murphy, decried the old doctrine as violating 'the universally accepted standards of human rights', as spelt out in several international agreements. Murphy addressed some of the flaws of the current proposal, when he wrote:

The civil death doctrine does not accord with modern standards in Australia . . . There is an overwhelming weight of evidence against the doctrine that a convicted person should, while under sentence, be without redress for a personal wrong, whether the wrong arises before, during or after imprisonment . . . Although the [civil death] doctrine treats the person as dead if he seeks to be a plaintiff, it treats him as alive when he is a defendant. The doctrine is anachronistic.

After this case a NSW Labor Government introduced the *Felons (Civil Proceedings) Act 1981*, which ensured a

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Guts and Pity: The Hanging that Ended Capital Punishment in Australia

by Barry Dickins; Currency Press, 1996; 99 pp; \$14.95 softcover.

At 8 a.m. on 3 February 1967, Ronald Joseph Ryan was hanged at Melbourne's Pentridge Gaol for the murder of a warder, George Hodson. Hodson had been killed on 19 December 1965 as Ryan and Peter Walker escaped from Pentridge Gaol. It has been the fact of his execution, the last Australian execution, above all else, which has attracted continuing interest in Ryan's case. The character of the man hanged by the state, as explicated by the press, 'true crime' writers and several television documentaries, helped create Ryan as a figure worthy of esteem. The continuing emphasis of popular culture on Ryan's redeeming features and on the possible miscarriage of justice involved in his hanging have served to demonise the state which hanged him and, in the process, exonerate Ryan. Barry Dickins' new book, *Guts and Pity* joins the collection of books which seek to depict Ryan as a misguided but honourable bloke.

Ryan differs from other criminals whose stories have been regarded as legendary because his criminal career was brief, and his public prominence still more brief. The majority of accounts make note of the fact that Ryan was not convicted of any crime until comparatively late in life. This has not prevented several journalists from searching for evidence of criminality in Ryan's earlier years.¹ Some details about Ryan's criminal career are necessary, perhaps precisely because Dickins is unusually vague about Ryan's criminal career. The portrait painted by Dickins is impressionistic — stole some suit coats here, a couple of mowers there and pounds and pounds of bacon. The real story is, arguably, less entertaining. In the 1950s, after a series of court appearances for forged cheques, possession of firearms and explosives and break, enter and steal offences, Ryan was eventually incarcerated.

In 1964, Ryan was arrested on four counts of shop breaking and stealing (motor mowers) and one charge of possession of explosives. He was sentenced to eight years with no minimum period.

The possibility that he would not see his family for this period of time was said to have distressed him so much he made plans to escape.² It was the death sentence for his escape and his implication in Hodson's murder that brought his case national and even international attention.³

Ryan and his companion Peter Walker were on the run for 19 days. During this time Walker killed a man they had met at a party, fearful he had discovered their identities. Finally the men were recaptured in Sydney and flown back to Melbourne to stand trial. By the time of their capture they were the 'best known men in Australia', but there was a definite gap between notoriety and esteem.⁴ The publicity surrounding the ensuing trial revealed much of Ryan's character, and his death garnered public support for the abolition of capital punishment. Subsequent media resurrections, with their focus on the man himself and the doubts surrounding his conviction, have rendered the notorious man and his death both courageous and heroic. Dickins' picture of Ryan continues this tradition, a tradition established by Melbourne *Truth*, true crime writers and various documentaries. But, Dickins work could have been more critical. The Ryan story requires an examination of the complexities of the individual and the issues raised by his execution, not merely another literary but insubstantial exploration of the Ryan myth.

In 1996, 29 years after the hanging of Ronald Ryan, his death and the circumstances surrounding his conviction still require explanation, perhaps to a new generation, whose government has never ordered the death of its lawbreakers. Amid recurring calls for the re-introduction of capital punishment, the issue remains relevant and worthy of consideration, especially from an historico-legal perspective. To some extent Barry Dickins' new book stands outside these motivations. Dickins has taken his impetus not so much from the issues — legal and social — but from the man himself. Barry Dickins developed a por-

trait of Ryan 'the man' to counter the negative image of Ryan which was created at the time of his crime. Dickins' play *Remember Ronald Ryan* opened at the Playbox Theatre in Melbourne in 1995, and from the material Dickins had amassed comes this book, *Guts and Pity*.

Unfortunately, *Guts and Pity* sits uncomfortably between true crime and academic analysis. Dickins' account is a verbal pastiche which combines opinion, direct speech and an assemblage of lengthy quotations. The author would have been well advised to explain some of the detail surrounding the case, given the time which has elapsed since its prominence.

Some of the material in the book is more appropriate to the play, especially the lengthy monologue, supposedly the thoughts of Ryan on the evening before his execution. The book is well researched and encompasses many of the thoughts attributed to Ryan by his family, warders and other associates, but still, it jars. It is reminiscent of the way in which true crime accounts attempt to recreate conversations to which the authors could never have been privy.

Dickins has had difficulties moving from the more forgiving medium of theatre, which allows for poetic licence to facilitate drama, to the realm of non-fiction where it is not possible to claim, as Dickins does, that Ryan was hanged for the theft of three Pope motor mowers. By writing the play Barry Dickins (re)created Ryan, and it is this incarnation of Ryan who appears in *Guts and Pity*. This can be seen in Dickins' defence of Ryan. It was alleged that Ryan clubbed a Salvation Army Officer on the head as he escaped from Pentridge. Dickins seeks to exonerate him with the rhetorical question 'who but a loathsome hideous criminal would bash up a poor old Salvo?' His creation of Ryan has answered the question; the Ryan of Dickins' construction would never have performed such a crime.

Ultimately, Dickins wants Ryan to be thought of as a 'bungler', a 'pub dudder' and a family man. Dickins is not the first to take such a view. The sympathetic media of the time portrayed Ryan as the object of Irish Catholic bad luck, a man who was basically non-violent and loved his family, especially his daughters. Ryan's apparent

lack of skill as a criminal was attested to by the six-part series detailing his criminal exploits run by Melbourne *Truth* in 1966. A detective interviewed by the *Herald Sun* claimed that Ryan 'bungled every job he ever did and was caught every time,'⁵ while the *Australian* chose to remember him as a 'Small-time crim [who] was last to hang'.⁶

Dickins has created a likable character in Ronald Ryan, but his focus on the man himself obscures the principles at stake with respect to capital punishment. The choice of whether to hang or not cannot be based on whether a man loves his mum. Dickins' play *Remember Ronald Ryan* did bring the man to life again in an arguably appropriate

forum. Unfortunately, *Guts and Pity* does not add much to this picture.

SUZANNE CHRISTIE

Suzanne Christie is a Sydney student of law and popular culture.

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decentring of law and privileging of the outsider is, of course, a political gesture which more than anything else distinguishes this book from, say, *The Idea of Law*. Where Lloyd asks 'Is Law Necessary?', Hunter *et al.* ask instead: 'What is a liberal?' (p.42). Instead of 'Law and . . .' Hunter reverses the formula: ' . . . and law'. It is a political gesture which leads into what is by far the longest chapter in their book, 'Objecting to Objectivity' (Gerry J. Simpson and Hilary Charlesworth) — a clear and precise catalogue of marxist, CLS, feminist and postmodernist legal theories. The chapter starts by explaining that the approaches to law which it describes:

are reactions against the accepted, traditional mythology about the nature of law that is imbibed by law students, expounded by judges and legislators, assumed by practitioners and which comforts the general public. [p.86]

I am not sure what a first-year law student would make of this sort of tough talk, but it does not continue into the body of the chapter and appears nowhere else in the book. It serves only as a reminder that this introduction to legal thought can afford to dispense with bravado, such is its intellectual force. *Thinking About Law* is challenging and cohesive, with detailed and helpful notes and suggestions for further reading. I hope it finds its way on to many law school reading lists.

JONATHAN MORROW

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Hard Target

by James Adams; Michael Joseph Limited (Penguin Group) 1996; 309 pp; \$19.95.

Here's an oddity — a novel which bills it's hero, David Nash, as 'Thriller fiction's new cyberspy' and yet which features only token cybertech which that same hero is very much less than comfortable with.

Having just finished Neal Stephenson's excellent *The Diamond Age*, a true cyber novel, I was looking forward to a thriller with a high tech edge and the silver embossed computer chip on the cover of 'Hard Target' promised just that. However it quickly became apparent that neither Adams nor his hero had more than a vague idea about computers. Adams is clearly attempting to cash

tively detailed discussion of the principles in *Milirrpum v Nabalco*, *Coe v Commonwealth* and *Mabo* (No. 2), but it is an opening which at a basic level encourages an untrained student to think around the conventional dichotomies — to reflect, for example, on the way law is implicated in social and political histories, on differences between competing legal systems, and on the shiftless nature of legal doctrine.

In each subsequent chapter the authors maintain this emphasis on narration as opposed to taxonomy, talking not about what law 'is' or 'is not', but rather about what law does, or more precisely about what different groups of people do with law. This is particularly true for later chapters on the enforcement of rules, judicial decision making and the law reform process, where competing theoretical models (positivism, functionalism, pluralism, realism etc.) are explained almost entirely through illustrative case studies and summaries of research. (By contrast, the book curiously avoids any genealogy of English legal institutions, preferring to present concepts such as 'the rule of law' ahistorically.)

Thinking About Law devotes considerable attention to the views of non-lawyers, in particular those of the economist and the sociologist (see Richard Johnstone, 'Economic and Sociological Approaches to Law'). The

Thinking About Law Perspectives on the History, Philosophy and Sociology of Law

edited by Rosemary Hunter, Richard Ingleby and Richard Johnstone; Allen & Unwin, 1995; 254 pp; \$29.95.

One of the introductions to legal theory that I was expected to read as a first-year law student was Dennis Lloyd's *The Idea of Law*. After the first chapter entitled 'Is Law Necessary?' (answer: yes), that book goes on to display a great fondness for the process of dividing the world into that which is law, and that which isn't. Chapters have the following titles: 'Law and Force', 'Law and Morals', 'Law and Justice', 'Law and Freedom', 'Law and Custom' and 'Law and Society'. Law, according to this metaphysic, is the great social priority; and the truth of law's importance can be discovered by measuring it against those amorphous concepts which seem to exist only so that they can be known by the jurist: force, morals, justice, freedom and so on.

This is a powerful framework, but it is one which is not always helpful for people who are seeking an introduction to legal thought. *Thinking About Law* envisages first-year law students as its readership, and prefers instead to come at law from the outside — which is, after all, what the law students themselves are doing. It starts off not with metaphysics but with a complex story, written by Penelope Mathew, Rosemary Hunter and Hilary Charlesworth — a history of law in Australia which concentrates particularly on Aboriginal law and native title. It is an arresting opening, involving a brisk and rela-

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in on the wave of hype pushing the Internet, but having your novel star a guy who's computer skills add up to self-admitted 'gulf of ignorance' is probably not the best way to do that.

After only a few pages both Adams and Nash reveal themselves as technophobic, and it gets worse as the novel progresses. Every possible computer cliché is dragged out, from a database that contains all known criminal knowledge to a Virtual Reality helmet that gets Nash hot and sweaty it's so real.

The bizarre thing is that the technology is a sideshow to the main story, and guns and gore have much more to do with carrying the story forward than anything else (see the movie 'The Net' for another example of this kind of thing). A gang of incompetent gangsters somehow manage to almost setup a new nation by using biological weapons (a new strain of the plague believe it or not) to hold the world to ransom. And it is most gratifying to see that the gang-

sters are a mixture of Russians, Japanese and Koreans. Racial stereotyping anyone? The cold war is over but the enemies remain the same.

Add to the mix some atrocious writing, a feature of which is a desperately scripted romantic interest ('How would she ever get to know this enigmatic man?'), an underground spy network called 'Spandau' (Maxwell Smart where are you when we need you), a penchant for espionage acronyms and some rather too graphic descriptions of violence and plague after-effects, and you have a novel to be avoided at all costs.

Perhaps the scariest thing comes in the final lines (don't worry, it doesn't spoil it):

One thing was certain — Spandau would be back. Well, so would he.

Help! A sequel!

CHRISTIAN McGREGOR

Christian McGregor wishes Devo would tour again.

Cunning FOG index or the Coleman-Liau Grade Level. Despite this I am willing to recommend *Plain Language for Lawyers* as an interesting, edifying and useful read.

MICHAEL EASTON

Michael Easton works at the Australian Law Reform Commission.

Everyday Law

by Stella Tarakson; The Federation Press 1995; 291 pp; \$14.95.

As a kid, I remember my mother giving me the type of advice that mothers give — don't speak with your mouth full, pick your clothes up off the bathroom floor, be back before dark, etc., etc.

There were various punishments for disobeying these orders, perhaps I wouldn't be allowed to watch the A-Team, or Dr Who, but in general the punishment fitted the crime and I could comprehend why these things were bad.

However, there were some things that stepped outside of this set of rules: advice that was delivered in such a grave way, that I understood, even as a child, that these were not areas in which to test my independence — don't open the door if I'm not here, never go near that man's house at night, etc., etc. At the time it was hard to understand what was so different about these crimes. The full realisation would take many years to develop.

It was with a similar tone that I remember my mother once saying to me 'Never have anything to do with the law if you can help it'. This was good advice. Unfortunately, no one can help it. Some people will make a career of trying (usually criminals), but most of us will try to live within its bounds. Increasingly, the complexity of the legal system is making the task of living within its bounds difficult for all but the specialist. *Everyday Law* attempts to address this issue.

Everyday Law presents itself as a user's guide for living under Australian law. It is written expressly for the non-lawyer, and makes no assumptions about the reader's legal knowledge. Jargon is kept to a minimum, except where it serves to explain the type of language that you might encounter, and a glossary provides a quick point of reference for any terms that may have been forgotten.

Everyday Law is divided into three major sections each of which is further

Plain Language for Lawyers

Michèle M. Asprey; Federation Press 1996; 241 pp; 2nd edn, \$30.00 softcover.

Your average cynical lawyer might approach this book expecting a load of facile, tiresome, banalities squeezed from the pen of an underemployed, quixotic ex-Esperanto enthusiast.

They would be pleasantly surprised. In a well-written, witty and extremely readable book Michèle Asprey describes what plain legal language is, argues for its importance and provides practical advice for drafting legal documents that replace obfuscation with clarity.

According to Ms Asprey the secret to Plain Language, legal or otherwise, can be encapsulated in three words — consider your reader. How does she fare when judged by her own standard?

To appeal to the weary lawyer who spends the day immersed in dreary legal language she writes in a chatty style illuminated by the odd sardonic aside, well-chosen quotation and oblique reference. Unlikely as it may seem, given the rather dry topic, it is possible to read this book from cover to cover and enjoy it. An extensive index also enables it to be used as a reference book.

Of course lawyers want the facts, the evidence and the precedents along with a convincing argument before they will

believe anything. This book demonstrates research of considerable scope.

Ms Asprey canvasses national and international moves to eradicate legalese. She quotes studies demonstrating the economic benefits of plain legal language. She surveys plain language policies, the rules of legal interpretation and efforts to legislate for intelligibility. Cases where the clarity of language has been an issue, such as *Commercial Bank of Australia v Amadio*, are analysed. Legal precedents on specific questions such as the use of punctuation and the future tense are included for those reluctant to let go of hallowed legal clichés.

Finally, as all lawyers have their feet firmly on the ground, they want some practical advice. But watch it, they'll walk away in a huff if they think they are being patronised. Michèle Asprey does not provide templates or set little tests, but engages the reader in a discussion of issues such as vocabulary, grammatical structures, legal affectations, textual organisation and document design.

I didn't have the time to subject her prose to the precise statistical analysis of the Flesch Reading Ease test, the

REVIEWS

divided (the book has a comprehensive index.)

Part One — Access to Justice — introduces our legal system, its processes, participants, and our rights and responsibilities within that system. Topics include: Lawyers and Fees, Going to Court, Alternatives to Court, Dealing with the Government, etc.

Part Two — Personal Concerns — covers Your Family (which includes areas such as Domestic Violence, Custody and Access, Property Settlements, etc.), Health and Safety, Children and the Law, Your Job, etc.

Part Three — Property Concerns — covers Your Home, Your Neighbour-

hood, Purchaser's Problems (including Consumer Protection and Credit Issues), Wills, etc. The book's intention is not to be a substitute for legal advice, but a point of reference, outlining various options and allowing the reader to make the most of the legal services that are available.

Furthermore, the book does not attempt to address every legal issue that you might encounter. Rather, it covers the most common areas in greater depth and each section ends with suggestions for further reading should you wish to take your research to the next level.

I found the book to be extremely clear in its explanations of the legal

concepts involved in each area as well as offering a number of practical suggestions for dealing with the realities of the legal system.

So who will buy this book? Lawyers won't need it, and the general public would probably rather buy the latest Danielle Steele. This is a shame because this book has a lot to offer your typical Steele reader.

Perhaps, you could slip a copy into someone's Christmas stocking (better put in a CD as well). Recommended.

DAMIEN HOGAN

Damien Hogan is not a lawyer.

Law Reform column continued from p.140

The national firearms register: The APMC resolved that all jurisdictions should have integrated gun licence and registration systems linked through the National Exchange of Police Information. This will mean NSW, Queensland and Tasmania must establish registration systems. The other jurisdictions already have gun registration.

Safe storage of guns: The APMC agreed on a national standard for gun storage. Category A and B guns must be stored in a locked hardwood or steel receptacle weighing more than 150 kg or fixed to a building. Category C, D and

H guns must be stored in a steel safe fixed to the building. All ammunition must be stored in a locked container separate from the guns.

Amnesty and compensation: Anyone who currently owns a prohibited weapon will be able to hand it in and receive compensation during a 12-month amnesty. The compensation will be based on the value of the gun in March 1996. People who currently own guns without a licence will have 12 months to apply for a licence. After the amnesty, penalties for breaches of the law will be severe.

What happens next: These measures will reduce the private arsenal in

Australia by taking certain types of gun off the market, and by making many current owners ineligible to own guns, since they will be unable to prove genuine reason. But the laws are not secure. The agreement is only the start — now comes the implementation phase, in which each State and Territory will amend their laws. The gun lobby may still succeed in pressuring politicians to water down the agreement when it comes to drafting State laws.

Rebecca Peters

Rebecca Peters, Coalition for Gun Control
P.O. Box 167, Camperdown NSW 2050 Australia, tel 61 15 234 220 fax: 61 2 351 5038
email: rpeters@extro.ucc.su.oz.au

Anderson brief continued from p.144

controlled right for convicted felons to institute 'any civil proceedings in any court'. Current moves to deny such rights would have to amend this Act and reverse this reform.

An international challenge to new legislation which seeks to extinguish prisoners' rights would argue against the necessarily discriminatory nature of such laws, and against the denial of equality before the law. Politicians who seek to deny universal rights by closing this alleged 'loophole' will distinguish themselves from their predecessors, who helped establish these universal rights.

Tim Anderson is a lecturer in social policy at the University of Western Sydney, and a committee member of the NSW Council for Civil Liberties.

MORE NOTICES . . .

'Pickle Street' Educational CD Rom

The New South Wales Board of Studies has released a CD Rom which 'brings Australian law to life'. By meeting the residents of Pickle Street, discussing and evaluating their problems, users become familiar with legal and non-legal solutions to issues in family, housing and criminal law. The disk also includes commentary on the law by a number of prominent Australian legal, political and popular culture personalities. In addition there is a reference database containing over 100 articles. The CD Rom is available from the Board of Studies (NSW), phone (02) 9927 8111.

Coalition for Class Actions News

The Coalition for Class Actions is a group of community organisations seeking to reform the law on class actions in NSW to bring it in line with Federal Court

procedure. It was formed after the High Court decision in *Carnie v Esanda* which made class actions more widely available by holding that a class action can still be launched where there are separate contracts and where damages are claimed. The Carnies returned to the NSW Supreme Court in September last year where Justice Young decided that the 'class' would be defined on an 'opt in' rather than 'opt out' basis. The Carnies, wheat farmers in NSW who are legally aided, were required to foot the bill for sending out the letters inviting people to opt in. The Coalition can be contacted through PIAC tel 02 299 7833.

SUPPORT GUN CONTROL IN AUSTRALIA

Send a donation to the Coalition for Gun Control, P.O. Box 167, Camperdown NSW 2050. Tel 0419 603 527.



BITS

Tomorrow's Law

edited by Hugh Selby; Federation Press 1995; 316 pp; \$25.00 softcover.

Go through any major Australian newspaper and you'll see that over half the stories touch on law or legal issues. Crime, euthanasia, drugs and the environment often put law on the front page and make the talkback lines run hot. The depth of coverage, however, tends towards superficiality as the media chews up one story and moves onto the next.

Tomorrow's Law is a collection of 12 essays that flesh out some recent and perennial media favourites, including: the role of forensic evidence, trust and betrayal in criminal justice, privacy, press freedom, law for a multicultural society, regulation of the legal profession, the Family Court and the changing role of the High Court.

A number of chapters are useful in providing an overview and context to topics that the reader often finds treated in a fragmentary fashion. In particular, the chapter by Mary Crock, 'The Peril of the Boat People', is an invaluable examination of Australia's responses to the various waves of refugees that have landed on our northern coastline. She dispassionately dissects the use of tit-for-tat legislation against the Cambodian boat people, the struggle between the government and migration lawyers and the consequences for the development of administrative law, and the effect of international treaties.

Similar comprehensive treatments of some long standing ethical dilemmas are found in David Kinley and Simon Bronitt's essay on undercover policing, suspects' rights and judicial oversight, David Lanham's chapter, 'Where Angels Fear to Tread', about the problems of legislating on euthanasia, and Beth Wilson's chapter 'Legal Straightjackets' on the difficulties the law faces in dealing with mental illness.

With the added benefit of Geoff Pryor's cartoons to provide insightful commentaries and visual relief, *Tomorrow's Law* is a good guide to some of the big questions that today's law faces. ME

Sweet & Sour

Stories from the working world of police, social workers, lawyers, judges, gaolers and occasional villains

by Rod Settle; Federation Press 1995; 181 pp; \$19.95 softcover.

The appeal of Rod Settle's collection of short stories, *Sweet and Sour*, rests on his 35 years experience working in the criminal justice systems of Papua New Guinea, the Northern Territory and Victoria. In clear and elegantly colloquial prose he tells his own stories and relates some his colleagues have shared with him.

The stories are wide ranging — murder trials and tribal warfare in the PNG highlands, the mixture of sordid tedium interlaced by drama faced by the young Victorian police recruit, the farcical results of culture clash in the NT outback — but they share a tone of laconic bleak humour. He has the ability to examine fundamental moral questions while remaining completely non-judgmental. For me, the book evoked an Australian Tom Waits (circa 'Closing Time') quietly telling tales over horrible late-night coffee in a glaring fluorescent-lit petrol station cafe.

The author, quoting Melbourne poet Laurence Collison, writes that he has tried to describe the feeling of 'being an integer in all of this most inelegant, most sad, and O most satisfying business of being human'. In a subtle and engrossing manner that mixes scepticism and humanity, this is exactly what he has done. ● ME

Liaison Interpreting A Handbook

by Adolfo Gentile, Uldis Ozolins and Mary Vasilakakos; Melbourne University Press 1996; 144 pp; \$24.95.

For those of us who, as lawyers, have occasion to work with interpreters, this book is fascinating. The authors are professional interpreters and teachers in interpreting/translating and their book

provides the authoritative interpreters' eye view of the role of their profession.

The term 'liaison interpreting' is used to refer to the setting where the interpreter is physically present in the interview or meeting and uses the consecutive mode of interpreting (in contrast to the simultaneous mode used at international conferences). Thus liaison interpreting occurs between client and lawyer, patient and doctor, citizen and DSS etc.

The book is divided into two parts. The first six chapters deal with general principles: the historical background, general considerations, the role of the interpreter, the interpreted interview, ethics and professional socialisation. Each chapter concludes with a concise summary of the main points.

The remaining four chapters each focus on a specialist area: mental health, legal settings, business settings and speech pathology. The chapter on legal settings, by Ton-That Quynh-Du, an experienced Vietnamese interpreter, performs the dual function of explaining to interpreters the legal system and to lawyers the role of interpreters in that system. It analyses a number of extracts from transcripts of evidence and illuminates the difficulties of the task of the interpreter. This chapter alone makes the book extremely useful for lawyers who may not previously have appreciated the skills or function of interpreters.

But perhaps the most striking chapters are those on mental health and speech pathology, for these settings present the interpreter with the most formidable task, in accurately interpreting disjointed, or irrational or mispronounced speech from one language to another. One simple example from the speech pathology chapter demonstrates this point. The doctor asks the patient: 'Here are two words — 'frog' and 'Friday' — what do they have in common?' How does the interpreter translate that?

This book is highly recommended. If all judges and magistrates read it, they might finally stop telling an interpreter 'Just translate exactly what the witness said, Mr Interpreter' and, instead, appreciate the extraordinary skill and professionalism of the great majority of trained interpreters. ● SC

BITS was compiled by Susan Campbell, Frith Way and Michael Easton.



NOTICES

WOMEN AND THE LAW

The National Women's Justice Coalition

The National Women's Justice Coalition was formed in 1995 and aims to provide a national voice on, and influence policy on, women's justice issues as well as promoting awareness of barriers to women's legal equality. The Coalition has already been active lobbying government and plans to continue its efforts in areas including the legal needs of indigenous women, women's employment rights and sexual assault and the Model Criminal Code. The Coalition publishes a newsletter reporting its activities. For more information send your details by post to GPO Box 3148 Canberra, ACT 2601, by telephone (06) 247 2075, by fax (06) 257 3070 or e-mail nwjc@ozemail.com.au.

'A Law for Women' Radio Program in NSW

Radio 2SER-FM, in association with the Law Foundation of NSW began broadcasting the 'A Law for Women' series on 5 June 1996. The series comprises ten weekly programs in which lawyers and community workers explain legal processes and advise women where to find information and assistance, and women speak of their experiences of law. Program topics include women and the law, family law, domestic violence, parents and young offenders, employment, social security, immigration, tenancy, women and debt, and women and small business. The programs are broadcast on 2SER-FM 107.3FM and various NSW community radio stations on Wednesdays at 9.30 p.m. and repeated at 9.00 a.m. on Fridays. The series is also available on cassette. For details on the program or to order cassettes, contact Radio 2SER-FM on (02) 330 3000.

PUBLICATIONS

Art and the Law

The Arts Law Centre of Australia is calling for subscriptions to 'Artlines', a bi-monthly journal. 'Artlines' includes articles on the legal and ethical issues raised by developments in digital technology, information on recent developments in digital art, profiles of people and organisations working in new media, and news and reviews. The journal is aimed at those who work in the arts

industry. Subscriptions cost \$30 with a discount for those who subscribe to the Arts Law Centre of Australia. For a subscription form phone (02) 356 2566 or 1800 221 6475.

PIAC Guides to Public Interest Remedies

The Public Interest Advocacy Centre (PIAC) has issued a set of fact sheets explaining the nature, procedures and circumstances in which some legal remedies can be used to pursue public interest issues. The fact sheets cover freedom of information applications, judicial review of administrative actions, class actions, court interventions as 'friend of the court' and complaints under the International Covenant on Civil and Political Rights. The sheets are available from Gisela Ibarra at PIAC on (02) 299 7833 for \$2 each.

HAPPENINGS

PERIN Win for PILCH

Under the Penalty Enforcement Registration of Infringement Notices (PERIN) system people can be gaoled for non payment of traffic and parking fines. The Public Interest Law Clearing House recently assisted a 49-year-old woman imprisoned in Fairlea Women's Prison to secure a Supreme Court order issuing her a custodial community permit. The effect of the permit is to allow the woman to complete the remainder of her 52 day period of imprisonment by way of unpaid community work. The permit was initially refused by the Office of Corrections according to an internal policy refusing such permits where more than 30 days were owed. The Clearing House says the decision has the potential to allow those imprisoned under the PERIN system to do community work instead of going to gaol.

Closure of regional Family Court Registries

The closure of regional sub-registries of the Family Court at Mackay and Bendigo is likely to severely affect separating families in these regional areas according to Ms Dodds, the National President of the Australian Association of Social Workers. The closures mean the loss of local access to the Family Court Counselling Service, the only supplier of specialised counselling to assist people make decisions about

their own, and their children's future after separation. Ms Dodds predicted it would take some time for other agencies to develop the specialised skills and knowledge necessary to perform the work undertaken by Court Counselors.

CONFERENCES

Counselling and Culture Conference

Organisers: The Institute of Counselling and Centacare
Date: 26-8 September 1996
Venue: Macquarie University, Sydney
Contact: tel (02) 417 8352; fax (02) 417 8401

Cultural Heritage Conference

The Centre for Applied Philosophy at Flinders University is organising a conference on Cultural Heritage (Philosophical and Legal Aspects) on 3-4 October 1996. For more information contact tel (08) 201 3198.

Government Information and Public Policy Getting the full picture

Date: 3-4 October 1996
Venue: Theatrette, NSW Parliament House, Macquarie St, Sydney.
Cost: \$435 includes working papers, lunch, morning and afternoon teas.

Sessions cover: •quality of government information •technology of parliamentary information •how consumers get information •information and civic education.

Contact: Maureen Henninger tel 02 385 3589 fax 02 385 3430 email: m.henninger@unsw.edu.au

Clinical Legal Education Conference

Date: 10 July 1996
Venue: University of South Australia
Contact: David Balmford, tel 08 201 3884 fax 08 201 3630

Feminism in Transit

Venue: Australian National University, Canberra
Date: 19-20 July 1996
Contact: Heather Brook, tel 06 249 3049
Email: brook@coombs.anu.edu.au

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Cover: Illustration by Mish Phong.

OPINION

The Body and the Law: Contested Sites

The body has become a 'sexy' subject — meaning that for many it is an exciting development and has entered the popular discourse.

The broadening circulation of the notion of the body risks losing its context. Feminists contributed significantly to theorisation of the body. They reacted against the traditional liberal idea that all women could achieve real equality by gaining admittance into the same practices as men. The problem with this is that many women have different needs and interests than men; most obviously women have babies and men do not. There are clear bodily differences that make a difference to many women's lives. The limited effectiveness of strategies aimed at achieving real change and equality, such as affirmative action and equal opportunity laws, led feminists to shift to theorising the body, and asking questions about the practices that engender meaning in the body.

Similar theorisation of the body has proceeded about other social minorities leading to new understandings of racial identity, physical disability, and gender embodiment. Slowly, notions of masculinity have emerged.

The contestation over the meaning of bodily identity and recognition of bodily difference occurs in many forums, but law is a significant one. An important assumption of the law is that to arrive at just decisions all people must be seen and treated equally. Individuals are thought to be in some fundamental way equal, and from this it follows that they are to be extended the same sorts of rights and considerations, and that similar cases should have similar treatment. Not to proceed in this way is seen as morally wrong. In this case, the human subject, the individual, is abstracted from her bodily, social and cultural context and then compared. This is problematic because it does not allow for individual difference, including bodily differences to be taken into account. An examination of legal cases shows that similar cases are not the same, nor do they involve the same sorts of people with the same sorts of backgrounds.

What lies behind these assumptions about equality as sameness is that some universal conception of the human subject is being suggested as that against which all cases of injustice are measured. The so-called universal subject is an abstracted human subject because individuality and particularity are denied. As many feminists have argued, this abstraction is not neutral and cannot be claimed to be a universal subject. The reason that bodily difference is ignored is because identity of an individual has traditionally been thought to be located in consciousness. The reality is we cannot expect to have a truly universal subject because people are always culturally bound. Human beings in part socially and culturally construct themselves. The universal standard that is put forward, feminists argue, is the standard of the western white male. The universal subject that is placed before us is not at all universal. Nevertheless, it is the standard that we use to

measure equality. The employment of these sorts of assumptions as shown in Andrew Sharpe's analysis of legal decision making contributes to understanding of how law deals with transsexuality, by eliminating conflict between biological characteristics and gender identity.

Reproductive technology has been the subject of legal intervention for some time. David Clark's analysis of recently emerging case law reports on the property rights of the zygote and shows how the law plays a role in determining what should be considered a person and hence what rights they can have. The inclusion of zygotes into our conception of personhood seems to work on an assumption of there being a universal subject because the biological and social characteristics are ignored.

Even if the universal subject is rejected and difference is embraced then there still may be room for injustice to occur. By accepting differences there is then room to differentiate between people on grounds which have no relevance to the issue at hand. For example, this person is unsuitable for this job because she is a woman or because she is black. A feature of a particular group is taken to be biologically fixed and used to justify why a person or group is more suitable to act in a particular role. It may even be that such a role may be complementary to the role of another person. For example, it could be claimed that women and men are different by nature but their differences are complementary and of comparable value. As Marion Maddox argues, affirmative action law has the capacity to take into account bodily equality, while still recognizing that differences exist.

The law is also viewed by some as a site where the misuse of particular bodies can be challenged. A strand of feminism has viewed law as a useful tool to seek social change. Ustinia Dolgopol's article exemplifies this. She records how comfort women are using human rights law to challenge the Japanese Government's unwillingness to take responsibility, and explicitly acknowledge their suffering.

But the law is not the best forum for dealing with all bodily differences, or as some see them, bodily problems. Susan Brady argues that families seeking ways to deal with the bodily reproductive functions of their physically and intellectually impaired daughters are not well served by law. She contends that legal cases centre on medical intervention when families really need home help and other resources.

**Helen Macdonald
Margaret Cameron**

Helen Macdonald teaches philosophy at The Flinders University of South Australia.

Margaret Cameron teaches legal studies at The Flinders University of South Australia.

Judicial uses of transsexuality

A SITE FOR POLITICAL CONTESTATION

Andrew Sharpe

Legal recognition of the post-operative transsexual.

In recent years, Australian judges have had occasion to decide the 'legal sex' of transsexual persons. In medico-legal discourse transsexuals are generally considered to be those people who possess a chromosomal, gonadal and genital structure which is congruent at birth, consider themselves to be men or women despite official designation to the contrary sex category and who have either undergone 'reassignment' surgery or have manifested a desire for such surgery. In departing from the landmark English decision of *Corbett v Corbett* [1970] 2 WLR 1306, the Australian courts have rejected the notion that 'sex is determined at birth' in favour of a story of 'psychological and anatomical harmony', whereby transsexual people who have undergone 'reassignment' surgery have been granted legal recognition.¹

However, it is important to resist the temptation simply to characterise this Australian trend as progressive to be contrasted with a repressive English scenario,² for legal recognition of transsexual sex claims has proved possible only through the simultaneous production of a constitutive and abjected transsexual 'outside' — a domain of 'unintelligible bodies', 'impossible (trans)sexualities and 'incoherent' (trans)gender practices.³ It would seem medicine and law posit these excluded differences as external to, and in opposition to the 'truth' of, transsexuality thereby reproducing the social system of gender as dichotomous.

'Unintelligible bodies'

The story of 'psychological and anatomical harmony' entered Australian legal discourse in the case of *R v Harris and McGuiness*⁴ where the New South Wales Court of Criminal Appeal held that a male-to-female transsexual who had undergone full sex 'reassignment' to align her genital features with her psychological sex was to be regarded as female for the purposes of the criminal law.⁵ Here, although chromosomes were viewed as irrelevant (at 192), and while birth was abandoned as the governing moment in determining 'legal sex', a judicial preoccupation with genital insignia is evident.

It is the centrality of genitalia in the reformulation of 'legal sex' which ensures that a dicotomous notion of gender is reproduced. While the biological and temporal specificities of *Corbett* are abandoned, the commonsensical and genito-centric notion that women are persons with vaginas and men are persons with penises is reaffirmed. In this way, sex, albeit in refashioned form, continues to provide a 'foundation' for, and to make sense of, the social system of gender. In other words, only one body per gendered subject is 'right'.⁶

Crucially, a judicial focus on genitalia serves to invalidate the lives of those people who contest sex categorisation yet are unwilling and/or unable to undergo genital surgery,⁷ thereby clarifying their status as legal 'outsiders'. The more permissive judgment of Matthews J is particularly revealing in this respect. The submission that the court should treat biological factors as entirely secondary to psychological

Andrew Sharpe teaches law at Macquarie University.

ones, made with the pre-surgical appellant Phillis McGuiness in mind,⁸ provoked the following response:

... it would be vulnerable to abuse by people who were not *true* transsexuals at all. To this extent it could lead to a trivialisation of the difficulties *genuinely* faced by people with gender identification disharmony. [Harris 193, emphasis added]

This passage makes clear that psychological sex can only be established, for legal purposes, by surgical intervention, a theme to be pursued in later decisions.⁹ Thus, in the case of Phillis McGuiness it was the 'wrongness' of her body which led to legal rejection of her 'sex' claims. The adoption by the court of a test of 'psychological and anatomical harmony' does not, therefore, involve a commitment to ascertain harmony per se, and certainly not any subjective kind of harmony. Rather, 'psychological and anatomical harmony' can exist in law only where it resides within one realm of a particular medico-legal binary division of sex. Therefore, recognition of the post-operative transsexual as legal subject excludes, and consigns to a realm of bodily 'unintelligibility', pre-operative transsexuals and those people who consider their psychology and anatomy to be harmonious even though, and precisely because, it is located outside either sphere of that division.¹⁰

In granting legal recognition to Lee Harris her once transgressive behaviour and body are forgotten (amnesia) and forgiven (amnesty).¹¹ Through prior submission to medical, including surgical, rites of passage she had confessed to her 'true' self and to the 'wrongness' of her former body. It is because legal recognition is made to depend on surgical intervention to 'correct' bodies that the possibility of, and for, a 'transgressive politics'¹² at the level of sex, one perhaps which uses psychological sex to challenge the genito-centricity of legal discourse and to subject 'legal sex' to radical rearticulation,¹³ is eliminated as a discursive and/or political possibility.

While the *Harris* decision has been followed in subsequent cases it is interesting to consider the decision of the Administrative Appeals Tribunal (O'Connor J, Barbour and Grimes) in *Secretary, Department of Social Security v SRA* [1992] 28 ALD 361; [1992] 69 SSR 991. While overturned on appeal by the Federal Court (Black CJ, Lockhart and Heerey JJ), which reaffirmed the Harris test of 'psychological and anatomical harmony', the Administrative Appeals Tribunal adopted a different test for determining 'legal sex'. The Tribunal, emphasising the beneficial character of social security legislation, which could therefore be interpreted more liberally, held that a pre-operative male-to-female transsexual was a woman for the purposes of s.37(1) of the *Social Security Act 1947* (Cth) and was, therefore, entitled to an age pension. The interpretation of 'woman' adopted was one which dispensed with anatomical considerations requiring only 'psychological, social and cultural harmony'.¹⁴

However, while the requirement for surgical intervention was dispensed with the judgment was nevertheless constructed in such a way that the gender dichotomy remained in place. Thus considerable emphasis was placed on the fact that SRA believed herself to be 'a female trapped in a male body' (*SRA* at 365) and had been approved for, but due to financial constraints had been unable to undergo, surgery.¹⁵ Here willingness to undergo surgery supplanted the surgery itself as the appropriate criterion for determining 'legal sex'. While desire for surgery and actual surgery differ as criteria for determining 'legal sex' they both serve to reproduce

gender as binary and polar through the construction of 'wrong body' stories.

Ultimately, legal recognition of SRA proved contingent on her acceptance of the medico-legal 'wrong body' story and the adoption of an apologetic stance toward her own 'wrong body'. Accordingly, the discursive production of SRA as female serves to clarify the 'unknowability' of the pre-surgical body even as it enables SRA to assume a presence within the law. What unites the 'psychological and anatomical harmony' and the 'psychological, social and cultural harmony' stories is that they both insist on the 'wrongness' of the pre-operative transsexual body and they both require the confession of this legal 'truth'. The process of confession complete, and the all important 'truth' about the 'correctness' of bodies established, the tribunal proved able to develop amnesia with regard to SRA's continued possession of a 'wrong', and therefore transgressive, body and granted legal absolution.

'Impossible' (trans)sexualities

The form of legal recognition granted in *Harris* has entailed the exclusion of (homo)sexual difference because it supposes the prior establishment of 'heterosexual' desire within the medical arena. This finds legal expression in the judicial assertion that transsexuals desire surgical assistance 'in order that they may enter into heterosexual relationships' (*HH* at 317). The exclusion of lesbian and gay (trans)sexualities in the production of a 'coherent' transsexual legal subject is effected through a medico-legal conceptualisation of transsexuality as being in opposition to homosexuality. It is this insistence on the mutual exclusivity of transsexuality and homosexuality which confronts a gay and lesbian politics. It serves to reproduce heterosexual hegemony within law and to clarify the status of homosexuals as 'outsiders' within legal culture.

In a medical and legal world in which 'reassignment' surgery and legal recognition are effectively prizes to be earned,¹⁶ homosexuality is likely to considerably weaken, if not terminate, the prospects of people intent on these types of prize acquisition. Moreover, medical discourse, irrespective of epistemology, constructs (trans)sexuality in relation to psychological rather than biological sex. Accordingly, heterosexuality in the transsexual is considered to be the desire for same (biological) sex sexual relations.¹⁷ By the same token, sexual relations which are considered in all other respects to be heterosexual become in the context of transsexuality homosexual and therefore problematic.

Thus medical knowledge with regard to sex 'reassignment' deems males to be the appropriate sexual object choice for a male-to-female candidate as she regards herself as female. Indeed, the absence of sexual relations with a male is for a male-to-female candidate viewed by some as an adverse sign.¹⁸ Here a woman is viewed as a 'lesbian' sexual object choice for a male-to-female candidate. More importantly, a 'lesbian' sexual object choice is considered to contraindicate surgery. Compared to the 'heterosexual', the 'lesbian', and indeed the bi-sexual, male-to-female candidate is considered a poor risk for surgery.¹⁹ Indeed, the male-to-female candidate who considers herself to be lesbian is more likely to be considered a transvestite or a heterosexual with impotence problems.²⁰ Thus homosexuality emerges in opposition to the 'truth' of transsexuality, a 'truth' which implies a gendered relationship between sex identity and sexual preference.

While medicine and law have constructed 'heterosexuality' as a 'truth' of transsexuality, Bolin in her study of male to female transsexuals found only one of her population of 17 to be exclusively heterosexual while six were exclusively lesbian.²¹ Similarly, Lewins in his study of male to female transsexuals found less than half to be heterosexual with 31% clearly identifying as lesbian.²² While these findings might be viewed as casting doubt on the 'truth' of transsexuality in individual cases they might more persuasively be used to challenge the coupling of transsexuality and heterosexuality as 'truth'. In the meantime lesbian and gay transsexuals seeking 'reassignment' surgery and legal recognition must continue to pass as heterosexual before a medico-legal gaze.²³

'Incoherent' (trans)gender practices

The form of legal recognition granted in *Harris* serves to reproduce a series of sexist assumptions which challenge a feminist politics. This is because it is dependent on surgery, and surgical intervention is dependent on prior medical rites of passage.²⁴ In other words, contentious assumptions are entailed in a form of legal recognition which serves to endorse a medical model with inbuilt notions of gender.²⁵

As a candidate for surgical 'reassignment', the male-to-female transsexual is required to 'pass' as female before a medical gaze. In order to be accepted as suitable for surgical procedures she is required to do gender²⁶ successfully enough to convince, predominantly male, medical experts that she will blend into society post-surgically.²⁷ In the Foucauldian sense she is required to confess, that is to say, she is incited to produce a discourse of truth about herself which is capable of having effects on her.²⁸

The successful accomplishment of gender would seem to require a presentation of self which, amongst other things, is feminine in physique, dress and demeanour, attractive, more concerned with giving than receiving sexual pleasure and, preferably, working in a 'suitable' occupation for a woman.²⁹ The further a candidate departs from this 'ideal' the less chance she has of obtaining 'reassignment' surgery or the longer she has to wait.³⁰ Here, because legal recognition supposes, and retrospectively legitimates, the prior successful accomplishment of gender, the discursive production of the male-to-female transsexual as female excludes alternative gender practices. While these medico-legal exclusions most directly affect the transsexual, they also serve, at the level of representation, to delimit the range and variation of possible gender performance for women generally.

Legal assumptions regarding female gender performance are not only implicit in the endorsement of the medical model but also find judicial expression. Thus, in *Secretary, Department of Social Security v HH* the Administrative Appeals Tribunal (O'Connor J and Muller) expressed the view that anatomy must be the overriding factor in sex determination if 'overwhelmingly contrary to the assumed sex role' (at 320). This contention that the female sex role can only be properly fulfilled with the 'right' anatomical parts, specifically a vagina, assumes that the role requires submission to penetrative sex. This phallocentric view of female gender performance finds further expression in the assertion that after 'reassignment' surgery the male-to-female transsexual is 'functionally' a member of her 'new' sex, a view shared by the Federal Court in the SRA case (at 493).

In conclusion, the legal recognition of the post-operative transsexual is a welcome legal development. The intention here is not to denigrate that recognition, but rather its prereq-

uisite medico-legal conditions. It is not legal recognition of the transsexual which is called into question, but rather the exclusion of bodily, (homo)sexual and gender difference which that recognition has entailed. It is the judicial uses of transsexuality which call for attention and which make it imperative that legal discourse and practice with regard to transsexuality be viewed, not as an esoteric subject for legal study but, as a locus or site³¹ for political contestation where, perhaps, the anatomical, sexual and gender specificity of the legally recognised transsexual might be subjected to disruption and radical rearticulation.³²

References

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2. See Foucault, M., *The History of Sexuality: An Introduction*, Vol. 1 of the *History of Sexuality* (trans. Robert Hurley), Penguin Books, 1981.
3. See Butler, J., *Bodies That Matter: On the Discursive Limits of 'Sex'*, Routledge, 1993.
4. Above, ref. 1. The story of 'psychological and anatomical harmony' has its legal origins in United States decisions. See *Re Anonymous* 293 NYS 2d 834 [1968]; *MT v JT* 355 A 2d 204 [1976].
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7. See Prince, V., *Transvestia*, Vol. 100, Chevalier Publications, 1980; Shapiro, J., 'Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex' in J. Epstein and K. Straub (eds), above, pp.248-79, p.251; King, D., *The Transvestite and the Transsexual*, Avebury, 1993, p.158; Transgender Liberation Coalition, (1994) 1 *Tranys With Attitude*, The Newsletter of the Transgender Liberation Coalition Inc., June, Kings Cross, Sydney, p.1.
8. In her judgment Matthews J makes clear that Phyllis McGuiness proposed to undergo sex reassignment surgery, above, ref.1 at 173.
9. *Secretary, DSS v HH*, above, ref. 1 at 321 per O'Connor J and Muller; *Secretary, DSS v SRA*, above, ref. 1, at 494.
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11. Fraser, D., 'Father Knows Best: Transgressive Sexualities (?) and the Rule of Law' (1995) 7(1) *Current Issues in Criminal Justice* 82-87.
12. Fraser, D., above.
13. Butler, J., above, ref. 3.
14. SRA, above, ref. 1, at 366. The test of 'psychological, social and cultural harmony' first received judicial articulation in the lone judgment of Brennan in *Secretary, DSS v HH*, above ref. 1 at 324.
15. SRA, above, ref. 1, at 367. At the hearing SRA had stated that if she had \$10,000 she would spend it on reassignment surgery.
16. King, D., above, ref. 7, p.85.
17. See Benjamin, H., *The Transsexual Phenomenon*, The Julian Press, NY, 1966; Kando, T., *Sex Change: The Achievement of Gender Identity among Feminised Transsexuals*, Charles C. Thomas Publishers, Springfield, Illinois, 1973; Pomeroy, W.B., 'The Diagnosis and Treatment of Transvestites and Transsexuals', (1975) 1(3) *Journal of Sex and Marital Therapy* 215-24; Walinder, J., Lundstrom, B. and Thuwe, I., 'Prognostic Factors in the Assessment of Male Transsexuals for Sex Reassignment', (1978) 132 *British Journal of Psychiatry* 16-20; Raymond, J.G., *The Transsexual Empire: The Making of a She-Male*, Beacon Press, Boston, 1979; Bolin, A., *In Search of Eve: Transsexual Rites of Passage*, Bergin & Garvey Publishers Inc., Massachusetts, 1988, p.55.

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Cold Comfort

Ustinia Dolgopol

Japan's refusal to compensate the comfort women in a meaningful way.

For several years the 'comfort women', those women taken by the Japanese armed forces and forcibly placed into military brothels, have been seeking meaningful reparations¹ from the Japanese Government. They have consistently requested the following:

- a full and frank apology;
- a complete disclosure of all information available to the Government about the comfort women system;
- the provision of adequate compensation;
- the creation of a fund for the payment of medical services, including mental health services and the cost of all efforts at rehabilitation; and
- a memorial to all of the women in the Asia-Pacific region taken and put into comfort stations.

In addition, some of the women's groups in Korea and the Philippines have demanded that those responsible for the creation and operation of the comfort stations be tried for war crimes.

Thus far the Japanese Government has refused to meet any of the women's demands. This commentary will focus on the issue of compensation and explore the reasons why the Asian Peace National Fund for Women (hereinafter 'the Fund') created by the Japanese Government in 1995 is not a sufficient response to the women's right to compensation.² At the end of the commentary is a resolution adopted at 'The International Conference — Opposing the Asian Women's Fund' held in December 1995. The resolution has been included in order to better inform Australians about the position taken by the former comfort women and those organisations working with them, both in their home countries as well as in Japan.

Background

Having initially denied that the then government of Japan and its military were responsible for the forcible and deceitful taking of women for the purpose of using them as military sexual slaves during the period 1932 to 1945, the Government of Japan was forced to admit its responsibility for these acts in 1993. This change of position was brought about by the publication of documents found in the archives of the Ministry of Defence which clearly demonstrated that the taking, transport and housing of the comfort women was directed by and under the control of the Japanese military.³

Immediately after this admission the Government began to state that all claims for compensation had been dealt with in the various peace treaties concluded at the close of World War II (WW II). However, as has been noted on numerous occasions, at least two of the countries from which women were taken (the Democratic People's Republic of Korea and Taiwan) do not have treaties with Japan. Furthermore, the legal position as stated by Japan, that such treaties where they do exist covered all claims by individuals for specific harms done to them, is

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not as clear as Japan would have us believe. There is at least an arguable case that all of the former comfort women have valid claims under international law.⁴

Since 1993 the position of the Japanese Government has been that it has a moral obligation to the women to make reparations, which would include compensation, but not a legal obligation. Although this argument would not prevent Japan from making a direct payment to the women, it has taken the view that its 'moral' obligation will best be fulfilled by the creation of a private fund to which all citizens may contribute. It states that this will allow all Japanese to make 'atonement' for the harms done. The reasons for the Government's course of action have never been obvious.

All Japanese over a certain age and income pay taxes; therefore any payment made by the Government is also being made by the people. Further it seems a nonsense to admit publicly that the former government was responsible for these events, but then refuse to undertake to pay a form of compensation which comes directly from the Government. It would appear that those in power are trying to avoid the ultimate acceptance of wrongdoing by the State. Some have argued that this course of action is an attempt by several government ministries to avoid undertaking any act which could be seen as admitting a wrongdoing by the Emperor. As the military was, in theory, under the control of the Emperor then he would have ultimate responsibility for their conduct. Those putting forward this position go further and state that such an admission would bring the 'emperor system' into disrepute and might force a fundamental shift in Japanese political thought.⁵

Another hindrance to the payment of adequate compensation is the continued presence of war veterans in the Japanese legislature, the Diet. Many of the more conservative members of the Diet stated their displeasure when former Prime Minister Murayama first apologised for the creation of the 'comfort woman system' in a speech before the parliament of South Korea. These parliamentarians continue to deny that the women were taken forcibly and are adamant in their refusal to authorise compensation to the women.

Before leaving office, former Prime Minister Murayama set out proposals for the creation of various funds which he argued would give concrete proof of Japan's remorse for the acts of brutality committed against the various peoples in the Asia-Pacific region following the invasion of China and then during WW II. Included in his proposals was the framework for the Fund. As envisaged, the administrative expenses of the fund as well as advertising costs would be paid by the Government. Donations would be sought from the general population and ultimately moneys would be paid to the women.

From the first, the women and the organisations representing them have opposed the Fund. They argue that any money collected is 'sympathy' money and is not truly compensation for the harms inflicted on them. Despite this opposition the Government went forward with its plan. For the women this is seen as a further attempt to victimise them and to deny the intensity of their suffering.

The importance of compensation

Before proceeding to set out the women's reasons for opposing the Fund, it is necessary to delve into the basis on which compensation is to be paid. By the Japanese Government's own admission it has inflicted 'unbearable pain and suffering'⁶ on the former comfort women. It is almost impossible

to describe the horrors endured by the women. They were repeatedly raped and brutalised, some for periods of up to nine years. Each day of their captivity they had to live with the knowledge that 30, 40 or 50 men would be allowed to rape them and to torture them if they chose. In addition they were aware of the potential consequences if they were to get pregnant: forced abortions or perhaps death. The women's humanity was denied by their tormentors. Those who survived had to live with physical and psychological scars in an environment where they were afraid to speak of what had happened to them, because they knew that they would be held up to ridicule and shame.

Compensation is to be paid because these acts of wanton brutality were allowed to occur with official sanction. The payment of compensation is only one of the steps toward reparations which should be taken by the Japanese Government but is a particularly symbolic step as it would demonstrate an acceptance by the Government of Japan that the conduct of its military was wrong and warranted condemnation. As noted by Jose Zalaquett, a member of the Chilean Commission for Truth and Reconciliation, 'dealing with past human rights violations is . . . a wrenching ethical and political problem'.⁷ In the process of examining past human rights violations a nation may have to confront some of the most horrific behaviour that one human being or a group can direct against another human being or group. It is not easy for any nation to undertake such a task. However, if '[t]he ghosts of the past, [are] not exorcised to the fullest extent possible, [they] will continue to haunt the nation [in the future]'.⁸

This exorcism must include adequate compensation. As noted by the Special Rapporteur on 'the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms':

. . . gross violations of human rights and fundamental freedoms, particularly when they have been committed on a massive scale, are by their nature irreparable. In such instances any remedy or redress stands in no proportional relationship to the grave injury inflicted upon the victim. It is nevertheless an imperative norm of justice that the responsibility of the perpetrators be clearly established and that the rights of the victims be sustained to the fullest possible extent.⁹

If a country's sincerity in pursuing reconciliation is to be judged by its willingness to face its past honestly and acknowledge the suffering of its victims, then Japan can not be adjudged sincere. Although it seems trite to state that the acts of violence perpetrated against the comfort women were violations of international law, in particular the international law of human rights and international humanitarian law, it is important that the legal basis of the women's claims be borne in mind. Japan has not denied, nor could it, that violations of international law have taken place. What it has denied is that it has any legal responsibility to make redress for those violations. But this denial of legal responsibility for redressing the harm done brings into question the honesty of its statements of remorse. Its refusal to pay compensation directly to the women must be seen as an attempt to avoid being held publicly accountable for the harms committed against the women and therefore an attempt to circumvent responsibility. In no way can the steps taken by the Japanese Government be viewed as an attempt to achieve justice for the women.

As I have argued elsewhere the Japanese Government's refusal to make adequate reparation for the harms caused to the women taken into military sexual slavery during its

occupation of Korea, China, Malaysia, Singapore, Indonesia, the Philippines and the Pacific Islands is evidence of the lack of political will to own up to Japan's colonial past and to admit to the racism and sexism inherent in the policies adopted by the previous government.¹⁰ Every aspect of the comfort women system is tarred with racism and sexism, including the Government's continued refusal to consult with the women and to find a form of compensation acceptable to them.

Why the Fund is an inadequate response

It has been said that the payment of reparations allows victims to feel vindicated and to regain a measure of dignity.¹¹ The Fund established by the Government will not foster a sense of dignity in the victims. Many of the women have expressed indignation at the idea that their harms could be compensated for by 'gifts' from private individuals or corporations. They have referred to the Fund as 'sympathy' money or charity.¹² Given the serious nature of the violations they suffered at the hands of a previous government, the women are opposed to any scheme which on its face allows the Government to ignore its responsibility to make adequate compensation. They argue that to channel money through the Fund is to deny that the Government has any responsibility, moral or legal, to undertake to compensate the victims. For the women, only a direct payment by the Government will be considered an adequate form of redress.

The following extracts from a poem read at the International Conference opposing the Asian Women's Fund captures the sentiments of the women and their supporters:

With innocent faces

They became the cold bones
Those young girls were thrown way
In far away lands and hillsides
Or in the cold deep waters
You were buried a half century ago
You contracted syphilis
Your figures could not be recognised
You suffered and died with the sickness
From a 'comfort station' in Pusan
You were taken to Singapore by a ship
And thrown out into the sea
With tied hands and legs
Because of being pregnant

...

Your beautiful buds were torn relentlessly
Japan caused their tragedy
Japan paid money to the war bereaved families
When Emperor Showa died
Ten-thousand guests were invited to his funeral
But, the inhumane treatment of non-Japanese women was ignored
Japan paid only lip-service apologies
By asking citizens to raise money for them
Such injustice should not be permitted

...

Close your eyes and see
All together they are nodding their heads
Those aged women with white hair
Wrinkled faces engrave the pains of the past

Let us all together nod our heads
And say 'NO!'¹³

The anger being expressed by the women should be enough to stop the Government. It can not be an adequate form of redress if significant numbers of women refuse to accept any payment from the fund. If the Government con-

tinues to act in ways which are insulting and which do not take into account the views of the victims, its motivation will be brought into question. At a minimum the continued intransigence of the Government in the face of the women's objections must be seen as a form of sexism. A male-dominated government wielding enormous economic and political power is refusing to negotiate with the victims of its past policies.

Extracts from Resolution adopted at the International Conference 'Opposing the Asian Women's Fund'

...

3. Japanese Government evasion of its responsibilities, simply by establishing an 'Asian Women's Fund,' should not be permitted.

4. Firstly, such a fund is an insult and an affront to the war survivors and victims. The courageous action on the part of the victims, after their prolonged suffering and agony caused by Japanese militarism, has brought to world attention and concern the cruel criminal violence perpetrated against them and humanity. The supporters of these war victims have strengthened their actions and are determined, along with the victims, that this violence shall never again be committed against women. The courageous actions of the victims have given the people of Japan an opportunity to become worthy members of the international solidarity community in order to pursue peacemaking and to enhance human rights. However, the Japanese Government is characteristically evading its responsibility and trying to resolve the issues by handing out some money for the 'Asian Women's Fund' which is to be collected from ordinary Japanese citizens. This is an insult to the war victims and a desecration!

...

6. Thirdly, this is an insult to conscientious citizens all over the world. Without investigating the facts involved and without seeking out those most centrally responsible for the problem, the Government is shifting state responsibility onto the people of Japan in general with the hopes of establishing individual self-satisfaction through contributions of money to an ignominious 'Asian Women's Fund.' This is an insult and a deceit.

7. Furthermore, the Japanese Government has taken measures which have antagonised the people who have been supporting the victims of war. This is becoming a source of distress for the victims. This is deceitful.

...

10. The Japanese Government should acknowledge the facts related to the 'comfort women' system, investigate the realities involved, pay reparations to the victims with appropriate apologies, penalize the perpetrators of these crimes, and establish an educational system which recognizes fully the history of Japanese aggression and war crimes. We will, in no manner, retreat from the above position until the Government meets these essential requirements.

Not only is the Government refusing to negotiate and to undertake adequate consultations with the women, but it has sent emissaries to some of the countries where the victims live in an attempt to influence individual women to accept money from the fund.¹⁴ The Government's tactics are heavy handed and appear to be designed to divide the women. Luckily any such division has been avoided.

There are also innumerable practical difficulties with the fund. It has not been able to raise any significant amount of money. It has been suggested that the money raised is less than that spent on administrative and advertising costs.¹⁵ Apparently the objections of women's groups and organisations working with the former comfort women convinced many members of the public that they should not contribute.

The Chairman of the Fund recently announced that a consolation payment will be paid in the near future. This announcement provoked outrage among the multitude of groups working on the issue.¹⁶ They have continued in their attempts to gain international support for their opposition to Japan's policies.

The extracts from the conference resolution (see boxed section) give a comprehensive overview of the position taken by the women and their support organisations, so I will not go into further detail at this point.

Conclusion

The final report of the mission undertaken by the International Commission of Jurists began as follows:

This is the story of people everyone tried to forget . . . Even now after extensive inquiries no significant actions [have been] taken to acknowledge the victims' pain or to provide relief to them. Perhaps the only reason for this silence and inaction is the fact that the violations were perpetrated against women.¹⁷

Despite the rhetoric of the Japanese Government it remains the situation that no significant action has been taken to acknowledge the victims' pain or to provide relief to them. There can be little doubt that the Government's continued refusal to consult with the women and to offer a form of redress acceptable to them is an outgrowth of its sexist attitudes. The behaviour of the Government raises serious questions about its commitment to the promotion and protection of human rights, particularly the right to equality.

References

1. I use the term reparations as it is used in the reports of the United Nations Special Rapporteur on 'The Right to Restitution, Compensation and Rehabilitation for the Victims of Gross Violations of Human Rights and Fundamental Freedoms'. He defines the term as encompassing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In addition he calls on all states and the international community to ensure that effective judicial, administrative and disciplinary procedures are put into place so that the rights of the victims can be upheld. See van Boven, T., Special Rapporteur, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,' Doc. No. E/CN.4/Sub.2/1995/8 pp.57, 58.
2. The legal bases for the women's claims are set out in Dolgopol, U. and Paranjape, S., *Comfort Women — The Unfinished Ordeal (Final Report of a Mission)* (ICJ Geneva 1994). A lengthier discussion of the women's demands and the insufficiency of the Japanese Government's response is contained in the seminar papers delivered at the ICJ Seminar, Sexual Slavery and Slavery-Like Practices in World War II, Tokyo July 1995 (proceedings of the seminar will be published by the ICJ in August 1996).
3. These documents were located by Prof. Yoshimi of Chuo University, Japan; their contents are described in Chapter 3 of Dolgopol, U. and Paranjape, S., above, ref. 2.
4. See, for example, Coomaraswamy, R., 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Report on the Mission to the Democratic People's Republic of Korea, The Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime,' Doc. No E/CN.4/1996/53/Add.1; Dolgopol, U. and Paranjape, S., above, ref. 2, pp.155-82; and Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference 1996 (Report III (Part 4A)).
5. Suzuki, Y., 'The Social Milieu which Conceived the 'Comfort Women' System — Legalized Prostitution, Patriarchy and Emperor System' paper delivered at the ICJ Seminar, above, ref. 2. This position has been put forward by several commentators and academics during conversations with the author. Women's groups in Japan have also attributed responsibility for the comfort women system and the failure to make compensation to the 'emperor system.'
6. Statement of Prime Minister Miyazawa to the Parliament of the Republic of Korea, January 1992, reprinted in Inter-Ministerial Working Group on the Comfort Women Issue, Republic of Korea, 'Military Comfort Women under Japanese Colonial Rule', Interim Report, Seoul July 1992; an extract is reprinted in Dolgopol, U. and Paranjape, S., above, ref. 2.
7. Zalaquett, Jose, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,' [1992] 43 *Hastings LJ* 1425 at 1429.
8. Zalaquett, Jose, above, at 1430.
9. van Boven, T., Special Rapporteur, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,' above, ref. 1, p.53.
10. Dolgopol, U., 'The Immorality of 'Moral' Obligations — Japan's Refusal to make Restitution to Military Sexual Slaves', paper delivered at the ICJ Seminar, above, ref. 2.
11. Yamamoto, E.K., 'Friend or Foe or Something Else: Social Meanings of Redress and Reparations' (1992) 20 *Denver J. I. Law and Policy* 223.
12. Former comfort women and representatives of organisations working with them came together at a meeting in Tokyo in December 1995 and uniformly denounced the governments attempt to use the Fund as a means of avoiding its responsibility to pay compensation directly to the women. See 'Report of International Conference — Opposing the Asian Women's Fund,' prepared by the Coalition of Groups Opposing the Asian Women's Fund, Tokyo December 1995 (report in the personal possession of the author).
13. Ishikawa, I. (translated by Aiko Carter), 'Today We Have Come Together', contained in 'Report of International Conference — Opposing the Asian Women's Fund,' above.
14. Letter and Recommendations of International Fellowship of Reconciliation submitted to the Prime Minister of Japan in May 1996 contained in a 1996 document prepared by the International Alliance Supporting Radhika Coomaraswamy's Report on Military Sexual Slavery in War Time entitled 'Towards Restoring the Dignity of the Survivors of Japanese Military Sex-Slavery . . . Saying no to the 'Asian Women's Fund' (copy in personal possession of the author).
15. Totsuka, E., Paper contained in 'Report of International Conference — Opposing the Asian Women's Fund,' above, p.34.
16. Statements from the major organisations as well as press releases, newspaper articles, resolutions put before national parliaments are contained in a 1996 document prepared by the International Alliance Supporting Radhika Coomaraswamy's Report on Military Sexual Slavery in War Time above, ref. 14.
17. Dolgopol, U. and Paranjape, S., above, ref. 2, p.15.

Invasive & IRREVERSIBLE

Susan Brady

The sterilisation of intellectually disabled children.

The child's right to be heard in the medical powers jurisdiction of the Family Court should be about a broad advocacy of the child's interests rather than mere representation in court. This article concentrates on the sterilisation of children with intellectual disabilities.¹ These cases highlight socio-economic and emotional issues confronting families, as well as the lack of information, advice and support services available to assist them with the care of their child. Fundamental to success in this jurisdiction is the support and co-operation of a broader community of medical practitioners, advocates, human service providers, specialist consultants in disability, and others. Any weak link compromises effective outcomes for the child and family. The current processes employed by the Court particularly relating to the rules of evidence and quasi-adversarial procedures cannot address these fundamental issues.

The views I express in this article are based on direct case work in the Victorian adult guardianship jurisdiction and the Family Court medical powers jurisdiction in my former capacity as Senior Advocate of Victoria's Office of the Public Advocate, a rights-based statutory authority representing the interests of people with disabilities, and in my current work. In these capacities I have had the opportunity of meeting many families seeking the sterilisation of daughters with disabilities as an option for fertility and menstrual management. The opinions expressed are mine. They do not necessarily express the views of these agencies.

The Family Court's medical powers jurisdiction

The Family Court of Australia in 1992 ratified Order 23B to frame its extended jurisdiction relating to 'Special Medical Procedures for Children'. The Order followed a long line of sterilisation cases culminating in *Marion's* case where the High Court of Australia held that the right to authorise sterilisation of children is not within the ordinary scope of parental power.² It found that the Family Court has the necessary authority to grant authorisation if it is equivalent to a declaration that sterilisation is in the best interests of the child. The medical powers jurisdiction of the Family Court envisages 'special medical procedures' being a broad category of sensitive and/or disputatious treatments, ethically contentious and irreversible treatments, and potentially life threatening medical neglect matters. To date, most matters coming before the Court in Australia have addressed proposed sterilisations of girls with intellectual disabilities but one addressed gender reassignment of an hermaphrodite child, and another, parental refusal to consent to heart surgery.³ Equivalent overseas jurisdictions have addressed cases involving cessation of life support, donation of non-regenerative tissue and treatment for anorexia nervosa against a minor's wishes. What is becoming increasingly clear is that the future will see an increase in and a diversity of special medical cases coming before the Court.

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Observations about the jurisdiction

Lawyers faced with a sterilisation application will grapple with the matter by referring to case law and precedent and poring over judgments to learn what is required and how to best represent the interests of the child. A cautionary note: matters which reach the court are failures. They are not and can never represent models of best practice. Best practice is to be found in the cases which do not proceed to court. Best practice is possible if guidelines are in place as there were in Victoria in 1993 and are now in Queensland.⁴ For example, in Victoria in 1993 nine out of eleven matters were diverted from court and in 1995 in Queensland seven out of eight matters have been diverted. They are the success stories because the families and children involved received services such as respite care, home help, and needs-based developmental programs and the child retained a functioning organ and her bodily integrity.

What is striking about these matters is that most families at the time of application will not have been given medical or developmental options of a less invasive nature. In my experience, what is equally evident and appalling is that the families may never have received assistance from local council (such as home help), from disability agencies (such as respite care) or special educators (such as educational programs in personal hygiene or protective behaviours). With the provision of needs-based services most families do not proceed with an application and, what's more, the parents do not come back to the Court despite knowing exactly how to. These cases are not to be found in judgments.

This is my advice to lawyers in this jurisdiction. When parents say that they wish to have their intellectually disabled daughter sterilised never, in the first instance, think this is the problem. Referral to a gynaecologist implies a view has been formed that the problem is the reproductive organ. It rarely is. The organ is not diseased. These applications are not about medical problems but socio-economic and emotional situations in which parents find themselves by virtue of having an intellectually disabled child. Medical science can offer no quick fix. If the child's interests are to be heard then the presenting problem needs to be seen in context. A pivotal issue involves giving families options and most do not want to subject their child to invasive surgery.

Unlawful activity

We are in fact faced with significant human rights and social problems in this jurisdiction. Despite the clear legal framework established by the High Court in *Marion's* case, the law does little to prevent unauthorised sterilisations occurring throughout Australia. In the five years preceding *Marion* (1987-1992), the national total of sterilisation procedures for girls under 18 years was 2313.⁵ Post *Marion*, in 1992-93, there were 384 sterilisation procedures performed on girls. In 1993-94 the number increased to 417 and in 1994-95 it increased to 464 for the same age group.⁶ Since *Marion* (although we do not have accurate figures), the number of cases which proceeded to the Family Court is in the order of 20. That means about 20 out of 1200 sterilisation procedures came to the attention of relevant authorities. It is probable that few of these hundreds of sterilisation procedures will be a by-product of surgery appropriately carried out to treat some malfunction or disease⁷ and, therefore, these figures suggest that there is significant unlawful activity and abuse of the rights of these children.

Why are we seeing an increase in the number of unlawful sterilisations?

It seems in large part a consequence of parents' fears for the sexual vulnerability of their daughters, a lack of information and advice about both the short and long-term risks of procedures like hysterectomy, and a paucity of support services and educational programs available to assist with the child's care.⁸ Another issue seems to be the fact that the adversarial system and judicial processes create an environment where parties become locked in and wedded to winning. Most people wish to avoid this situation and the significant financial and emotional costs associated with litigated matters. The other and most obvious reason is that doctors and families are ignorant of the requirement to gain court authorisation for these procedures. How are we to address these issues?

What is required is a practical, less intrusive framework which addresses the presenting problems of parents in a timely manner through the identification of and access to appropriate services. The framework ought to create the mechanism for 'informed decision making' by parents through the exploration of alternative options to sterilisation.⁹

A case study

Annie's case will put my comments in context and illustrate why it is so important *not* to see an application for sterilisation as a 'legal problem' or a 'medical problem'.

Annie had severe intellectual and physical disabilities as a result of a near drowning when she was two years old. She was admitted to a Children's Home for care. She spent school holidays with her family. She lived at the Children's Home for nine years until it closed its residential facility. At age 11 Annie returned to the care of her parents. This was difficult for both her parents and her siblings since Annie required full nursing care.

Over the years she had undergone numerous surgical procedures and after each one 'she had regressed' taking a long time to relate again to her family and carers. This was a matter of great despair for all, particularly when the outcomes of surgery did not live up to the expected improvements in her quality of life. Her father described an incident three years earlier when he and his wife had been asked to attend a case conference with a number of physicians who were considering an orthopaedic procedure to cut Annie's tendons to release her legs from their contracted and stiff position. The intended result would be increased flexibility which would make transporting and caring for her easier. He said the surgeons asked him to show them the range of flexibility in her legs. He initially declined saying he was really not familiar with Annie's condition as he was not her primary carer. The surgeons encouraged him to do so on the basis that 'Annie would feel more comfortable with her father than strangers'. He complied with their wishes and broke both her legs as a consequence. He said Annie was subsequently terrified of him and that it took almost a year before she would make eye contact with him. The operation proceeded and after much pain and suffering, months in plaster casts, traction and skin ulcers, the increase in her limb flexibility was minimal.

The next recommended surgery was a hysterectomy. Her parents now viewed surgical intervention cautiously. Nevertheless, they had to maintain faith with the medical profession and felt that if doctors were proposing the hysterectomy then it ought be in her interests. Some two months after her

return home Annie's parents contacted a solicitor to assist with an application to the Family Court. The application suggested that the procedure would assist with her care and nursing management. She was not menstruating but it was thought that she would do so within the next couple of years. Her parents wished for a hysterectomy on the grounds that she would require nursing care with her menstruation. They were also worried that she was vulnerable to sexual abuse and its potential consequence, pregnancy. It was accepted that Annie would always require full nursing care and supervision and that she would be unable to care for a child.

The application was made to the Family Court which referred the matter to a State department with expertise in disability under Guidelines referred to above. A case conference followed. Annie's father expressed extreme anger about what he perceived to be legal intervention in matters which in his view rightly belonged to parents. He expressed his feelings about 'the lack of humanity', 'the high moral ground of professionals' and 'the high and mighty society' which offered rhetoric but little else in protection of his daughter's interests. He said he was terrified by Annie's vulnerability and the pain and suffering she had experienced since her acquired brain damage from a near drowning. He described his family as having had little if any assistance in coming to terms with the accident and the pervasive guilt which overwhelms them about what has happened since.

The question to be answered — is sterilisation a blessing or burden for Annie?

The family were given medical advice about the proposed hysterectomy and it was the same advice which appears in almost all applications.¹⁰ The advice came from generic specialists who offered no options other than the removal of her uterus. Her parents were not referred to experts in disability. The procedure was marketed as a panacea for all potential problems. Was it a social judgment masquerading as a medical need? The Family Court referred her parents to the appropriate government department for information and advice on alternative and less invasive options to sterilisation. The department offered services like respite care, home help and other supports to the family to assist with Annie's care. The family decided not to proceed with the application for sterilisation.

Are alternatives heard?

Interestingly, alternative opinions are not often heard in the majority of cases which get to court. What is clear is that the court needs to hear about clinical research which critically questions a range of long held assumptions about the nature and purpose of invasive procedures like the removal of the uterus. As well as this, there are some common sense questions worth asking. For example, if a functioning organ is removed will it have long-term consequences? Here are some views to consider. Removal of the uterus may cause the onset of early menopause, compromise skeletal structure, lower bone density and increase the risks of osteoporosis.¹¹ It may increase the risks of heart disease.¹² It is true that hysterectomy will solve the problem of menstrual management for care givers.¹³ The child will no longer bleed for five days a month. However, she will continue to urinate and defecate each day for the rest of her life. This is a greater nursing management problem. Why is there an inconsistency of approach to menstruation as opposed to other bodily functions? A hysterectomy will never solve vulnerability to sexual abuse but it will avoid pregnancy. How likely is it that she

will be raped?¹⁴ What should be done about this? Do you think she is entitled to educational programs about how to indicate to others she does or does not like sexual involvement?¹⁵ There is no data to suggest that pregnancy is a significant risk in this population. There are approximately 18 million people in Australia: 50.2% of them are females. The number of females under the age of 18 years is approximately 2,300,000. Of these approximately 2% have some form of intellectual impairment.¹⁶ Crudely this means approximately 40,000 intellectually impaired girls may be potential candidates for sterilisation because they are potentially at risk of pregnancy. If pregnancy is a significant risk in this population where are all the babies? Thinking about these figures it becomes clear that the numbers of unwanted pregnancies (or pregnancies) in this population seem statistically insignificant.¹⁷ This ought to raise a cautionary note when thinking about authorising sterilisation on the basis of risk of pregnancy. This response is a matter of fear not fact. It may be camouflaged eugenics.¹⁸ What is apparent is that a respectable body of medical evidence and critical investigation of options has been excluded from the majority of cases before the court.

In a search for information

We should be seeking information not acting as arbiter of opposing views in these matters. Those familiar with this jurisdiction will know that since Marion this area of law has been the subject of heated debate.

Human rights advocates, the disability sector and some counsel have raised concerns about cases before the courts. They variously described their concerns about the speculative nature of evidence, particularly relating to children who have not commenced menstruation, the lack of investigation to establish the real problem, the lack of separate representation for the child, and, if a separate representative is appointed, the illustrated lack of expertise and knowledge. They also query the processes employed by the Court particularly relating to adherence to the rules of evidence and quasi-adversarial procedures, the use of the 'expeditious' hearing rule and decisions being made on first return dates when there is no identifiable need for a 'quick fix' response, and of course the financial costs associated with court action.

Added to this the courtroom setting elicits comments like: '... an attack on the parents as care givers', '... cross-examination and the strong undercurrent of criticism and subtle demotion of their worthiness as care givers'. It 'elicits strong emotional reactions', 'palpable distress', and so on and so forth.¹⁹ If this is a true reflection of these cases then there is cause for serious concern. If costs are added to the concern, will the option of a declaration of lawfulness by the courts simply be rejected by parents and doctors as intrusive and unnecessary? The answer may be diversion into unlawful activity. The current system is clearly not serving to encourage applications and may well be discouraging them.

In a search for the solution

The Family Court, to its everlasting credit, has embraced the need for guidelines and protocols for the conduct of these matters. Attempts have been made proactively to develop co-operative arrangements between key stakeholders as in Queensland and Victoria, to ensure that 'special medical procedures' are responded to appropriately, consistently and in a manner which protects the rights and best interests of the child. The debate continues, however, and becomes increas-

ingly focused on whether legislation is required to prescribe the circumstances in which the Court can authorise the sterilisation of the child.²⁰ Even with legislation and guidelines there remain concerns about the standards of critical investigation and calibre of the evidence presented to the Court. Whatever the preferred option, the outcome must centre on placing the Court in the best possible position to make decisions in the best interests of the child. In practical terms this means ensuring 'quality of evidence' before the Court, complimented by procedures conducive to hearing such evidence. What is also clear is that these cases should never be a matter of contest but should involve the critical investigation of all pertinent issues. The problem is how to ensure the rigorous exploration of the problem. If investigation is limited, all things being equal, a pitched battle may be required to ensure that the interests of the child are protected.

Potential hearing impairments in the legal process

Even though the rules of evidence do not strictly apply in matters involving the welfare of children, by and large the Family Court adheres to them. This has serious implications for the role of the separate representative because it means that the outcome, in each application, depends on the evidence put before the Court. In my discussions with counsel about sterilisation applications, expressions of frustration abound. For example, one said: '... we continue to have to work up elaborate legal argument to get non medical evidence into court in the hope that the presiding judge will give appropriate weight to it ...' Another considered that '... options and alternatives must be investigated and tested prior to hearing ...' Yet another considered that '... the Court is responsible for its decisions and should make more use of its discretionary powers to seek alternative expertise ...' while another expressed frustration about established practices and that '... the Court has not taken on board an inquisitorial role; its only lip service in practice ...'

Lawyers make other troublesome comments such as: '... if the situation continues then agencies should withdraw from court involvement and use valuable resources to secure direct service provision because the court will likely give consent to sterilisation, and agencies would only be viewed as spoilers and frustrators'.²¹

It appears that a major task lies ahead for the child's separate representative. Unless the separate representative critically investigates, the presiding judge will not be afforded the opportunity to consider pertinent issues. Mushins J in *Re A (a child)* (1993) FLC 92:402, a gender reassignment case, noted that problems arise when materials indicating available options or contrary views are not filed for the Court's consideration. The current process of hearing evidence does not necessarily inform the Court about whether investigation of options has occurred or not. The right questions are not always asked. Until such time as they are, it may be necessary for the separate representative to act as a 'contradictor' seeking out contrary opinion, testing assumptions and the calibre of evidence. That is not to suggest that the role ought to be obstructionist. It would be preferable that 'testing' is undertaken prior to the hearing, and outcomes filed for the Court's consideration. Primary dispute resolution options may be appropriate forums for a co-operative and open exchange of information, drawing on expertise in the disability area as well as traditional medical opinion.²²

Let all the facts be heard and let justice be seen to be done

If the Court is to deal with the facts then let all the relevant facts be heard. It is generally accepted that the separate representative is deputised by the Court to act as an investigator but in all fairness the separate representative cannot deliver on this expectation in a vacuum. It is not unreasonable to suggest that definition and structure is necessary to operationalise critical investigation. Principles of critical investigation ought to be drafted and rigorously applied. Concepts such as best interests should be defined, if not by legislation, at least by guidelines. Another pervasive need seems to be education about disability for the Court, the separate representative and interested parties. Dialogue and co-operative arrangements are an integral part of an appropriate response and look to the development of a multidisciplinary approach. Nicholson CJ some five years ago saw the value of co-operative arrangements. As already mentioned the Family Court and the Office of the Public Advocate in Victoria developed guidelines for conduct in these matters. The aim was to identify needed services and supports for the child and her family so that the application could be deferred until such time as all issues could be explored, to provide reports which would assist the Court in determination, to avoid a pitched battle, and to keep trauma and costs at a minimum. Guidelines which promote a greater emphasis on prelitigation resolution are operational in Queensland.

Are guidelines and protocols a sufficient condition?

In my view the Court and key stakeholders must give parents every opportunity to participate in an investigation of alternative options and information. If this does not happen then they are unlikely to make an informed decision. This situation has serious ramifications for the legal process particularly given the significant weight the court gives to the wishes of the parents.²³ In these circumstances it seems to me to be incumbent on the court to determine whether or not the wishes of the parents are in fact 'informed' wishes rather than misguided expressions premised on fears or lack of options. Most parents are distressed about the prospects of surgical intervention and if given practical options will opt for less drastic alternatives.

A cautionary conclusion

The appointment of a separate representative will not and can never be all things to all people in these matters. It is churlish to suggest that responsibility for the child's right to be heard lies solely with separate representation. The separate representative plays a major role in applications to do with the welfare of children but in reality it is a bit part entirely dependent on the support and co-operation of a broader community of expertise.

As suggested earlier, any weak link compromises effective outcomes for the child. It is incumbent on all parties to form a view as to the child's welfare based on full and informed evidence obtained through critical investigation of the problem. Critical investigation is dependent on the development and implementation of a set of guiding principles and processes. Principles and processes should not be limited to legal niceties but incorporate the social, economic and political realities of being a vulnerable child whether disabled, abused or enmeshed in family dispute. Principles must be strictly adhered to. In my view, materials before the Court,

and certainly in sterilisation matters, must include documented evidence of the trial of less invasive medical treatments and developmental options. There is, however, a danger in becoming complacent with the introduction of guidelines, and indeed, rules. They should never be viewed as 'hurdles' or 'lip service' to social justice principles like the protection of the interests of children and their rights to be heard in proceedings.

The child's right to be heard is about adequate resourcing and this is not only in the area of training and accreditation of separate representatives. It is fundamental to the resolution of matters relating to vulnerable children that resources also be targeted to the development of multidisciplinary team approaches.

Resource allocation does not rest solely with State departments and service provision but also with the Commonwealth through the adequate funding of representation for children. As suggested above, it takes little intellectual rigour to accommodate a justification for the sterilisation of children if you are predisposed to placing an overriding emphasis on parental burden which is, in reality, a consequence of scarce public resources and concomitant lack of service options.²⁴ This reality reflects a socio-economic problem, not a medical problem and not a legal problem. Invasive surgical interventions need to be called for what they are and what they are not. If the Court's responsiveness to scarce public resources is authorisation of invasive and irreversible surgical intervention then it should be called that rather than 'best interests' and 'last resort' findings for the child at issue.

References

1. This paper concentrates on the sterilisation of girls with intellectual disabilities because most sterilisations are performed on girls and all the litigated cases in the Family Court of Australia involve applications to authorise the sterilisation of girls. This is not to say that boys are not subject to unlawful sterilisation procedures. The unabridged and footnoted version of this article is available in the Proceedings of the 29th Australian Legal Convention, Brisbane, September 1995 titled 'The Rights of the Child to be Heard. The Extended Jurisdiction — Potential Hearing Impairments in the Legal Process', pp.101-16.
2. *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.
3. See *Acting Public Advocate for the State of Victoria v GP and KP and Human Rights and Equal Opportunity Commission*, unreported, 17 May 1994, file no. ML 8841/93; and *Re A (a child)* (1993) FLC 92:402.
4. Practice Notice 3/95, 'Draft Guidelines for Special Medical Procedures Involving the Sterilisation of and Other Medical Procedures in Respect of an Intellectually Disabled Child pursuant to Order 23B of the Family Law Rules' between the Family Court of Australia Northern Region, the Queensland Department of Family and Community Services and the Queensland Legal Aid Commission.
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15. Hamre-Nietupski, S. and Williams, W., 'Implementation of Selected Sex Education and Social Skills to Severely Handicapped Students' in (1977) 12(4) *Education and Training of the Mentally Retarded* 364-72.
16. Australian Bureau of Statistics (ABS) Population Data No.3201.0 released January 1995 and ABS Welfare Section Unpublished Data sourced 30 June 1995. It is essential that the figures are recognised as only those people within households and does not represent those in institutional or hospital settings. The population as of 30 June 1994 was 17,843,300. The proportion of males at 49.8%. The proportion of females in Australia under 18 years is approximately 25% of the total being 2,238,200. A survey was conducted listing 17 criteria to distinguish disability and a single criteria 'Slow Learning' which can constitute developmental delay was screened. It was conceded that this criteria would identify about 50% of the intellectually disabled population. The national total of people categorised as slow learners is 139,900 of which 61,500 are female. Crudely this constitutes approximately 19,800 females under the age of 18 years.
17. Figures from the Victorian Office of the Public Advocate since 1987 note 132 sterilisation applications, 20 termination applications and 40 cases involving protective services and foster care/adoption issues. Note that these figures include not just women with intellectual disabilities but other statutory disabilities like mental illness. Many of the sterilisations will also represent women who are beyond child bearing age and the primary issue is gynaecological health because of disease or malfunction. In Queensland, data is not available but anecdotal information from the Office of the Legal Friend notes that there have been in the past seven years approximately 30 sterilisation requests, two being male and two termination requests.
18. For a discussion of involuntary sterilisation and eugenics see Cepko, Roberta, 'Involuntary Sterilisation of Mentally Disabled Women' in (1993) 8 *Berkeley Women's Law Journal* 122-65.
19. See *Re a Teenager* (1988) 94 FLR 181 particularly Cook J's judgment.
20. Family Law Council, above.
21. See Brady, S.M., above, ref. 8, pp.108-9.
22. See for an example Practice Notice 3/95, 'Draft Guidelines for Special Medical Procedures Involving the Sterilisation of and Other Medical Procedures in Respect of an Intellectually Disabled Child pursuant to Order 23B of the Family Law Rules' between the Family Court of Australia Northern Region, the Queensland Department of Family and Community Services and the Queensland Legal Aid Commission.
23. The High Court in *Marion's case* 1992, said that the best interests of the child will ordinarily coincide with the wishes of the parents.
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en ventre sa frigidaire¹ Zygotes as children

David Clark

In a world first a Tasmanian Court has held that a zygote may inherit under intestacy legislation.



The courts have typically two responses to new technology. They may either absorb the new technology within existing legal categories which may have to be manipulated to accommodate it; or they may decide that the policy issues raised are so controversial or difficult that the matter is best left to the legislature to make new statutes. Both responses have been common in the past 15 years as various Australian jurisdictions have wrestled with the legal problems posed by the new medical technologies, especially the innovations in artificial conception.

The first response was exhibited recently by a judge in Tasmania who was asked by the Public Trustee whether, for the purposes of an intestate estate, the word 'children' in the legislation² included two zygotes: one at a two-cell stage of differentiation the other at a four-cell stage left by the deceased father (Estate of K A, 16/1996, 22 April 1996, Tas. Supreme Court, Slicer J). The case arose because the Public Trustee applied to the court for a determination of the issue since it was the responsibility of his office to deal with the estates of people who die without leaving a will. Two precise questions were posed to the court:

- were the embryos,³ as they were called, actually living at the date of decease? and
- do they become children on being born alive?

The father and mother had, in fact, entered the in vitro fertilisation program at Hobart hospital and five embryos were produced, three of which were implanted. This led to the live birth of a son. It had been the parents' intention to use the two remaining embryos but the father died before this could happen.

Were the embryos issue at the time of death?

The answer given to the first question was no, and the judge added that the same answer would have been given had the embryos been implanted in the mother at the time of the death of the father. The judge arrived at this conclusion by considering the existing law on the status of a human embryo prior to birth. This subject is sometimes considered by reference to the french expression *en ventre sa mere*: in the belly of the mother.

Legal recognition of a child *en ventre sa mere* in the law of wills came late to the common law and was, as with many legal contrivances, based on a fiction. In the 16th century the doctrine did not exist for the purpose of wills where the testator had left his property to his children.⁴ At that time this phrase did not refer to children who were 'on the way', so to speak but by 1634 first recognition to children *en ventre sa mere* was accorded.⁵ Thereafter, it was not uncommon for the drafters of wills to avoid doubt in the matter by explicitly stating in the will that the class 'children' included children *en ventre sa mere*.⁶ If they did not, the courts adopted the rule of construction that a reference to children in wills included a child *en ventre sa mere*.⁷ The central point

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to grasp here is that it was always necessary for the child *en ventre sa mere* at the time of the death of the testator to be subsequently born alive⁸ and to survive until any age at which they were to take the property under the terms of the will. The rule was later extended to recognise the right of children *en ventre sa mere* at the time of the death of the testator to challenge the distribution made under the will under testator family maintenance legislation.⁹

The doctrine was always based on a fiction namely that a child *en ventre sa mere* is a person in being, not in a literal sense since the law does not recognise a person until it is born alive and is outside the body of the mother,¹⁰ but in the sense that the potential existence of the child places it within the reason or motive of the gift.¹¹ Thus the term 'children living at the time of the death of the testator' came to mean children procreated.¹² The one exception to this construction was if the terms of the will clearly indicated otherwise in which case the fiction could not be relied on and a narrower construction of 'child' was adopted.¹³ This would arise, for example, if the will referred to the children by name and not to children as a class. In such a case the courts have held that a child *en ventre sa mere* is not one of the named children and cannot take under the will.¹⁴

The problem that faced Slicer J was that there were no previous cases on the precise point he had to consider nor did State legislation help.¹⁵ Accordingly, the Court proceeded to examine the *en ventre sa mere* cases generally. This review noted that such rights as the unborn may have do not exist prior to birth, but are conferred at birth when the child is born alive and has a separate existence from its mother. Thus the rights of the unborn, especially in an abortion context, do not, strictly speaking, exist and the courts have denied their existence.¹⁶ The principle that a child *en ventre sa mere* may take legal action when it is born alive has now been extended to a great variety of activities. Such a child may bring legal proceedings for injuries suffered in utero,¹⁷ even against its own mother if she is responsible.¹⁸ The rule that a right to sue only comes into being when the child is born alive is a strict one and should the child die in utero or be stillborn the day before it was due no right to sue accrues in such a case.¹⁹ It would seem that there are only two ways by which this rule may be extended:

by the legislature to extend the ambit of relevant legislation, or

the courts interpret the term child to include viable children as has happened in several American States.²⁰

Although the State of Louisiana has allowed a human embryo at the one-cell stage legal recognition to sue and be sued, even this law does not extend to allowing it to inherit until it is actually born.²¹

Similarly, criminal injuries sustained while in the womb may be a crime against the unborn child provided that it is born alive. This would include manslaughter if the child was injured before birth, was born and subsequently died.²² On the other hand, if the child is killed whilst in utero this cannot be murder, manslaughter or infanticide since this may only apply to a human who is in being, that is, born alive,²³ though in some jurisdictions a separate offence exists to cover such a contingency.²⁴ Recognition of the unborn has also been extended to the registration of the stillborn for the purposes of the births, deaths and marriages legislation.²⁵

At the end of this tour d'horizon, Slicer J concluded that a foetus is not recognised by the law in a full legal sense, but

that it has rights contingent on being born alive. A child *en ventre sa mere* is not a human being and to acquire this status it must have quitted its mother in a living state. A child so born is treated as a child in being at an earlier point in time and is treated as capable of receiving a benefit as if it had been actually born at that earlier time.²⁶

Interestingly, the issue had arisen previously though it was not resolved in the manner chosen by Slicer J. In 1981 two wealthy Americans named Rios went to Melbourne and entered an in vitro fertilisation program that resulted in three embryos. After one unsuccessful implantation the other two were cryopreserved. The couple died in a plane crash in Chile in 1983 but left no instructions as to what to do with the embryos. In the end they were implanted in an Australian woman. Meanwhile, in California a probate court decided that under the State intestacy law 50% of the deceased's estate went to Mr Rios's son by a former marriage and 50% to Mrs Rios's mother.²⁷ At the time, legal figures in Australia had expressed the opinion that any claims by the embryos against the Rios estate were fanciful.²⁸ It seems that when considering whether the embryos might inherit under the California intestacy statute the probate court decided that only children born or in utero at the time of the parental death could inherit.²⁹

Do the embryos become children of the deceased on being born alive?

The answer to this question was yes. Before answering this question the Court concluded that the embryos in this case were not living at the death of the intestate father. But in respect of the question whether once born these embryos would be cloaked with the fiction and deemed to have been born at the date of death the court arrived at a clear answer. The judge held that there should be no difference in principle between a child *en ventre sa mere* and a sibling that was at the time a frozen embryo. Support for this conclusion was derived from several law reform commission reports that recommended that children in embryo should be able to inherit and the Court noted that a New South Wales Law Reform Commission report³⁰ had also recommended that embryos be accorded the capacity to inherit under a will. It was but a small incremental step from this line of reasoning to conclude that the same position should obtain in the case of an intestate estate.

The Court discounted practical objections such as how long a period might be involved. After all if the embryos were stored for a long period of time, though just how long this may be done is medically unclear, and then implanted in the widow at say age 60, as happened in one case in Italy, to which should be added the period of gestation plus 18 years, this might be decades hence.³¹ In the meantime the executor would have to allocate a portion of the estate for the potential children in case this scenario should eventuate. If it did not, and this might be known very early if the widow died before implantation, or the embryos were implanted and no live birth resulted, or the widow decided not to use them at all, the other children³² would inherit the residue assuming they survived until age 18 years and such other period that lapsed until the fate of the embryos was definitively known.

Policy considerations

While these were only obliquely adverted to by the Court it seems that the judge held that there was no justice in saying that if there were two children — one born after in vitro

fertilisation but actually born alive before the death of the father, the other born by the same technique, but neither implanted at death nor born at the death of the father — only the former could receive property. The difficulty in these cases is that the old rule that a person could only rely on rights if they were born alive might work real injustice. In the personal injuries cases it has been argued that ‘... if the trauma is severe enough to kill the child, then there will be no recovery; but if less serious, allowing the child to survive, there might be recovery. Again, if the fatality was immediate, the suit could not prevail, but if the death was protracted by a few hours, even minutes, beyond birth, the claim would succeed. Practically, it would mean that the graver the harm the better the chance of immunity.’³³

In the inheritance cases, a similar argument might be mounted, that is, if there had been an implant on the day the father died there would have been a child *en ventre sa mere* and the rule in existence since the 17th century would operate. But if the implantation had been made minutes after his death that argument could not be relied on. The problem that the decision in this case opens up is that legal recognition has now been given, in a qualified manner, to life just after conception. In this case, one of the zygotes had reached the stage of two cells, that is, 24-36 hours after fertilisation. It is hard to imagine that this recognition could be pushed back any further, though, of course, if medical science is able to identify with precision the exact time of fertilisation, that is, when the ovum and sperm mingle to become an undifferentiated zygote, this argument would have to be revised.

The scope of this decision if followed elsewhere may be greater than it might seem for between 1978, when the first in vitro fertilised child was born in England, and 1991 16,000 such children had been born world wide.³⁴ Prior to in vitro fertilisation the *en ventre sa mere* rule would have embraced a limited group since the wife or partner would have to be pregnant at the time of death. Normally in such cases this would involve only one child *en ventre sa mere* unless it was a case of a multiple birth.

A nice question might arise if the intestate father had not donated the sperm. Would the child in such a case be his child for the purposes of his estate? Fortunately, other Australian jurisdictions have dealt with this question in their reproductive technology statutes which hold that the donor of sperm, if other than the husband or partner of the birth mother, has no legal rights or obligations vis a vis the child.³⁵ On the other hand, the husband or de facto partner of the birth mother may only have such obligations and rights in the event that he approved of the in vitro fertilisation. If no such approval was forthcoming it would seem that resultant children would not have a father in a legal sense. None of these issues arose in the *Estate of K* since the deceased father S was the donor in this case.³⁶

References

1. Derived from an unnamed female law student see: Barton Leach, W., ‘Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent’, (1962) 48 *ABAJ* 942, 943, fn 3; see also Sappideen, Carolyn, ‘Life After Death: Sperm Banks, Wills and Perpetuities’, (1979) 53 *ALJ* 311, 312.
2. *Administration and Probate Act 1936* (Tas.) s.46(1) which provided that where the residuary estate is directed to be held on trust for the issues of an intestate person, such shall be held ‘(a) In trust, in equal shares if more than one, for all or any of the children of the intestate, living at the death of the intestate, who attain the age of 18 years or marry under that age ...’
3. Strictly speaking a fertilised human embryo is regarded as a zygote, i.e. when a sperm and ovum mingle and become a single cell, and until it reaches the 8-cell stage it is a pre-embryo.
4. *Anon* (1585) 3 Dyer 303b, 303a ; 73 ER 682, 683 (KB).
5. *Marsh v Kirby* (1634) 1 Rep Ch 76; 21 ER 512.(Ch).
6. *Re Davis* (1906) 7 SR (NSW) 71.(SC).
7. For an early Australian example see: *Trustees Executors and Agency Co Ltd v Sleeman* (1899) 25 VLR 187, 192 (SC) per A’Beckett J. For a Tasmanian example relied on in *Estate of K* at 3 see *In re Bruce* [1979] Tas SR 110, 123 (SC).
8. *Permanent Trustees Co of NSW Ltd v Ralfe* (1940) 57 WN (NSW) 183 (SC).
9. *V v G* [1980] 2 NSWLR 366, 368 D-E (SC); *Re Lawrence* [1973] Qd R 201 (SC).
10. For the citation of early common law classics on this point see: Barry, J.V., ‘The Child *En Ventre sa Mere*’, (1941) 14 *ALJ* 351-57 at 353.
11. Winfield, P.H., ‘The Unborn Child’, (1944) 8 *Cambridge LJ* 76-91 at 77. As one judge put it ‘From the beginning this construction was acknowledged by the courts to be in some sense a straining of language ...’ per Lord Loreburn LC in *Villar v Gilbey* [1907] AC 139, 145 (HL(E)).
12. *In re Brown (Deceased), Brown v Brown* [1933] NZLR 114, 117 (FC).
13. *McGrath v Hughes* No. 2345 of 1992 (24 July 1991) NSW Equity Div, per Bryson J at 17.
14. *Bull v Sloan* [1938] 3 DLR 79, 81 (BC CA).
15. In *Estate of K* at 5 he noted that the *Status of Children Act 1974* (Tas.) s.10A(2) provided that nothing in Part III, which dealt with fertilisation procedures and their consequences, altered the law as it existed before commencement of this Act.
16. *Estate of K* at 2 citing *Attorney General for Queensland (Ex rel Kerr) v T* (1983) 57 ALJR 285 (HCA). See also p.3 where Slicer J refers to the cases that have denied a right in either a father or other persons to seek an injunction to prevent an abortion on this ground. Cf *Re Simms and H* (1980) 106 DLR (3d) 435 (NS Family Ct) where the Court appointed a guardian *ad litem* for an unborn child in a case where a father sought an injunction to prevent the mother having a therapeutic abortion.
17. The classic case is *Watt v Rama* [1972] VR 353 (FC). See also *X and Y (By her Tutor X) v Pal* (1991) 23 NSWLR 26 (CA) (negligence suit against failure of doctor to carry out a syphilis test); *Manns v Carlton* [1940] VLR 280 where the action was stayed until the birth of the child. That is, the Court denied that a child *in utero* could sue before its birth. See further: Cane, Peter, ‘Injuries to Unborn Children’, (1977) 51 *ALJ* 704-720; Pace, P.J., ‘Civil Liability for Pre-Natal Injuries’, (1977) 40 *MLR* 141-158.
18. *Lynch v Lynch* (1992) 25 NSWLR 411 (CA).
19. *Davey v Victoria General Hospital* [1996] 3 WWR 347 (Man QB) (a child stillborn one day before the expected delivery date was not a person for the purposes of the *Fatal Accidents Act*). A child that is stillborn was not regarded at common law as a true child: *Re Millar* [1938] 2 DLR 164, 172 (Ont SC) citing *R v De Brouquens* (1811) 14 East 277, 279; 104 ER 607, 608 (KB).
20. *Stidam v Ashmore* 167 NE2d 106 (Ohio CA, 1959); *Mone v Greyhound Lines* 331 NE2d 916, 920 (Mass SJC, 1975) (child died *in utero* but at 8.5 months gestation was deemed to be viable); *Commonwealth v Cass* 467 NE2d 1324 (Mass, SJC, 1984). For discussion see: Whitfield, A., ‘Common Law Duties to Unborn Children’, (1993) 1 *Med L Rev* 28-52.
21. La Rev Stat. Ann section 133(West 1991) cited in Feliciano, Tanya, ‘Davis v Davis: What About Future Disputes’, (1993) 26 *Conn L Rev* 305, 311, fn 51.
22. *Estate of K* at 2 referring to *R v Martin* WA SC, unreported, 8 December 1995. See also *R v Kwok Chak Ming (No 2)* [1963] HKLR 349, 354-355 (FC).
23. *R v Hutton* [1953] VLR 338, 340(SC); *R v Tait* [1989] 3 All ER 682 (CA).
24. *Crimes Act 1961* (NZ) s.182; *R v Henderson* [1990] 3 NZLR 174 (CA).
25. *Births, Deaths and Marriages Registration Act 1995* (SA) (passed 23 March 1996) s.4 (to be at least of 20 weeks gestation or at least 400 grams at birth), s.12(2)(b).
26. *Estate of K* at 4.
27. Smith II, George P., ‘Australia’s Frozen Orphan Embryos: A Medical, Legal and Ethical Dilemma’, (1985-86) 24 *J of Family Law* 27, 28.
28. Smith II, George P., above, at 37 citing Deputy Chairman of New South Wales Law Reform Commission and the Waller Committee set up to decide what to do about the remaining embryos.

Continued on p.172

Bodies, Equality & Truth

Marion Maddox

What does affirmative action affirm?

Why have a journal issue on ‘Law and the Body’? Perhaps because law has things to learn from recent philosophical work on the body. In this article I approach from an opposite angle. I address an area in which the law has started to come to grips with issues relating to the body, in ways which pose challenges for philosophy.

Affirming bodily existence

In Australia, employers of more than 100 people are obliged by the *Affirmative Action (Equal Opportunity for Women) Act 1986* to report to the Affirmative Action Agency about the measures they have taken to comply with the *Sex Discrimination Act 1984*. The Affirmative Action Agency is responsible for seeing that large employers ‘go the extra mile’ to change their practice to comply with the *Sex Discrimination Act 1984*, which forbids discrimination against people because of their sex, or because of sex-related circumstances like marital status¹ or pregnancy.²

The relevance of affirmative action law to theories concerned with bodily existence is that affirmative action law takes seriously the fact that workers are not disembodied minds. However body-mind dualism might work in other areas, it will not work in thinking about employment: all sorts of bodily experience (and not only illness or industrial accidents) can affect an employee’s working life, and employers are obliged to take into account these aspects of lived experience which might obtrude (so to speak) from the worker’s private, and bodily, existence into the public realm of work.

The introduction of affirmative action law was followed in North America (and preceded in Australia) by a wave of philosophical discussion about its ethical justifiability. That 30-year-long discussion is not over yet, as the continued emergence of new publications makes clear.³ At issue are such questions as, ‘Does offering affirmative action for women mean discriminating against men?’ and ‘What are the goods to be achieved by affirmative action (and do they outweigh any possible dangers)?’

Bodies and equality

In answering these questions, moral and political philosophers tend to start from a heritage of theory which supposes that the basic notion of what an individual is can be understood without consideration of bodily specificity. Neither sex, nor race, nor age, nor other features with bodily manifestations are included in the definition of what an individual is. In this way, all subjects can be considered as equals. Critics have often observed that this tends to lead to a view of the individual which excludes non-male, non-white, children and the elderly.

Affirmative action policies turn a presupposition of disembodied equality on its head. Affirmative action starts from the assumption that bodily differences exist, and that they are not morally or politically

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insignificant because they are the basis for discrimination against some, and advantaging of others. In short, affirmative action policies start from the recognition that all are not equal.

This creates an obvious problem for those who try to justify affirmative action through conventional moral and political philosophy. I shall demonstrate this by comparing two articles by the same author (indeed, successive articles in the same collection).⁴ The author is Richard Wasserstrom, and the pair of articles has been influential in contemporary affirmative action debates. 'Racism and Sexism' mounts a case for the elimination of racism and sexism, starting from the kind of assumption about the equality of individuals which I have just outlined. The second, 'Preferential Treatment', argues for affirmative action.

In 'Racism and Sexism', Wasserstrom argues for a vision of the good society in which sex and ethnicity are regarded as purely contingent and insignificant attributes, and uses the analogy of the way eye colour is regarded in our own society. He contends that earlier arguments against racism and sexism have failed on methodological grounds, and sets out to show how a society can be conceived in which sex and ethnicity are viewed as incidental to identity. He calls this ideal an 'assimilationist' one, and adds a footnote in which he explains,

That term often suggests the idea of incorporating oneself, one's values and the like into the dominant group and its practices and values. No part of that idea is meant to be captured by my use of the term. Mine is a stipulative definition.⁵

Taking the example and footnote together, we might understand that in Wasserstrom's good society, attributes of sex and ethnicity, although regarded as arbitrary (like eye colour in our own society), will retain their specificity, bringing particular insights, traditions and views about the world. Yet it is hard to imagine how these points can combine. The reason Wasserstrom finds eye colour such a useful analogy for the assimilationist ideal is surely just that eye colour (except in the very vague and imprecise associations which it may have with ethnicity) does not lead to, or bring with it, any specific insights or outlooks.⁶ Indeed, following this analogy, Wasserstrom is at pains to disclaim any idea that sex or ethnicity could differentially affect a person's approach to or performance at their job.

It is therefore hard to see how his well-intentioned footnote can actually prevent the 'assimilationist ideal' from meaning anything other than assimilation of the feminine into the masculine, or of ethnic minority positions into those of the dominant ethnic group. Wasserstrom's view of the subject is one in which bodily distinctiveness is something to be circumvented. Repeatedly drawing on the example of physical disability ('lameness'), Wasserstrom points out ways in which sexual (read: female) specificity can be overcome so as not to prejudice a person's (read: woman's) employment. Menstruation, Wasserstrom suggests, might not be so painful or psychologically destabilising in a non-patriarchal society; but even if it were, it could be factored into a work schedule in the same way as other human frailties, like physical disability or fatigue.

Bodies and truth

One possible justification of affirmative action is by a group of arguments which I call the 'service delivery' approach. These arguments say that employing women is not only good for women, but is also good for the employer and the com-

munity, because there are special skills, talents, or perhaps just desirable personality characteristics which women uniquely bring to the workplace. Women in the positions in question would deliver a service that a man in those position could not.

'Preferential Treatment', the second paper of the pair from the Wasserstrom collection, is an example of this kind of argument. Discussing affirmative action in academic jobs, Wasserstrom proceeds from the assumption that institutions of learning have a duty to perform a particular kind of service, namely the development of knowledge. He argues in favour of affirmative action for the likely social effects of appointing women, and male members of ethnic minorities, to positions as university staff or students. Coupling the case in terms of the services which universities aim to deliver, he invites us:

Consider, for example, one of the more traditional conceptions of the function of the university, the search for truth. One argument for programs of preferential treatment is that the addition of minority persons and women to the student body and the faculty will, *ceteris paribus*, increase substantially the likelihood that important truths, which would otherwise have gone undiscovered, will be discovered.⁷

Wasserstrom implies, here, that there are 'truths' which are specific, or at least uniquely accessible to white women and to members, male or female, of ethnic minorities.

Taking this point in the light of his remarks in 'Racism and Sexism', Wasserstrom appears to want to have his argument both ways. If being male or female is just a physical difference whose significance can (in the good society) be reduced to the kind of significance that eye colour has now, then the question of where 'women and minority persons' get their 'important truths' demands further investigation.

Wasserstrom to some extent anticipates this question. In 'Racism and Sexism', he opens his argument by pointing to four 'domains of inquiry' which are involved in discussions of gender and ethnicity and which, he insists, must be kept separate.⁸ He maintains that '[m]uch of the confusion in thinking about matters concerning race and sex' comes from a failure to keep these four domains separate.⁹ The first domain is that of current social realities. The second consists of explanations for how these realities came to be. The third deals with the ideals one might hold for the future. The fourth is the domain of instrumentalities which a society might employ in order to conform itself more nearly to the third domain's vision.

Wasserstrom could, therefore, plausibly reply (to my criticism in the last-paragraph-but-one) that the assimilationist ideal relates to the good society of the future. At this hoped-for point, when sex and ethnicity have become culturally and politically insignificant distinctions, like eye colour, then presumably they will no longer yield access to specific truths or privileged access to general truths (just as, under current conditions, eye colour is not held to yield such access). In the meantime, while we remain in the first domain of current social realities, ethnicity and sex do lead to such unique insights.

If this is the answer to the apparent contradiction, then one must ask, what is the critical element of being female and (or) of an ethnic minority which yields such insights (now, and which would not yield them in the future)? According to Wasserstrom, it cannot be biological sex, or a culturally and materially distinctive way of life; for these things (or at least, the distinctions of biological sex and physical racial markers like skin colour) will remain under the assimilationist ideal.

Although he refrains from saying so, it seems, on Wasserstrom's own analysis, that the critical element which yields these new insights, these previously overlooked or invisible truths, cannot be sex *qua* sex, or ethnicity *per se*. There is, therefore, only one thing left which could be the critical element: it must be the experience of oppression.

Oppression and truth

This view, that oppression itself yields a kind of epistemological privilege, is not unique to Wasserstrom. It underlies, for example, the body of academic studies described as 'from below' or 'from the underside'.¹⁰ It also underlies a considerable body of feminist writing.¹¹ This view, of an epistemological privilege which comes with a lived experience of oppression, is not without its problems; but they are not insurmountable.

One problem is that as long as one defends an epistemological privilege of the oppressed, it may become awkward to argue for an absolute end to oppression. For if only the experience of oppression can bring a person the necessary insights to discover as yet undiscovered truths, who will discover them once the good society is achieved? In Wasserstrom's schema, the university's job is to discover truth; and some truth can only be discovered by those who suffer oppression on the basis of their sex or (and) ethnicity. This view of epistemological privilege, coupled with Wasserstrom's notion of truth as existing independently of the institutions in which it is sought, seems positively to require the retention of a materially, socially and culturally deprived, yet epistemologically uniquely privileged underclass/elite.

As I said, this problem is not insurmountable. Probably the best way to surmount it is to abandon Wasserstrom's rather (perhaps deliberately) idealist view of truths waiting to be discovered and then immortalised in the academy. If this view gives place to one of truth as phenomenologically grounded in the human condition, one can safely proceed (or at least try to proceed) along the path to the elimination of oppression. We can do so secure in the knowledge that, with the change in the material and social structure of human experience which would come with the elimination (or reduction) of oppression, the 'truths' which arise from the vanished experiences of oppression will no longer be necessary or useful to the continued flourishing of a human race in which oppression (or certain instances of it) does not happen.

This approach is consistent with approaches 'from below', whose epistemology is generally based in historical materialism, and which therefore tends to eschew transcendental and transhistorical conceptions of truth. This would issue in a rather different view of knowledge and subjectivity from Wasserstrom's. For example, a theory grounded in situation would require us, among other things, to regard the material (including sexual difference and material culture) as a constitutive and not a contingent element of what it means to be human. This being the case, it seems unlikely that such a view would be able to incorporate any version of Wasserstrom's assimilationist ideal, however 'stipulative' his definition is taken to be.

It also follows, though, that a vision of a world from which oppression has been eradicated is harder to imagine in a theory which acknowledges difference than in one which holds an assimilationist ideal. Even in the best of good societies in which difference is allowed to continue, a more appropriate vision stems from Foucault's account of pervasive power and pervasive resistance. As long as difference

remains, and people engage in cooperative endeavour across their differences, it is hard to see that power will be eliminated; and as long as power remains, we surely cannot hope that resistance would pass away.

A theory which takes bodily difference to be more than a contingent part of identity is therefore actually more cautious than Wasserstrom's assimilationist vision in its assessment of the possibility of oppression being eradicated. In Wasserstrom's view of the good society, there are at least no logical barriers to the total elimination of oppression, although there are practical ones. In the difference-oriented view there are both logical and practical obstacles. On the other hand, Wasserstrom's lack of logical hindrances is undermined by the requirement, implied in his view of epistemological privilege, that someone must remain oppressed so that the cause of truth may not suffer. The view which grounds epistemology in situated, lived experience, instead of *only* in the state of oppression, does not have this problem because Wasserstrom's transcendent and idealist view of truth as independently existing, waiting to be sought and discovered, is removed. Instead, truth becomes something which emerges as it is needed out of the situations of those who need it.

Since the chances of eradicating all oppression from the face of the earth are, realistically, about equally remote under either schema, I do not think it is a problem to have a theory which is structurally imbued with caution about the prospects for ever doing so. Paradoxically, the more cautious theory has the advantage over its assimilationist competitor of not actually *requiring* the continuation of oppression for its epistemological advantage.

To sum up, then, Wasserstrom's argument in 'Preferential Treatment', that female sex and non-dominant ethnicity bring their own access to truth, is meaningful only if it rests on a less idealist and more embodied view of subjectivity than the one he argues for in 'Racism and Sexism'. On delving, it transpires that sex and ethnicity cannot be, of themselves, the elements to which Wasserstrom attributes the endowment of a subject with unique access to truths (since ethnicity and sex can be as immaterial to a person's life experience and outlook as eye colour). Rather, the critical element must be the experience of oppression which goes with being female in a patriarchal society, and with belonging to an ethnic minority in a racist one.

Bodies and truth again

While a view of epistemological privilege deriving from the experience of oppression is not without problems, the problems can be eased by appeal to a more embodied view of the subject than Wasserstrom allows for. Removing the difficulties in this way, however, leaves another problem. If we accept the more phenomenological account of the subject (which, I suggest, affirmative action laws imply), the question becomes why the experience of oppression should be the *only* kind of lived experience which has the capacity to yield unique access to truths — since under the phenomenological view of subjectivity, there are far fewer 'merely contingent' elements of subjectivity than Wasserstrom presents. Since the lived experience of being male or female, and the lived experience of belonging to one materially based social and cultural community rather than another, would, in a phenomenological argument, be readmitted as components of what it is to be a thinking and knowing subject, they can hardly be

held to exert no voice in how their bearers see the world, criticise current realities, and engage with truth.

Wasserstrom's advocacy of the potential role of ethnic minority members and white women in the academy rests on the assumption that sex and ethnicity can give privileged access to certain truths as long as they position subjects in relation to discourses of racism and sexism. Once those discourses have been demolished, bodies will lose any capacity to intervene in social discourses. Bodies will be what Moira Gatens denies they are — *tabula rasa*, waiting to be inscribed at their owners' will with any of multifarious discourses of behaviour and relationship, now free-floating within the society and no longer arbitrarily labelled 'male', 'female', 'masculine', 'feminine'.¹²

A further implication of Wasserstrom's argument, once it is sifted through to the form I have just presented, is as follows. If a major advantage of having women and male members of ethnic minorities in the academy is that we bring our own access to truths, this contains the task of ethnic minority members and white women within the terms of the existing institution. Rather than an institution founded (in part) on assumptions of racism and sexism and with these as defining discourses in the tasks it sets itself, Wasserstrom's academy is neutral ground, to which women and ethnic minority men, and other people marginalised from the academy's traditions, can bring our experiences of oppression. We distil these experiences for their epistemological essence, which we carry carefully *in vitro* and toss in to season the giant, collective pot in which the academic quest for truth bubbles over an undying flame. The possibility that the essence thus added might curdle the other contents of the pot — or even crack the pot itself — is written out of Wasserstrom's account at the start.¹³

In other words, Wasserstrom's good society is problematic in that it assumes a more or less seamless continuation of the institutions of our own society. He offers no account of how such continuation would get around the fact that the institutions of our own society are, at least in part, grounded in and shaped by the racist and patriarchal practices which his good society would eliminate. Wasserstrom's response to this criticism might well be along the lines that he sees affirmative action programs 'not . . . as constituents of the good society but as one means by which more nearly to bring it into being'.¹⁴

However, by responding in this way, the problem to which I pointed above is only thrown into greater relief. If it is a feature of affirmative action programs that they lead to a society (Wasserstrom's 'good society') in which ethnicity and sex are as culturally, politically and psychologically insignificant as eye colour is in our current society, then the academy must be envisioned as remaining comparatively unchanged, except in terms of its content within specific disciplines. To follow some of Wasserstrom's own examples,¹⁵ the university in the good society will be one in which trainee lawyers will learn to deal sensitively with rape victims (if rape still exists), and trainee philosophers will learn to defend a woman's right to choose an abortion. Not only this, but, it follows from Wasserstrom's eye-colour analogy, the lectures on these topics will be offered with equal passion and conviction by male and by female lecturers.

Wasserstrom is at pains to bring this point home. On page 81 he adds a footnote to explain why affirmative action programs are a means towards, and not an element of, an assimilationist version of the 'good society':

They [affirmative action programs] would, perhaps literally, make no sense. If race and sex were like eye color, one's race and sex would necessarily lack the significance they now possess, and none of the things that are true today of race and sex, except the physiological features, would still be true of them.¹⁶

The rape example demonstrates the problems with this view particularly clearly. Presumably, in the 'good society' there would be no rape as we know it (boys having been taught from childhood to deal constructively with their feelings of anger and inadequacy). While we might accept that, even in Wasserstrom's good society, individuals would still from time to time stray from the path of good behaviour, rape is a crime which only makes sense because of its ideological content. Rape (at least as we know it today) is a crime of patriarchy, and in the good society, patriarchy having been abolished, rape would have no more meaning than acts of violence and humiliation perpetrated upon the green-eyed by the blue-eyed would have under current realities.

However, even in such a society it would be remembered that rape, when committed at all, was committed by those with male bodies, and mainly upon those with female bodies. It is hard to imagine that this could escape the notice or fail to intrude into the reflections of those participating in such a utopian classroom; and the nature, meaning and affective impact of the intrusion would surely differ according to whether the thinker was male-bodied or female-bodied. Therefore, this example illustrates the difficulties inherent in Wasserstrom's project of disentangling gender ideology from lived, bodily experience.

Wasserstrom's account fits into the 'service-delivery' collection of arguments for affirmative action in that he ties the epistemological specificity of being female under patriarchy or (and) of an ethnic minority in a racist society to the particular services that a university aims to deliver. Thus, if his argument holds, being female (under patriarchy) and being a member of an ethnic minority (in a racist society) can in themselves be seen as legitimate elements of what it means to be a qualified contributor to the university's mission. However, the problems in Wasserstrom's account mean that this argument fails to provide a convincing case for affirmative action. It comes unstuck at the point at which he tries to take account of the impact of being female and the impact of belonging to a minority ethnic group while at the same time asserting a universal human nature for which sex and ethnicity can have no significance.

Wasserstrom undertakes the peculiar task of trying simultaneously to affirm and deny that the lived, bodily experience of being male or female bestows upon the experiencer a unique access to the world. It is a peculiarity often shared by arguments which try to justify affirmative action while ruling out the kinds of specificity, including bodily specificity, which affirmative action policies are designed to acknowledge. Like others in the parts of liberal tradition which rely on such exclusions, Wasserstrom's argument is made up of oppositions: sex is separate from personality, mind is uninfluenced by body, truth is detached from the world. The detachment which issues in a society of individuals whose various lived experiences impinge upon their and other consciousnesses no more than eye colour leads into a whole framework which undercuts arguments for affirmative action. Wasserstrom suggests that in his good society affirmative action programs would become meaningless; but once his vision of the good society is accepted, even taking into account the discreteness of the other three domains of current realities, aetiology and instrumentalities, his arguments them-

selves become meaningless, because they 'talk past' the very kernel of what affirmative action is about; namely, taking account of the multiple levels of individuals' situatedness.

Nevertheless, as affirmative action programs falter under the USA's Gingrich-led backlash and its 'relaxed and comfortable' Australian equivalents, the task of developing a philosophical justification for affirmative action is as urgent as it has ever been. To succeed, any justification has to be able, while preserving liberal gains, to take account of the specificities of lived experience, including bodily difference, which affirmative action law has begun to recognise.

References

1. If the traditional reason given for discriminating against married women in employment was that they might become pregnant at any time (backed up by the ideology of the man as breadwinner), then the sections of the Act which forbid discrimination on the basis of marital status should also be interpreted as also being part of the prohibition of discrimination on the basis of potential pregnancy.
2. This is distinct from USA law, in which affirmative action includes ethnicity as well as sex; and North American philosophical analysis tends to concentrate on ethnicity rather than sex. The author discussed in this paper, Richard Wasserstrom, is an exception in this regard.
3. For example, Rosenfeld, Michael, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry*, Yale UP, 1991; 'Affirmative Action and the Myth of Merit' in Iris Marion Young (ed.) *Justice and the Politics of Difference*, Princeton UP, 1990, pp.192-225.
4. Wasserstrom, Richard, 'Racism and Sexism' and 'Preferential Treatment', both in *Philosophy and Social Issues*, Notre Dame UP, 1980.
5. 'Racism and Sexism', p.47, n 25.
6. This is an analogy which does not completely exclude difference — eye colour, after all is not a totally neutral phenomenon in the culture we have now. The association of green eyes with jealousy and quick temper, brown eyes with peaceful disposition, blue eyes with merriment ('twinkling blue eyes') and grey eyes with thoughtfulness is a common literary device. Wasserstrom could plausibly claim that he is not arguing for the eradication of all cultural ascriptions of difference. However, these literary associations probably do not have great impact on the actual lives of green-eyed, blue-eyed, grey-eyed or brown-eyed people; Wasserstrom is arguing for a much lower level of recognised difference based on bodily experience than is now the case.
7. 'Preferential Treatment', p.56.
8. 'Racism and Sexism', p.12.
9. 'Racism and Sexism', p.11.
10. For example, Wolf, Eric, *Europe and the People Without History*, Berkeley: University of California Press, 1982. Wolf attributes his development of the model to 'the intellectual reassessments that marked the late 1960s' (p.x). The movement involving studies 'from below' owes much to the Frankfurt-inspired South American-based theorists such as Freire, Illich and Gutierrez, who formulated their approaches during this period.
11. For a survey and analysis of this tradition of feminist scholarship see, for example, Harding, Sandra, *The Science Question in Feminism*, Cornell UP, 1986; Duran, Jane, *Toward a Feminist Epistemology*, Sage, Rowman & Littlefield, Maryland, c1991.
12. See Gatens, Moira, 'A Critique of the Sex/Gender Distinction', in Judith Allen and Paul Patton (eds), *Beyond Marxism: Interventions after Marx*, Intervention, Sydney, 1988.
13. On the possibilities and dangers of the incorporation of difference into the liberal academy, see Champagne, John, *The Ethics of Marginality: A New Approach To Gay Studies*, University of Minnesota Press, Minneapolis, 1995; also the critical foreword to Champagne's book, by Donald E. Pease. See also related arguments in Poiner, Gretchen and Wills, Sue, *The Gifthorse: A Critical Look at Equal Employment Opportunity in Australia*, Allen and Unwin Sydney, 1991, p.98.
14. 'Preferential Treatment', p.60.
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27. Kessler, S.J. and McKenna, W., *Gender: An Ethnomethodological Approach*, John Wiley & Sons, NY, 1978.
28. Foucault, M., 'The Confession of the Flesh' in C. Gordon (ed.), *Power/Knowledge: Selected Interviews and other Writings, 1972-1977*, Harvester Wheatsheaf, 1980, pp.194-228 at 215-6.
29. See Koranyi, E.K., above, ref. 3, pp.27, 84; Billings, D.B. and Urban, T., 'The Socio-Medical Construction of Transsexualism: An Interpretation and Critique', (1982) 29 *Social Problems* 266-82 at 275; Bolin, A., above, ref. 22, pp.107-8; King, D., above, ref. 9, p.85; Lewins, F., above, ref. 27, p.103, 116. However, what counts as feminine may be indicative of a middle-class as well as a male medical gaze. For as Tyler points out 'it is only from a middle-class point of view that Dolly Parton looks like a female impersonator; from a working-class point of view she could be the epitome of genuine womanliness' (Tyler, C.A., 'Boys Will be Girls: The Politics of Gay Drag' in D. Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories*, pp.32-70, Routledge, 1991). Indeed, it may be that a successful gender performance and the degree of that success implicates multiple relations.
30. King, D., above, ref. 7, p.85.
31. Foucault, M., *The Archaeology of Knowledge*, Tavistock, London, 1972, pp.51-2.
32. Butler, J., above, ref. 3.

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30. NSWLRC, *In Vitro Fertilization*, Report No. 58, 1988, Recommendation No. 39.
31. The report in *Estate of K* does not state the age of the wife.
32. i.e. the sole child of the relationship plus three children of the father from a previous marriage.
33. *Todd v Sandridge Construction Company* 341 F2d 75, 77 (4th Cir, 1964) per Bryan J.
34. Feliciano, Tanya, 'Davis v Davis: What About Future Disputes', (1993) 26 *Conn L Rev* 305 fn 6.
35. See *Artificial Conception Act 1984* (NSW) ss.5-6; *Artificial Conception Act 1985* (ACT) ss.5-7; *Artificial Conception Act 1985* (WA) ss.6-7; *Status of Children Act 1979* (NT) ss.5A-5F; *Status of Children Act 1978* (Qld) ss.15-18; *Family Relationships Act 1975* (SA) ss.10c-10e.
36. Nor have Australian courts been faced with disputes about whether embryos are property or may be left in a will, or may be the subject of a custody dispute as have several American courts: *Davis v Davis* 842 SW2d 588 (Tenn SC, 1982); *Hect v Superior Court* 20 Cal Rptr 2d 275 (Cal App 2 Dist, 1993).

SUING THE POLICE

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Ian Freckleton

Police accountability and the Tasty Nightclub affair.

Civil actions seeking the award of damages for trespass to the person (assault and battery), false imprisonment or negligence constitute in principle a means of regulating police misbehaviour. In a context in which a significant cloud hangs over the effectiveness of police complaint procedures throughout Australia and where few actions are brought against police in the criminal courts, and even fewer result in conviction, civil actions have the potential for impacting on police practices and procedures at least for economic and symbolic reasons. Thereby, to some extent they could act as a catalyst for facilitating the accountability of police to the community for excesses committed in the execution of duty and for abuses of power.

However, a benevolent attitude has been taken to police improprieties on many occasions by the civil courts. As recently as 1986 Olsson J, for instance, commented that, 'No doubt policy considerations suggest that, in the case of police officers bona fide discharging their statutory functions, the Court must not lightly attach civil liability to them' (*Akers v P* (1986) Aust Torts Rep 80-035 at 67,813). By and large, the onus falls on plaintiffs not just to prove trespass to the person or false imprisonment but also to demonstrate mala fides and unlawfulness of behaviour by police. Moreover, it must be acknowledged in the context of a consideration of the role of civil proceedings in promoting police accountability that the primary function of such proceedings is to resolve disputes between litigants, not to audit the performance of institutions of state, nor to provide a forum for members of the judiciary to express their views about police behaviour. From time to time, judges and magistrates determine that it is appropriate in the context of an admissibility ruling or in the context of the resolution of particular proceedings to express views about the justification or lack of it of the use of force by police. This is very much the exception rather than the rule, though. Thus, the extent to which the resolution of civil litigation constitutes a realistic means of rendering police accountable is dependent on the significance in the eyes of police of such awards of damages as are made, the media coverage of such cases and the preparedness of judges and juries to make awards of sufficient proportions to deter police from repetition of socially unacceptable behaviour.

This article argues that, by and large, damages awards in police cases in Australia are of such low dimensions that they have had minimal impact on the police culture of inappropriate preparedness to resort to force and to confront rather than to apprehend in less violence-prone circumstances.¹ As an example of this proposition, it examines in detail the decision of Victorian County Court Judge Ostrowski in *Gordon v Graham*, unreported, 20 May 1996, the first case in the notorious 'Tasty Nightclub' litigation.

Vicarious liability of police

While technically the principle of constabulary independence (see *Enever v R* (1906) 3 CLR 969), by which individual police are

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responsible for their exercise of discretion, means that governments, police commissioners and police senior to a police defendant are not vicariously liable for the actions of a police tortfeasor, amendments to legislation regulating the liability of the Crown (see, for instance, *Kubicki v State of South Australia* (1987) Aust Torts Rep 80-137) and general practice has evolved into Plaintiffs suing individual police officers and the state itself as ultimate employer. By and large for political reasons, governments and police forces have not been taking the 'constabulary independence' point and seeking to escape liability. The advantage for plaintiffs is that this creates a 'deep pocket' to stand behind potentially relatively impoverished police defendants. The disadvantage from a point of view of making police accountable is that the financial pain for a police officer found to have exceeded his or her powers, and so the specific deterrent value of an award, is non-existent save in those rare cases where, prior to trial, police officers are told by police command that they will not be indemnified on the basis that they are not regarded as having been acting in execution of their duty when they committed the act said to constitute a tort.²

Actions for damages against police

In Australia three kinds of damages are awarded in tort litigation: 'ordinary', 'aggravated' and 'exemplary'. Ordinary damages compensate for actual physical or economic losses incurred. Where they are more than nominal, they are often referred to as 'substantial', and consist of 'general damages' for matters to be calculated by the court such as pain and suffering and 'special damages' for quantifiable matters such as economic loss. The attempt by the courts is to place the plaintiff in the same position as he or she would have been in if the tort had not been committed. Aggravated damages are also compensatory in nature but are awarded for injury to the plaintiff's feelings for insult, humiliation and the like (see *Lamb v Cotogno* (1987) 164 CLR 1 at 8). The damages are increased because the injury is aggravated by the circumstances in which the personal injury is inflicted. Thus in *Henry v Thompson* (1989) Aust Torts Rep 80-255 at 68,826 Williams J of the Queensland Supreme Court awarded \$10,000 aggravated damages to a plaintiff beaten up and urinated on by police, even though no actual physical harm was caused to him, on the basis that the police behaviour had caused 'great emotional hurt, insult and humiliation'. By and large, such awards, when they are made against police, are of moderate dimensions and are not such of themselves to have an aversive impact on cultural acting-out of violent behaviour against civilians.

Exemplary (or vindictive or punitive)³ damages are rarely awarded against police although they would in principle seem particularly appropriate in the public interest to discourage abuse of power. The object of the award of exemplary damages has traditionally been stated to be not to compensate the injured party but to 'punish' and 'deter' the wrong-doer, functions more commonly associated with the selection of sentencing dispositions in the criminal law. Hope AJA in the police case of *Lippl v Haines* (1989) Aust Torts Rep 8-302 at 69,313 termed their function 'to serve one or more of the objects of punishment — moral retribution or deterrence' while Brennan J in the High Court has focussed on the moral culpability of the tortfeasor:

As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the

assessment of exemplary damages are quite different from those considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761, substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?'

The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co* [1972] AC 1027 at 1030 'to teach a wrong-doer that tort does not pay.'⁴

Exemplary damages can be awarded where the conduct of the tortfeasor is wanton, such as 'where it discloses fraud, malice, violence, cruelty, insolence or the like' (*Lamb v Cotogno* (1987) 164 CLR 1 at 8). It may be that 'reckless disregard amounting to insult is enough', or reckless indifference toward responsibilities but probably not 'mere recklessness' (*Hart v Herron*, unreported NSW Court of Appeal, 6 June 1996). In addition, the High Court has suggested that exemplary damages serve to 'assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace' (*Lamb v Cotogno* (1987) 164 CLR 1 at 9). In principle there is little difference between the law on the subject in Australia and in the United States, save that for cultural reasons the quantum of awards made in the two countries is markedly at variance and thus their potential for acting as a catalyst for change to policing practices. In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 136-7 Taylor J cited with approval a passage from the judgment of Grier J delivering the opinion of the Supreme Court of the United States in *Day v Wentworth* (1851) 12 How 363, 14 L Ed 181:

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'. This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.

Evidence may be admitted of the financial circumstances of the tortfeasor against whom exemplary damages are to be awarded to ascertain their capacity to satisfy a substantial judgment, to gauge what sum will be sufficient to act as a deterrent of the conduct that attracts the award (*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 57 ALR 639 at 655) and also to determine what sum will be necessary to constitute a real punishment. In principle, then the fact that individual police members are generally indemnified for awards in civil actions by their police forces may also constitute a relevant consideration for a judge in fixing the sum of exemplary damages.

However, the award of exemplary damages in any context is controversial. They have largely been abandoned in England, but held still to be available in the United States, Canada, New Zealand and Australia. As Gibbs CJ has noted, there is a risk that the jury award of exemplary damages may constitute a punishment greater than would be imposed by a court if the conduct were criminal (see also *Rookes v Barnard* [1964] AC 1129 at 1227-8 per Lord Devlin). His Honour affirmed the proposition that in exercising the function of awarding exemplary damages juries should 'exercise restraint' (*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty*

Ltd (1985) 57 ALR 639 at 655). Among others, Stone, Luntz and Mendelson have argued that exemplary damages should never be awarded in cases of non-intentional injury, maintaining that they constitute a function of the civil law that is anomalous and should be abandoned.⁵

In Australia both jury and judicial awards of damages tend to be of modest dimensions, particularly when they are against serving police officers. There are occasional apparent exceptions, such as the 1994 Victorian case of *Zalewski v Turcarolo* (1994) Aust Torts Rep 81-280 in which \$116,000 of ordinary damages were awarded to a psychiatric patient shot by police. This decision represents an example of a higher than normal award of damages. However, it needs to be scrutinised carefully because the plaintiff was in fact rendered a quadriplegic by what were determined to be negligent actions by the police. In such circumstances, the award of damages was extraordinarily low.

The case of *Henry v Thompson* (1989) Aust Torts Rep 80-255 at 68,826 is a further example of the pattern of low damages awards against Australian police. Exemplary damages were awarded but only in the sum of \$10,000 (in addition to \$5000 ordinary damages and \$10,000 aggravated damages) in face of truly vile torture of an Aboriginal man by Queensland police. They gratuitously punched, kicked and jumped up and down on their suspect, who was taken into custody for use of indecent language, and then a constable urinated on him, while two sergeants did nothing to prevent what the Court found to be a 'cowardly and unseemly assault'. The police appealed against the amount of the award! Even though their appeal was unsuccessful, the award against the police sent a truly mixed message to the community by being of such moderate dimensions.

The Tasty Nightclub litigation

A typical but disappointing example of the award of damages is to be found in the 1996 decision of *Gordon v Graham*, the so-called *Tasty Nightclub* case, which arose out of a major raid by police on a Melbourne nightclub known to be frequented by a homosexual and lesbian clientele and allegedly suspected of being the venue for significant drug use. Police intrusively searched 465 patrons of the 'Commerce Club', also known as the 'Tasty Nightclub', including the plaintiff. Most were searched in the presence of others, and detained pursuant to a warrant to search the premises for drugs. Only one patron was exempted from the search, an ex-policeman, who was asserted by police to be an informer.

The plaintiff sued for ordinary, aggravated and exemplary damages for assault and false imprisonment. Through her counsel she sought \$40,000 ordinary and aggravated damages and \$20,000 exemplary damages. The police urged that if tortious conduct was found, no aggravated or exemplary damages should be awarded and that the appropriate amount was \$1000 of compensation. The plaintiff was awarded \$10,000 ordinary damages but no aggravated or exemplary damages.⁶

Facts found

Judge Ostrowski, the County Court judge who heard the case and produced an 86-page judgment, found that the plaintiff was detained by police at the nightclub for approximately three quarters of an hour, with her hands on her head for a period of between 20 and 30 minutes. He found that swearing had accompanied the detention. In general, he preferred the version of the plaintiff as to the details of what occurred to that offered by the police officers. She maintained that shortly

after the surprise arrival of the police she had been ushered into a room where she was confronted by a latex gloved police woman and assumed that the search that she would have to endure would be internal. She said she was petrified. She underwent a search in the presence of another woman from the nightclub who was also being searched. It turned out not to be a search that penetrated any of her orifices. No drugs or other unlawful substances were found on her person; nor did police have any specific reason to believe that she was in possession of drugs save that she was a person in attendance at the nightclub. She testified that part way through her search a male police officer appeared at the door of the room in which she was being held, was told to leave by those conducting the search but dallied in the entrance for about ten seconds, looking at what was happening. Judge Ostrowski found that the search consisted of 'the running of the officer's hands down the plaintiff's uplifted arms and sides of her torso; the touching which took place when the officer pulled out the plaintiff's underpants at the front and then at the back; the lifting of one breast after the other and "swiping" of the officer's hand underneath each breast' (p.32). The search therefore was intrusive but did not involve unlawful violation of any body cavities.

The tortious conduct

Judge Ostrowski examined in detail the kind of search able to be conducted under the Victorian drug legislation. Section 81 of the *Drugs Poisons and Controlled Substances Act 1981* (Vic.) provides that a magistrate may issue a search warrant to police if satisfied by evidence on oath that 'there is reasonable ground for believing that there is on or in any land or premises' anything in respect of which a drug offence is reasonably suspected of having been committed or anything which there is reasonable ground to believe will afford evidence of the commission of a drug offence. Such a warrant entitles a police officer to search the land or premises 'or person found on or in that land or premises' (s.81(2)(c)). Judge Ostrowski found major problems in the way in which the Act is framed, noting that 'The power to search any person found on the premises comes out of the blue' (p.60).

No arguments (until what was determined to be too late in proceedings) were addressed to the judge about the sufficiency of the information put before the magistrate who issued the warrant, which constrained the judge to treat the warrant as validly issued. Had such arguments been put, he may well have come to another view, given that nothing was known about the presence at the time of the application of any drugs on the premises and it appeared that the warrant may well have been sought for an 'ulterior' and unlawful purpose (see p.20).

In a key aspect of the decision, from a point of view of police powers, Judge Ostrowski found that the relevant section indicated that Parliament intended to give power to magistrates to issue warrants with a consequence being that executing officers 'had the power to search all persons found on the named premises whether the suspicion of any kind attached to them or not' (p.62). However, he determined that the ambit of the power to search people found on the premises was 'implicitly limited by the description of the thing for which the search may be conducted' (p.64). He found that the section did not permit a search of a person found on the premises named in the warrant 'for the purpose of seeing whether per chance at the time of the search he is committing an offence' (p.65). However, Judge Ostrowski found it was clear that what the police intended to do and actually did

during the raid was to search each patron who happened to be in the Club at the time of the raid. The affidavit prepared by police in support of the application for the warrant made it clear that the police were not investigating any particular offence but ‘hoping that by searching at some future time, [they] might discover some offences at some future time’ (p.66). Judge Ostrowski found that all police involved in the raid acted under the extraordinary (my description) misunderstanding that the s.81 warrant ‘gave them unlimited power to search every person on the named premises at any time of their own choosing *in any way they considered appropriate*’ (my emphasis).

He rejected the argument put on behalf of the police that the standard to be applied to their behaviour was whether they had adhered to the standard of a reasonably prudent police officer of the relevant rank and determined that the standard was ‘what would the ordinarily reasonable prudent and informed member of the community consider to be reasonable in the circumstances?’ (p.68) This constitutes a most important distinction, consistent with the criteria imposed on doctors for liability for failure to warn of risks of medical treatment. He found that by applying the community standard of reasonableness to the facts, the conduct of a universal strip search in the circumstances was unreasonable, having regard to the indeterminate amount of time that people were detained incomunicado without access to a toilet facility, and the requirements to strip in the presence of others. In the alternative he found for the plaintiff on the ground that the execution of the warrant was unreasonable. In addition, he found that the police exceeded their powers under the warrant to detain people for the purpose of search. The result was that the police behaviour constituted assault and unlawful imprisonment.

His Honour accepted that insofar as he was able to read the general mind of the Victorian public, ‘I believe that it would be startled on finding out about these events’ (p.13). He came to the conclusion that all police defendants ‘genuinely held the view that what they were doing they were by law authorised to do’ (p.78). He found that view to be mistaken but determined that, ‘Action perpetrated under a mistaken view of the law cannot be said to be tantamount to ‘a conscious and contumelious disregard of the plaintiff’s rights’ nor ‘a conscious wrongdoing’. Thus he focused on the intentions of the police rather than on the impact of their behaviour on the plaintiff in determining whether or not to award exemplary damages. He determined that the behaviour of none of the police was deserving of punishment in addition to the exacting from them of compensation. In relation to the male officer’s entry into the room, once again His Honour’s focus was on intention and he found it to have had no motive deserving of punishment.

Damages

Judge Ostrowski considered in detail what sum should be awarded by way of damages and whether aggravated or exemplary damages should be awarded. He accepted that the plaintiff felt frightened and diminished by the experience on the night and to that extent found there to have been injury to her feelings. However, he found in apparent mitigation that she had not been treated differently from anyone else on the premises, being in no way singled out from those around her. Curiously, it appeared to be inherent in his decision that the police behaviour toward the other patrons of the nightclub, the ex-policeman, who decamped, aside, was also unlawful. This, though, should have been recognised by Judge Os-

trowski to have been an erroneous standard against which to measure the police behaviour toward the plaintiff. He was engaging in a false comparison — just because a policeman is only one of a group of people behaving in a disgraceful way toward members of the public, the fact that the members of the public are all treated equally badly should in no way be regarded as ameliorating the unacceptable conduct of the policeman. Nevertheless, Judge Ostrowski found that the plaintiff was not entitled to complain that she had been subjected to any ‘insult, humiliation and the like’ apart from the imprisonment and assault themselves (p.79) and declined to award aggravated damages. What he failed to acknowledge is that the assault itself was quite sufficient to constitute at least a humiliation for the purposes of an award of aggravated damages.

Judge Ostrowski appeared to regard the fact that the other person present was a female friend to be a mitigating factor in assessing the seriousness of the police excesses. A preferable interpretation would have been that if the person present had been male this would have been *still more aggravating*, not that it was somehow of no major consequence that the plaintiff was denied privacy and dignity by being intrusively searched in front of a female friend. Moreover it was arguably even more embarrassing that she was searched in front of someone known to her than in front of an unknown other suspect of the same gender. Aside from these errors of approach, the judge failed to have proper regard to the corporate abuse being committed by the police or the extent of the subjective fear engendered by impropriety wrought at the hands of a large number of police engaged in a series of unwarranted and improper searches. His focus was not on the objectively serious malfeasance of the police and the intrusiveness of the actions that was part of their malfeasance but on whether their malfeasance was committed in good faith, the let out adverted to earlier in this article by Olsson J in *Akers v P*. On this logic so long as police believe ‘genuinely’ that what they do is ‘authorised’, behaviour which devastates and grievously humiliates vulnerable victims will still not attract aggravated or exemplary damages. Under this unsatisfactory approach it becomes the intention of the wrongdoer not the effect of their tortious behaviour which determines the damages.

His Honour accepted that the behaviour of the police around her was sufficiently stern to make her feel humiliated, frightened, apprehensive and generally diminished: ‘It is a fair description, I think, to say that she felt like what she in fact was: an innocent prisoner’ (p.80). Judge Ostrowski found that the plaintiff had unwittingly exaggerated the time during which the male police officer was in the doorway: ‘She is not weak or timid of character’ (p.83). He conceded that the 10-second estimate of the plaintiff carried:

an implication of how embarrassed and degraded she felt . . . The experience of being totally helpless and unable to communicate with anyone who might help, the experience of fear because one is cowed into submission by others, the stripping off of one’s clothes in front of others, the being looked on by others when one is in a state of virtual nudity, all this is a most unpleasant experience . . . To that one must add the physical discomfort caused by the aching arms. [p.13]

His Honour determined that the intrusion into the room ‘had no motive deserving of punishment’ (at p.78) and rather charitably held on the balance of probabilities that the male officer ‘inadvertently put his head inside the door to speak to the police officers in the office [conducting the search] and withdrew immediately on being admonished by those officers’.

He found that fortuitously the plaintiff was a person of resilient disposition and did not succumb or suggest that she had succumbed to a post-traumatic stress disorder, meaning that she did not exhibit signs of any psychological consequences that would have justified 'special damages' — '[s]he struck me as a strong character, a person of intelligence and determination' (p.85). The result was that the only award made by the judge against the police was the comparative pittance of \$A10,000 of ordinary damages.

The ramifications of the Tasty Nightclub decision

The *Tasty Nightclub* decision highlights a variety of important aspects of the civil law. First, it is abundantly clear that s.81 of the *Drugs, Poisons and Controlled Substances Act 1986* (Vic.) is most unfortunately constructed, on its face giving police wide powers indeed to search people found on premises covered by search warrants issued by magistrates. Significantly, the decision has articulated the limits of intrusiveness of search appropriate under the Victorian provision, and similar provisions, by imposing a criterion of reasonableness on the execution of the warrant, to be assessed by reference to community standards. Police were held not to be the arbiters of reasonableness. Judge Ostrowski determined in effect that a search may not be any more intrusive or lengthy than the warrant and the circumstances of its execution can reasonably justify. Although it was not expressly stated, this could have major ramifications for the level of search able to be undertaken — pat down or frisk, ordinary or strip — in terms of a search not being justified unless a less intrusive option is not reasonably sufficient in terms of the execution of the warrant in all the circumstances.

The award of damages in *Gordon v Graham* falls broadly within the standard tariff of awards of damages for assault and unlawful imprisonment in Australia and Great Britain.⁷ As the plaintiff had not been especially 'injured' in terms of her psyche by what had occurred, her compensatory damages could only have been of limited extent. However, it is significant that the plaintiff was found by the Court to have been humiliated, frightened, apprehensive and generally diminished, embarrassed and degraded at the time and in the immediate aftermath of the police actions. On their face such findings should have been sufficient for a determination that the injuries to the plaintiff's feelings for 'insult' and 'humiliation' were sufficient for an award of aggravated damages. Had the case been before jurors, it is possible that they may have been more sympathetic.⁸ Judge Ostrowski's decision, though, was that because the police had been bona fide in their execution of the warrant (although they were found to have executed it unreasonably and to the acute distress of the plaintiff) the plaintiff was not entitled to aggravated damages. Brennan J's criteria for the award of exemplary damages seem to have infected the judge's analysis of her entitlement to aggravated damages.

Most significantly, the plaintiff was not awarded exemplary damages for conduct that the disinterested bystander might well have classified as 'showing a conscious and contumelious disregard' of her rights. Again, the let-out appears to have been that the disregard of her rights was not malicious and she was not especially singled out — she suffered like the other 400 plus victims of the unlawful searches. This reasoning highlights a problem in Brennan J's formulation of entitlement to exemplary damages in *XJ Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* because it focuses on the intentionality of the wrongdoing

rather than on reckless indifference to rights, the objective impact of the tort, the seriousness of its error and the need to deter people with an especial power for coercion from similar abuses of their power. If exemplary damages were not awarded in this case, the moral can only be that such damages against police are to be confined to the most vicious and unequivocally deliberate abuse of police powers, such as the defilement of the Aboriginal suspect in *Henry v Thompson*.

Unfortunately the damages which have been awarded against the police in *Gordon v Graham* are hardly likely to impact on the police budget or to impel police to change their practices to any significant degree. No message was communicated by the award that a raid based on false premises and executed in such a way as to humiliate and demean its victims is completely unacceptable to the community. The police wrong-doers were not taught that tort does not pay. The judge's rhetoric was that the community would be 'startled' by what had occurred but his words do not sit easily with the low award of damages. The only potential for a real impact of the decision lies in the fact that there is the possibility that in excess of 400 plaintiffs may obtain similar judgments in further *Tasty Nightclub* litigation.

Ultimately what the *Tasty Nightclub* case demonstrates once again is that obtaining substantial damages against police is very difficult even when a plaintiff is found to be of good character, to have acted in no way improperly and to have been seriously harmed by police malfeasance. Unlike the plaintiff in the *Tasty Nightclub* case, the reality is that people suing police generally start from a profoundly disempowered position. Usually they have few means, and are dependent on legal aid. If they have some means, they will probably not qualify for legal aid, and the expenses of protracted litigation, especially with the prospect of costs being awarded against them if they cannot prove their case to the necessary level, will be such as to preclude the feasibility of their proceeding to trial. Frequently those contemplating suing police are intimidated by the realization that police are repeat players in the courts, concerned that their word will not be believed against that of the police and are fearful of practical repercussions of their suing people as powerful as members of the police force. Often plaintiffs in litigation against police have a criminal record, have been affected by drugs or alcohol at the time of the incident, speak little English, are young, intellectually disabled or mentally ill, or suffer from a combination of these disabilities. By contrast, the police are accustomed to the litigation process and represented by experienced government lawyers who use all the forensic advantages that their position makes possible. Even finding out the identity of the police members against whom allegations of impropriety are being made can be a lengthy, expensive and enervating process in face of sustained obstructionism. It is not surprising then that anecdotal indications are that many plaintiffs in actions against police abandon their claims or settle them on disadvantageous terms, with confidentiality clauses that prohibit them from disclosing the terms of settlement, simply to finalise the process, to put a cap on their costs and avoid the trauma of going to trial.⁹

The *Tasty Nightclub* case reaffirms that in Australia, as to a lesser degree in the United States, 'the nexus between police accountability and civil damage claims is generally very weak'.¹⁰ The impact on policing of those damages that are awarded is further attenuated by the fact that the police

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Law Reform in CHINA

Sarah Biddulph

Amending the power of detention for investigation in The People's Republic.



Publicity of an exhibition of the results of the 'serious strike' campaign, Shanghai, June 1996.

Re-construction of the legal system has been one of the priorities of the Chinese regime ever since adoption of the policy of economic modernisation at the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (the party) in December 1978. Among the first laws to be passed were the Criminal Law of the People's Republic of China (the Criminal Law) and the Criminal Procedure Law of the People's Republic of China (the CPL).

They were adopted by the Second Session of the Fifth National People's Congress (NPC) on 1 July 1979 and became effective on 1 January 1980.

Since then, both the Criminal Law and the CPL have been amended or added to numerous times. There is now a widely held belief that the Criminal Law and the CPL reflect neither the current state of the law, nor the current needs of society, if they ever did. Priority has been given to comprehensively revising both laws in an attempt to better reflect these 'social needs'. Revision of the CPL was completed and the revised law was adopted by the National People's Congress in its March 1996 meeting. This law will come into effect on 1 January 1997. Work on revision of the Criminal Law is currently under way.

The CPL introduces a number of reforms to the system of criminal procedure. One important reform is to permit an accused person access to a lawyer at an earlier stage of the criminal prosecution process than in the past, though still not as early as some had hoped. The accused person under the old law was entitled to seek advice of a lawyer after the case had been accepted by the people's court and set down for trial, around a week before the trial. Now the accused person may seek legal advice after interrogation by the police (also called the public security organs). Another reform is to abolish the system of 'conviction without punishment' which allowed the procuratorate (the prosecuting organ of state) to record a finding of guilty before trial, but to exempt the person from criminal punishment.

Here, I want to discuss another reform made by this legislation. It was one of the most controversial issues debated in the revision process and involves reform of a power which in fact appeared neither in the old CPL, nor in the new. That is, the abolition of the police power of detention for investigation (shourong shencha). This power has also been translated as 'shelter and investigation'. (In this article I also call it 'the power'.) Detention for investigation is coercive power exercised by the police outside the scope of the CPL. It has been classified as an administrative power. The existence and use of this power illustrates one of the most enduring features of the exercise of coercive powers of the state in China, that is, the concurrent use of 'administrative' and 'criminal' powers.

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Background

The debate which preceded the decision to abolish this power reflects the growing divergence of views in China about the proper nature and scope of the state's coercive powers and the ways in which those powers should be exercised. It also gives us some insight into the growing tension between the ways in which organs of state have been accustomed to exercising their coercive powers and the development of legal norms that place limitations on both the types of powers exercised by state organs such as the police, and the manner of their exercise.

The power of detention for investigation is merely one of several administrative powers exercised by the police. This power in particular is used in circumstances almost indistinguishable from the powers exercised by the police under the CPL. One of the criticisms of this power has been that it is used by the police to avoid the more restrictive provisions of the CPL governing pre-arrest detention.

A particular feature of police administrative powers is their flexibility. The number and type of administrative powers has changed since the founding of the People's Republic. The purpose filled by one power may later be filled by another. Even though detention for investigation was created in 1961, powers used for similar purposes existed before this time. Administrative detention as a form of punishment could also be imposed by the police under the Securities Administrative Punishment Law 1957 and under its successor, the Securities Adminsitritative Punishment Regulations 1986. Measures such as administrative 'control' and 'forced (or supervised) labour' were used in the early days of the regime. Their roles were later taken over by administrative punishments such as Re-education Through Labour (under this power a person may be sent to a labour camp for up to four years), and later, for those who had failed to reform after imprisonment, Retention For In-Camp Employment. More recently, specialist detention centres for prostitutes have been established, different to re-education through labour camps, where prostitutes are detained for re-education and treatment of disease for between six months and two years. As the war against drugs intensifies, specialist centres for the forcible treatment of drug addiction have also been established. The courts play no role in determining whether a person should be given an administrative punishment.

The content and use of any of these administrative powers may change over time. The purposes for which detention for investigation were originally used have changed significantly over its history of more than 30 years.

The formal distinction made between administrative and criminal powers in many particular instances is a distinction without substance, as the result is deprivation of personal freedom. The distinction is that criminal powers are those set out in the Criminal Procedure Law and imposed by a court, and administrative powers are those powers exercised by the administrative organs of state in their administrative capacity. One of the debates surrounding detention for investigation has been whether it should be considered to be an administrative or criminal power.

In this article I look at the issues which formed the substance of the debates leading up to the final decision to abolish this power. We might ask ourselves how effective the new CPL will be in ensuring uniform and 'fair' treatment of accused persons. Any answer to this question will depend not only on the ways in which the law itself is enforced, but also on the limits placed on the exercise of those administrative

powers which don't appear in the CPL at all. We must wait to see whether detention for investigation has been abolished in substance, or in name only.

Detention for investigation

Today detention for investigation is primarily, though not solely, used as a mechanism for investigation of suspected criminal activities by people who are transient and whose identity is unclear. Public security organs (the police) may detain specified individuals for a period of up to three months to interrogate them, gather evidence and determine whether they have committed any offence. It is a procedure taken before the police have sufficient evidence to determine whether a person has committed an offence worthy of punishment. If they discover evidence of a criminal offence then they may make a formal application to the procuratorate for arrest of the detainee. If interrogation reveals evidence of a more minor infringement then an administrative punishment, such as a warning, fine, or re-education through labour may be given. If no evidence of wrongdoing is discovered, then the person should be released.

Detention for investigation is directed at four types of person. They are:

Those people who have committed a minor offence or crime and do not tell their true name and address and whose background is unclear, or they have committed a minor criminal offence and are suspected of floating from place to place committing crime, committing multiple crimes, or forming a group to commit crime, who need to be taken in to investigate their criminal acts ...¹

The power of detention for investigation has become one of the most controversial police powers. It has passed through stages of relative obscurity, where the existence of the power was not widely known and was not able to be publicly discussed, to its current situation as a focus of public dissatisfaction about police abuse of power. In China there is now widespread opposition to this power from the general public, from academics and from the NPC and people's congresses at local levels. Detention for investigation was the focus of the NPC's Internal Work Judicial Committee inquiry into the enforcement system in 1990. The Committee found that public security organs commonly exceeded the scope and time limits of detention for investigation. It also found that detention for investigation was commonly used as a substitute for criminal investigation and punishment, as well as a substitute for administrative punishments.²

A primary reason for its notoriety is that it is one of the powers most abused by the police. There are also serious legal problems with the power which are related to abuse but also have a broader significance in that they affect the integrity of the legal system as a whole. Although the work of reconstruction of the legal system has been taking place since 1979, not all police powers have been 'modernised'. The form and use of detention for investigation highlights the tensions between recent legal reforms and the continued exercise of coercive powers of state agencies which predate the reforms.

Development of the power of detention for investigation

Detention for investigation has been used in different ways since its introduction in 1961. In November 1961 the Central Committee of the Chinese Communist Party (the 'CCP') approved and issued the 'Report concerning urgently pre-

venting the free movement of the population'. Chinese authorities have always tried to discourage the uncontrolled and unplanned movement of people. After the famine caused by the failure of the Great Leap Forward, huge numbers of people had left their homes. Peasants had drifted to cities in search of food and people in cities had drifted throughout the country, also in search of food. At that time, detention for investigation was used both as a measure to return people who had moved without permission from their place of household registration, as well as to deal with 'counter-revolutionary' and other 'criminal elements' who had 'insinuated' themselves amongst this large group of transients.³

At the end of the Cultural Revolution, a period which had also seen large population movements, the function of returning itinerants to their place of household registration was separated from the criminal investigation aspects of detention for investigation.⁴ Vagrants and beggars are now dealt with under a different power, called detention for repatriation, which is administered jointly by the civil administration and the public security organs. Detention for investigation was only used to detain people suspected of committing crime.

In August 1975, the State Council approved the Report of the Ministry of Public Security and the Ministry of Railways 'Work Meeting Concerning the Situation of the National Railway's Public Order' which proposed the establishment of centres for the detention of 'transient criminal elements'.⁵ Separate detention facilities operated by the public security organs continue to be used for people detained under this power of investigation. Between 1980 and the beginning of the law and order campaign in 1983, some moves were made to integrate the site of detention for investigation into re-education through labour camps, though the part of the rule passed to effect this integration was never implemented. Detention for investigation became an important method for implementing law and order campaigns and its use increased dramatically after 1983.

Arguments about abolition of detention for investigation

Over the last few years, there have increasingly been calls for abolition of detention for investigation and growing concern about abuse of the power. The arguments for abolition of the power have been based not only on the practical problems of the use of the power, but also the increasing disparity between the legal form of the power and the ways in which the legal system is developing.

The arguments put forward by Chinese scholars for abolition of this power are very informative at a general level, as they reveal a growing intolerance for police abuse of power and a sensitivity to the need, in form at least, to protect the integrity of the legal system. The causes for police abuse of this power are complex and I do not address them in this article. Here, I will just set out the main problems so as to give some indication of the types and magnitude of issues which law reformers in China face.

Those who argued for abolition of detention for investigation said that abuses of power were inextricably linked with the existence of the power itself. They argued that these abuses could not be rectified by stricter supervision and better legal definition of the power. Others who supported the retention of the power agreed that there were both legal and practical problems with the power.

They pointed out though, that that the power had been exercised in fact over a long time, it was very effective and

had 'Chinese characteristics'. They argued that detention for investigation should be retained but given a proper legal basis, and that the rules on which it was based be clarified.⁶

The debate about the proper legal character of the power was, to an extent, also used as a vehicle for the arguments about abolition of the power. Classification of the power as criminal in nature was primarily used as an argument for its abolition. Classification of the power as administrative on the other hand, was often used to ground an argument for retention of the power. Some acknowledged that it was in substance a criminal coercive power and suggested that it be included within the CPL. The predominant view though, was that it should be seen as an administrative power.⁷

Practical problems with the use of detention for investigation

There is good evidence that especially since 1983, detention for investigation has been widely used by the police to facilitate 'campaign style' enforcement. That is; to strike heavily and quickly against targeted groups and activities. The extremely serious abuses of this power at the local level are widely known in China and have even been acknowledged by the Ministry of Public Security. Since 1978, the Ministry has issued a series of directives to its lower level organs exhorting them to confine use of the power within the limits set by administrative regulation.⁸ These calls have been ineffective.

There are a number of main areas of abuse of the power identified by Chinese academics and the police themselves. The first is 'expanding the scope of targets'. The targets for detention, which are already framed in very wide terms, are set out above. People are detained for a range of reasons that have nothing to do with the scope of people who may lawfully be detained. They include: local people whose identity is well known to the police, mentally ill people, alcoholics, people who illegally cohabit and people who are involved in economic disputes. The last group are often detained as a means of procuring payment of the disputed amount on behalf of one party to the economic dispute.⁹ An indication of the seriousness of this problem can be found in a notice from the Ministry of Public Security entitled Notice on Immediately and Conscientiously Rectifying Detention for Investigation Work which was issued on 31 July 1986. In that notice the Ministry stated that in some areas of China the proportion of people detained under this power who actually fall within the scope of targets was less than 10% of detainees. In eight other provinces (or province level administrative units) the proportion was less than 25%. Only in four provinces was the proportion over 80%, which was the Ministry target.

Another major problem is 'lengthening the time of detention'. A significant number of people are detained for longer than the maximum of three months. Some people are held for periods of one, two, three and even five and ten years without being released.¹⁰

'Poor management of detention centres' has also been a major problem in the specialist detention for investigation centres. This includes overcrowding, poor sanitation, inadequate food, clothing, bedding, spread of communicable diseases and failure to protect detainees from being attacked and beaten by other detainees. This problem was especially pronounced at the height of the law and order campaign from 1983 to 1984.¹¹ There is also evidence that public security

officials beat, abuse and humiliate detainees and use torture to extract confessions from detainees.¹²

Legal problems with the power of detention for investigation

The legal form of detention for investigation highlights a number of problems with the current legal structure of police powers as a whole in China:

- the existence of a wide range of administrative powers exercised in parallel to the powers granted to the police under the Criminal Law and the CPL;
- the vagueness of rules defining when and how they may be used;
- the high level of overlap between them; and
- the lack of effective mechanisms for supervision of police use of these powers.

Legal basis of detention for investigation

One of the concerns about detention for investigation is that it has no proper legislative basis. This means that there is no legislation passed at the level of National People's Congress or its Standing Committee that forms the basis of this particular power.

The problems of determining which documents actually form the legal basis of the power really only became an issue when the Administrative Litigation Law (the ALL) was passed in 1989. Under that law, the people's courts are empowered to determine the lawfulness of specific administrative actions. Initially, it was unclear whether detention for investigation would fall within the scope of the acts that could be reviewed under that law. It was determined that detention for investigation fell within the scope of 'administrative coercive measures' which can be reviewed by the people's court under article 11(1)(ii) of the ALL.

The Opinion of the Supreme People's Court on Several Questions on the Implementation of the 'PRC Administrative Litigation Law' states at article two that '... citizens who are dissatisfied with the decision of a public security organ for coercive detention for investigation, can commence litigation in the people's courts'. Since then there has been a small number of people who have sued the public security organs for wrongful detention under the power and won.

The question of lawfulness of an act is to be determined on the basis of laws or regulations of the type specified in the ALL. The People's Court 'may refer' to other lower level administrative regulations and rules when making its judgment, though it is able to ignore these rules if they conflict with laws passed at a higher level.

The problem of the lack of a coherent legal basis for this power then becomes a problem for the people's court in determining what rules form the legal basis of the power and whether they are rules to which the the people's court is obliged to refer.

The rules which are now accepted as forming the standard on which a judgment of lawfulness is to be made are primarily those passed by the Ministry of Public Security itself and were designated as such by the Ministry of Public Security in the Notice of the Ministry of Public Security Concerning Several Questions About Implementation by Public Security Organs of the 'Administrative Litigation Law'. This notice was directed to the lower level public security organs and sets out the documents which were to form the legal basis of detention for investigation and some other administrative

powers. Technically, such a notice should not bind the people's courts and the rules specified in it were originally not intended to be the sole basis for determining lawfulness under the ALL.

That notice provides that the 'targets' of detention are to be determined by article two of the State Council Notice Concerning Supporting the Unification of the Two Measures of Forced Labour and Detention for Investigation with Re-education through Labour of 29 February 1980. Investigation and approval procedures and time limits for detention are to be determined in accordance with the Ministry of Public Security Notice Concerning Strictly Controlling the Use of Detention for Investigation Measures July 1985. In addition, it states that 'reference may also be had' to the Ministry of Public Security Notice Concerning Publication and Distribution of 'Notes of the National Public Security Legal System Work Meeting'.

Even in Chinese legal theory these documents are quite inadequate to form a legal basis for the exercise of this power. They consist of rules which the Ministry of Public Security passed itself and a State Council notice passed for a different purpose, which was not implemented and refers to the targets of detention for investigation as a subsidiary issue.

Legal norms are vague and inconsistent

If we accept that the Ministry of Public Security has effectively specified which notices form the legal basis of the power, the problem that follows is that these notices are vague and mutually inconsistent in some respects. There is no definition for example, of how to determine whether a person is 'floating from place to place', on what, if any, basis a 'suspicion' that the person has committed an offence must be founded on, or what is the nature of the 'minor offences or crimes' which are a prerequisite for detention.

The co-existence of inconsistent regulations defining the power adds to the uncertainty about the scope and nature of the power. It also indicates the fluid nature of the power which is changed and reinterpreted by rules passed by the Ministry of Public Security from time to time. For example, the scope of targets in the 1985 Ministry of Public Security notice referred to above is inconsistent with that set out in the 1980 State Council Notice at article 2 set out above. In the Ministry of Public Security Notice the targets for detention are described as:

... people suspected of floating around committing crimes or people who have committed a criminal act and do not tell their true name and address and whose background is not clear ...

Such a description comes far closer in substance to the targets for imposition of criminal detention under the old CPL than the targets set out in the 1980 State Council notice. As criminal detention and detention for investigation in practice have been used interchangeably, the lack of clear legal distinction between them is not surprising.

Overlap with other powers

As I mentioned in the introduction, the co-existence of criminal law and procedure with a range of administrative powers has been an enduring feature of the Chinese justice system. This distinction has been entrenched in, and justified by, the legal rules governing these powers. Police administrative powers are exercised in parallel to, and as a complement to, the punishments and coercive measures used in the criminal justice system. The law distinguishes between criminal and administrative powers and between punishments and coercive measures. Administrative powers, including punish-

ments and coercive measures, are exercised in order to protect public order in circumstances which are not sufficiently serious to warrant use of the criminal law.¹³ Coercive powers are exercised where there is no evidence to show that a person has committed a punishable offence. Detention for investigation is an administrative coercive power.

Detention for investigation has been used as a substitute both for other forms of investigation and punishment. It has been used instead of giving administrative punishments of detention under the Security Administrative Punishment Regulations 1986 and the legislation these regulations replaced. It has also been used either prior to, or instead of, employing the coercive measures of criminal detention, or arrest, which are set out in the old CPL. For example, article 41(6) provided that one ground for imposing criminal detention was:

if his or her identity is unclear and there is a strong suspicion that he or she is person who goes from place to place committing crimes.

Both criminal detention and detention for investigation address the problem of obtaining sufficient evidence to show that the person in detention has committed a criminal offence.

There have been reports made of the police coercing detainees to make statements and confessions which are later used to provide evidence in the prosecution of a criminal offence.¹⁴ It has been acknowledged that detention for investigation is commonly used as a substitute for criminal detention and arrest. One source relies on incomplete statistics which show that between 80 and 90% of people convicted of criminal offences since the promulgation of the CPL were first taken in for detention for investigation.¹⁵

Although the powers appear to be used interchangeably, in practice, detention for investigation was a much more severe form of detention than criminal detention. Detention for investigation may lawfully last for three months, whereas the maximum time for criminal detention was ten days. The degree of suspicion required for criminal detention is 'a strong suspicion' as opposed to a 'suspicion' which is required for detention for investigation. It is ironic, that on the face of the law, a higher degree of suspicion is required to impose criminal detention than that required for detention for investigation.

One of the trade offs made under the new CPL in exchange for abolition of detention for investigation was to increase the maximum period for criminal detention to 30 days for those people who would previously have fallen within the scope of detention for investigation.

Problems of supervision

The 1985 notice passed by the Ministry of Public Security provides that the exercise of detention for investigation 'should be subject to the supervision of the People's Procuratorate'. However, it appears that the procuratorate has never supervised the exercise of this power. There is an issue of the existence of the duty at all, as the Ministry of Public Security does not have the power to impose a duty on the people's procuratorate, which is actually located higher in the state structure than the Ministry of Public Security. The question of the existence of the duty, and the way in which the duty, if it exists, is to be exercised, was never settled.¹⁶

The main channel for supervision of the exercise of this power is by the people's courts under the ALL, discussed above. Even though the courts asserted jurisdiction over these cases, many public security personnel are reluctant to

appear in court as a defendant for fear of losing face and so their authority. Often the public security organs will deny the court's jurisdiction to hear cases concerning detention for investigation on the basis that they are investigating a criminal matter. These cases indicate that many public security personnel treat the power as though it were an integral part of their criminal coercive powers.

After the ALL, the Administrative Review Regulations (the ARR) were promulgated in 1990, establishing a system of review of the exercise of police administrative powers by either the people's government at the same level, or the higher level public security organ.

Broader ramifications

These legal issues raise two legislative problems at a deeper level. The first is should powers which are virtually interchangeable with those powers granted under the CPL be permitted to exist at all? The second question is about the constitutionality of the power. Should the Ministry of Public Security have the power to regulate the use of a power of this nature which its own officers exercise? Although these questions have already been resolved for detention for investigation, these arguments apply with equal force to other administrative powers, especially re-education through labour.

Undermines the integrity of the CPL

Even though detention for investigation is called an administrative coercive power for the purposes of review under the ALL and the ARR, that did not end the debate about the nature of the power. Those who argue for abolition of the power say that detention for investigation is 'criminal' in nature because it is essentially used for investigation of criminal activities and so it undermines the integrity of the CPL, which is intended to be a code. They say that the similarities between detention for investigation and criminal detention would also mean that including it in the CPL in its present form would undermine the effectiveness and integrity of the existing criminal coercive powers.¹⁷

Those who argue for the abolition of detention for investigation also say that the public security organs ought not exercise a power akin to a criminal procedure power which is not included in the CPL. They point out that a person should either be dealt with under administrative law within the scope of the Security Administrative Punishment Regulations or under the CPL. They argue that there is no justification for the existence of some middle ground represented by detention for investigation which allows a person to be channelled into either the administrative punishment system or the criminal system depending on the outcome of the investigation for which that person was detained.

Similar reasoning is now being used to argue for the abolition of re-education through labour. It is argued that a person should not be deprived of their liberty for up to four years unless convicted by a court after following criminal procedures specified by law. Re-education through labour is an administrative punishment that may be imposed by a committee on the advice of the police for infringements of the law which are not sufficiently serious to warrant criminal prosecution. The maximum amount of time for re-education is three years with a possible extension of one year for a person who has not reformed well.

Contrary to the Constitution

Both opponents and supporters of the retention of detention for investigation agree that the lack of an adequate legislative basis for the power is an issue of great concern. Those who call for the abolition of detention for investigation go further and state that the existence of the power itself is unconstitutional. They claim first, that it is contrary to the spirit of article 37 of the Constitution which guarantees freedom of the person¹⁸ and second, that the State Council does not have power to create detention powers such as detention for investigation.

The first argument rests on an interpretation of this 'fundamental right' as it is set out in the Constitution. Article 37 guarantees that freedom of the person of citizens 'is inviolable' and also provides that 'no citizen shall be arrested' unless approved by the people's procuratorate or the people's court. They argue that the words of the constitutional provision do not contemplate any form of detention other than arrest. However, as there is no specific mechanism by which individuals or groups may directly challenge the constitutionality of either actions or rules, there is no way to assert such an interpretation of the words of the Constitution. The Standing Committee of the NPC is empowered under article 67(1) of the Constitution to interpret the Constitution and supervise its enforcement. It has not yet established any specialist body to oversee the implementation of the Constitution.

Those people opposed to the continued existence of the power argue that a citizen may not be lawfully deprived of her or his personal freedom unless it is pursuant to legislation passed by the National People's Congress or its Standing Committee.¹⁹ This is the second and related argument, that is, the State Council does not have power to create a detention power such as detention for investigation. This argument has now been accepted and enacted in the Administrative Punishment Law which was also passed at the March 1996 meeting of the NPC. It provides at article 9 that only the NPC or its Standing Committee have power to pass legislation under which a person may be deprived of her or his personal freedom.

Conclusion

Abolition of the power of detention for investigation is to be welcomed. Its abolition is the result of not only the strong opposition at all levels of Chinese society to this power, but to the painstaking and dedicated work of a group of Chinese academics and officials. Apart from the extreme problems of abuse of power, the existence of a power such as detention for investigation highlights the problem of lack of substantive difference between criminal and administrative powers and between punishments and coercive measures exercised by the police in China. Especially where the person is detained, it is hard to argue that one form of detention is a punishment whilst another form of detention is not, especially where the time limits for many of the punishments of detention are shorter than the time limits for the coercive measure of detention for investigation.

Abolition of detention for investigation will go some way to clarifying those important distinctions.

The practical consequences of abolition of the power remain to be seen. The pressures placed on the police to ensure a high degree of social order are, if anything, increasing. Campaign style policing, which formed the practical incentive for increased use of this power after 1983 is still

strongly favoured. A campaign to crack down on law breakers was commenced in April of this year and is ongoing.

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2. Yang Xinhua, 'Shourong Shencha Cunzai de Wenti Ji Duice' ('Problems and Strategies for the Existence of Detention for Investigation'), (1991) 4 *Jiangxi Faxue (Jiangxi Legal Studies)* 42; Zhang Jianwei and Li Zhongcheng, 'Lun Feizhi Shourong Shencha' ('Discussing the Abolition of Detention for Investigation'), (1993) 3 *Zhongwai Faxue* 55-9 at 57-8 also argue that detention for investigation is used as an alternative to criminal detention.
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lawyers, lawyers and more lawyers!

Francis Regan

Can the profession cope with the growing number of law graduates?



We are often reminded of the startling fact that there are more students currently studying to be lawyers in Australia than there are lawyers practising law. And the expansion of law schools over the past 10 years means that there will be more and more law graduates entering the labour market in the future. So will there be a crisis in employment in the Australian legal profession in the near future? Will the new graduates have difficulties finding work? And will the practising profession have difficulties absorbing the graduates? While it is clear that the legal services industry faces a major increase in supply of legally trained graduates it is probably still too early to predict what the precise consequences will be. And it is probably too early to argue that there is a crisis looming. Nevertheless it is worth asking whether we can currently detect early signs of problems in the industry.

Two problems

There are at least two potential problems flowing from the growth in law school places. First, there is the problem of oversupply of legal services; that there will be too many lawyers providing legal services. The profession is concerned, for example, that the amount of legal services needed in the society will not grow quickly enough to absorb the growth in the number of graduates. As a result there will not be enough work for all the graduates coming out of the law schools. And there may not even be enough work for all those who are practising law. We will have to wait and see whether there is in fact an oversupply. But whether there is an oversupply will at least partly depend on how many graduates actually want to practise law. And we should not assume that they will all want to. Currently about 50% of graduates do not enter legal practice but instead use law as a general qualification for a variety of careers. Law is increasingly used in much the same way that a BA was used 20 years ago. That is, it is used as a basic qualification for interesting and well-paid jobs. It is particularly useful for entry into careers in public service or industry where legal skills are valued.

A good way to examine the concern about an oversupply of lawyers is to identify the current rate of employment growth in the legal services industry. In particular we need to identify whether large numbers of legal graduates are currently being absorbed. If there is going to be a problem in the future we may be able to detect signs that employment of graduates is already a problem. But if the industry is currently experiencing rapid growth and absorbing large numbers of graduates then the same trend may very well continue into the future. If there is evidence of a trend of large scale absorption of graduates then this may actually signify that the industry is in a process of rapid change that is resulting in rapid growth. Rapid employment growth may therefore continue into the future.

We can also compare the legal service industry's growth with the growth in the labour force generally to check how that industry is faring

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relatively. If it is growing at a slower rate than the labour force then this might suggest that the industry is already saturated with lawyers. On the other hand if growth is higher than the labour force then it suggests that the industry is not saturated. This sort of data, on its own, will not completely allay fears about the industry's capacity to absorb graduates in the future. But it does paint a picture of the current situation and identify some trends which may continue.¹

A second problem concerns income. Will a rapid increase in the number of lawyers result in a decline in all lawyers' incomes? The profession is certainly concerned that an over-supply of lawyers will lead to a decline in the price paid for legal services. And that as a result lawyers' incomes will decline. Again this may or may not be correct in the future. The Federal and State Governments have recently pushed through reforms to improve competition within the profession. These reforms may result in lower prices for legal services. But as any high school economics student knows, lower prices should also stimulate more demand: there should be more demand for legal work. The net result may very well not be a fall in the profession's income. On the contrary, the result may actually be an increase in income for the profession as a whole, and for most individual lawyers, due to an increased volume of legal work.

A good way to examine the problem is to analyse current income data for the industry. The data may demonstrate that the industry's income is currently in decline. On the other hand the data may demonstrate that the industry is experiencing rapid income growth. But at least we will have an idea of what is currently happening and what might continue to happen if the trend persists. We can also compare the income growth for the legal services industry with the economy generally to identify whether the profession is performing relatively better or worse. Such a comparison identifies at least short-term trends for the future.

The two problems are best dealt with as questions that can be tested empirically. Reliable and relevant data can inform us about the current growth in employment and income, and help us to identify the likely future trends if nothing else changes. But does this sort of data exist for the legal services industry in Australia? Fortunately the Australian Bureau of Statistics recently published its second survey of the 'Legal Services Industry'.² The survey is conducted every five years and provides a snapshot of key features of the industry. In addition the two surveys can be used to identify trends over time.

Below I examine the two problems using the ABS data. First I summarise some of the main features of the Australian legal services industry in order to provide some details of the overall nature of the industry. Then I discuss findings of the survey relating to change in employment and income. Contrary to the concerns that have been expressed, I conclude that the legal services industry is currently experiencing very healthy growth in both employment and income. Whether these trends will continue into the future is unclear but currently the industry seems to be in a good position to continue its rapid growth.

Key features in 1993

The legal services industry employs a large number of people and generates a large income. At the end of June 1993, the industry employed 63,108 people in a total of 8850 legal practices. Women accounted for three-fifths of all employment (see Table 1).

Table 1
Employment in the Legal Service Industry 1993

Employment at end June 1993	No.	%
Male	24,941	39.5
Female	38,167	60.5
Total	63,108	100.0

The total value of the legal work undertaken was \$5144 million and the profit before tax was \$1666 million. But the value of the industry's production was just 1.8% of the production of the whole economy, excluding the farm sector. So it is actually a small industry in relation to the economy as a whole.

The survey also identifies some characteristics of legal work. It demonstrates, for example, that much legal work is document based rather than court based. This is reflected in the fact that most legal businesses are solicitors' practices (63%) and most of the rest barristers only (see Table 2).

Table 2
Number of Legal Service Businesses by Type, 1993

Businesses at end June 1993	No.	%
Solicitors	5579	63.0
Barristers	3184	36.0
Other	87	1.0
Total	8850	100.0

The industry generates its income from many areas of law but the largest proportion comes from commercial, financial and business law (32%). Conveyancing, or sale of houses and land, is still the second highest income earner for the profession despite the freeing up of restrictions on who can do that work over the past few years. Conveyancing still accounts for 15% of the profession's income (see Table 3). When we see this sort of income flowing from conveyancing we begin to appreciate why some sections of the profession have resisted government moves to break the profession's monopoly over this work. Conveyancing is a very lucrative form of work indeed, generating \$748 million of the profession's income. Nevertheless, we should not assume that this is complex legal work. It is, of course, usually fairly straightforward clerical work. In legal firms, it is usually undertaken by clerks under the supervision of lawyers, and in those States where non-lawyers are allowed to do this work, the cost of conveyancing is considerably cheaper than where lawyers maintain the monopoly.

Table 3
Source of Income for Legal Service Industry 1993

Income from legal services	\$ million	%
Commercial, financial & business	1637.4	31.8
Property conveyancing	747.8	14.5
Other property work	320.9	6.2
Family law	307.8	6.0
Criminal law	241.9	4.7
Probate	185.1	3.6
Environmental	82.3	1.6
Other law	1199.3	23.2
Other income	421.5	8.4
Total	5144.0	100.0

LAWYERS, LAWYERS AND MORE LAWYERS!

We are also reminded that most legal work is not undertaken for ordinary citizens. *Table 3* demonstrates that very little of the profession's work is concerned with the ordinary legal problems of citizens, such as family, criminal, and wills and estates (or probate). In this light it becomes clearer why the profession has been slow to consider reforms to practices which might reduce legal costs to the citizens.

The Australian legal services industry is highly concentrated in NSW and Victoria if measured in terms of the number of businesses and the total employment or the gross income (see *Table 4*). The ABS notes that 60% of Australia's population lives in those two States but that almost three-quarters of the country's legal work is conducted there. Why is this? Because those two States are the financial and commercial centres of the country. Also conveyancing, or sales of houses and land, is undertaken by non-lawyers in other States such as SA and WA, thereby reducing the profession's income.

Table 4
State Breakdown of Legal Services Industry 1993

State/Territory	No. of businesses	Total employ-ment	Gross income \$million
New South Wales	3590	25,208	2243.5
Victoria	2884	16,932	1427.8
Queensland	1341	11,136	742.7
South Australia	397	3222	240.7
Western Australia	378	3774	304.7
Tasmania	108	1092	61.2
Northern Territory	40	400	29.9
ACT	113	1,344	93.5
Australia	8850	63,108	5144.0

Over the five-year period the structure of the industry became more polarised into both small and large legal practices. Contrary to the concerns in the 1980s about the growing domination of the industry by large or 'mega' law firms the industry is actually dominated by small businesses. The number of small firms, those employing less than 20 people, grew by 40% over the five years to 1993. But the number of very small firms increased even more dramatically. Those employing less than four people increased by more than half to nearly 6000 practices over the period (see *Table 5*). The total employment in the firms employing less than 20 people increased from 28,000 to 33,500 over the period. The rapid growth of the small firms resulted in the average size of all Australian legal businesses declining substantially from 8.6 to 7.1 persons per business. The legal services industry is an example of an industry increasingly dominated by small businesses. It is also an example of an industry that has successfully absorbed large numbers of lawyers into small businesses. If such a trend continues, the future absorption of graduates may not be a problem.

At the same time as rapid growth occurred in the number of small firms, the number of very large law firms also increased. The number of practices employing more than 100 people increased by more than 50% in the five-year period. The actual number of very large firms increased from 42 to 64 and the total employment in these large firms increased from 9765 to 13,696.

Table 5
Change in Business Size in Legal Services Industry, 1988-93

Employment size (persons)	End June 1988	End June 1993	% Change
0-4	3722	5882	58.0
5-9	1480	1677	13.3
10-19	749	798	6.5
20-49	374	343	-8.3
50-99	92	86	-6.5
100 or more	42	64	52.4
Total	6459	8850	37.0

In effect, the industry grew dramatically at either end of the scale. The number of small and large firms increased. Did any section of the industry not grow? In fact the number of medium-size firms, those employing 20-99 people, declined by 8%. So it seems that neither the days of the sole practitioner, nor the large law firms, are over. But if the trend of rapid growth at both ends of the scale continues then the future employment prospects for legal graduates looks promising.

There has been substantial change in the gender balance of law students over the past 20 years or so. Women now make up more than 50% of those studying law. But the overall gender balance in the legal services industry has, paradoxically, declined due to the fact that male employment growth was the most rapid and that they were employed as practising lawyers. Employment of women and men grew rapidly over the period but the latter grew at nearly three times the rate of the former (see *Table 6*).

Table 6
Change in Employment in the Legal Services Industry by Gender, 1987/8-1992/3

Employment at 30 June	1987/8	1992/3	% Change
Male	20,301	24,941	22.9
Female	35,062	38,167	8.9
Total	55,363	63,108	14.0

The gender employment patterns have changed in other ways. While women account for 60% of employment in the industry they are, and have been, clustered at the lower levels of responsibility and income. So 85% of non-legal staff are women, employed as secretaries and paralegals. The gender balance among the legally qualified personnel has also changed substantially over the five-year period. But the gains have been patchy and overall are less than dramatic. For example, the proportion of all barristers and solicitors who are female increased by a dramatic 41% to 5411, over the five-year period. At the same time the proportion of women in the senior echelons of the profession (principals and partners), increased from 8 to 12%. While this is a massive 50% increase, it is from a very low starting point. It seems that women still find it hard to get to the top in this industry. The profession still has a long way to go in addressing gender employment patterns.

In the next section I discuss the data in relation to the two problems outlined at the beginning of the article.

Problem 1 — employment

The ABS survey demonstrates that the legal services industry has grown dramatically over the five years to June 1993. First, the number of legal businesses increased by a massive 37%. In addition, total employment grew by 14%. And employment growth is occurring in both large and small firms. Contrary to concerns that the small business sector is declining, the ABS survey shows that the small firms employing less than 20 people accounted for much of the growth. Total employment in these small firms increased from 28,035 to 33,473 over the five-year period to the end of June 1993. The small legal firms are flourishing and boosting overall employment in the industry in the process. At the same time, the large firms are also growing in number as is the total number of people they employ. The total number of people employed in the firms that employ more than 100 people increased from 9765 to 13,696 over the period from 1988 to 1993. That is a hefty 40% growth in employment.

The employment in the industry grew rapidly and it particularly favoured lawyers. Employment of legal graduates made up the bulk of the growth. The number of legally qualified members of the industry grew by a massive 31% over the five years but employment growth overall was only 14%. So the industry also changed the proportions of legal and non-legal staff. Many more lawyers were employed than non-lawyer support staff. As a result, legally trained staff became less reliant on support staff. For each barrister or solicitor there was 1.9 support staff in 1988 but this had declined to 1.6 support staff by 1993. The impact of technology and cost cutting would together account for this decline in support staff. This data suggests, therefore, that the industry is in a process of change. It seems to be increasingly relying on legal staff and it will probably continue to do so. The employment prospects for legal graduates may, as a result, continue to be very bright for the foreseeable future.

The ABS survey also demonstrates that the legal services industry grew at nearly three times the rate of employment growth in the Australian economy. The legal services industry grew at 14% over the five years while the economy generally grew at only 5%. Therefore the industry is growing rapidly, absorbing large numbers of legal graduates, and seems to be able to generate new legal work for them.

The data suggests that the industry may be able to employ large numbers of graduates in the future if the current growth rate continues. But we can't say for certain if the industry will keep absorbing new graduates. It is possible that there may be very few new jobs in the future, or that the industry's rate of growth may not be sustained. Alternatively, the high level of growth and the greater competition may result in more legal work and more employment in the future as Australian citizens are encouraged to use lawyers more to assist them with all sorts of problems. We will have to wait and see. But we can be reasonably confident that the industry should be able to continue to employ large numbers of new graduates. Whether this is enough to give legal work to all those who want it is of course another matter.

Problem 2 — income

The income generated by the legal services industry grew rapidly over the five-year period from \$3079.1 million to \$5144 million in 1993. This rate of growth of 67% far exceeded the rate of growth of the industry's expenses of 54.4%. As a result, not only did the income increase but also the industry's profits grew substantially. And the profits grew

rapidly despite the fact that the survey period included the 'recession that we had to have'. The ABS uses a number of different measures to quantify profitability but the legal services industry profitability was remarkable on any measure. For example, operating profit before tax for the industry as a whole, increased by 102%, or over 20% in each of the five years. Another measure is the average operating profit for legal services businesses. This increased by 47% over the period, or over 9% per year. This is healthy rate of growth to say the least. But it is even more healthy when you consider that the rate of inflation as measured by the Consumer Price Index increased by only 26% over the period. Profit per business grew by almost double the rate of inflation. Wages certainly did not rise by this sort of percentage over the period and nor did farm incomes. Finally, the ABS notes that the profit margin for all legal services businesses was nearly six times the profit margin for all non-farm businesses in the economy generally. This is undoubtedly an extremely profitable industry.

The data therefore demonstrate that the legal services industry generates a high level of income, that income has grown very rapidly over the past five years and far more rapidly than the economy generally. It is also a very profitable industry and more so than businesses in the economy overall. It is difficult not to conclude that the future prospects for the legal services industry are good. And it is therefore difficult to be too concerned at the moment about the profession's capacity to maintain its income as a whole, or for individual lawyers.

Conclusion

We have seen that the profitability and employment growth in the legal services industry have been very healthy over the five-year period to 1993. The healthy growth suggests that the concerns about the ability of the industry to absorb graduates and to maintain high rates of income growth are, in the short term at least, unfounded. Based on the performance of the past five years, there seems little to worry about in terms of the capacity to both absorb new members into legal practice and to maintain income levels. This is not to say that the future may bring substantial change, but at the moment there is little cause for concern.

The legal services industry is in fact a spectacular success story of the past five years. The ABS data suggests that one key to continued employment and income growth may be for the industry to continue to expand at either end of the scale, as both small and large businesses. In this way large numbers of graduates may continue to be employed. But the data also suggests that if the industry continues to become more competitive and diversify into new areas of legal practice then it may continue to absorb large numbers of graduates and maintain high levels of income growth. It is still relatively easy to get a job in this highly paid occupation and will probably continue to be so in the foreseeable future. This is more than can be said for a lot of other occupations.

References

1. The data therefore does not tell us whether all those who graduate and want to practice law currently are able to find jobs in the industry. The discussion here focuses on the growth in the industry not the demand for employment in the industry.
2. Australian Bureau of Statistics (1995), Legal and Accounting Services, Australia 1992-93, Australian Bureau of Statistics, Canberra (Catalogue No. 8678.0).

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

WAS THIS SEXISM STUFF EVER FUNNY?

In a recent hearing in the County Court in Victoria a male barrister likened the actions of an insurance company to 'an 18 year old girl in the back seat of a car — can't make up her mind to say yes or no, come or go'. Huh? A female articled clerk observing the case from the body of the court wondered why this remark (joke?) passed without comment. She found it offensive and also observed that other women in the courtroom were upset by it. This young woman, not a big fan of the Helen Garner just-ignore-the-minor-indiscretions-we've-put-up-with-worse-than that approach, did not like to think the profession she had just joined condoned the use of insulting, sexist stereotypes in the course of 'legal argument' — she spoke up about it. The Bar Council responded positively to her firm's report of the incident, that that sort of behaviour is unacceptable'. Branded a 'Troublemaker' by some, she gets Girlie's coveted Cleaning up the Courtroom (speaking your truth) award for 1996.

BACK ON THE FLOOR

A settlement between Ms Julianne Ashton and her employers Bankers Trust (BT) has spared the NSW Equal Opportunity Commission a decision in a protracted sexual harassment case (see Girlie, April 1996). Under the terms of settlement, BT apologised to Ms Ashton for failing to deal with her complaints about what was clearly an unacceptable level of 'sexual banter' (read: pretty shocking harassment) from her male colleagues on the trading floor. Ms Ashton will continue to work for the firm, which has paid her an undisclosed sum in settlement and says it is 'currently correcting' the 'bad workplace behaviour' (*The Australian*, 13 July 1996).

Ms Ashton's stand against BT should be a cause for celebration amongst women in the finance industry, especially those who work in the boysie boy, cut and thrust trading end of the market. Girlie was, therefore, disappointed to read the comments of Ms Marea Laszok, Chief Executive Officer at Midland Bank, Australia, in an article about dealers displaying more responsi-

bility after their 'gung-ho trading in the eighties' (*Australian Financial Review*, 13 May 1996). Girlie was hoping to read that women with integrity and talent had been part of improving the credibility of the trading sector of the industry. But no, a senior woman was undermining the credibility of women in the 'tough, male domain' of trading: 'If you have girls on the trading side, they are good, but they don't seem to have that great confidence and aggression that guys have to get on the phone and make a two-way price'. Thanks Marea, always ready to celebrate male aggression.

Girlie echoes the sentiments of Amanda Coombs, a Melbourne foreign exchange dealer who wrote to the AFR on 21 May: 'It is rather disappointing that an executive with the seniority and responsibility that Ms Marea Laszok holds . . . would believe that women, as a group, are less suitable to any office job than a man. Surely many women and men will not be suited to this type of work, but should we not assess each person on their individual suitability? . . . It is exactly this type of statement, when made by senior executives, which is sustaining the myth that men are more suited to trading.'

FOR THOSE WHO DON'T DO BALL AND STICK

'I did what I had to do to get attention' says Rosalie Osias, an attorney with a practice in real estate and banking in Long Island NY. Not keen on playing golf and going out drinking with the predominantly male members of the mortgage banking industry, Rosalie used other means to bond with potential clients — she took out a series of advertisements in local trade newspapers, featuring photographs of herself in seductive poses. While business is booming, Rosalie has copped a lot of criticism from other female members of her profession who say her marketing approach demeans their gender. She rejects the criticism, arguing that 'women should use their assets to manipulate men' (*ABA Journal*, January 1996).

Yes, it's marketing legal services, nineties style. Who said law wasn't a classy profession that attracts the finest young minds to fight for truth and justice? It's just that these days you also need an iron gut, a reasonable golfing handicap, or good legs and some attitude.

GIRLS IN BLUE (WITH THE BLUES)

In late July, over 300 women police from around Australia, New Zealand, Papua New Guinea, and South-East Asia gathered in Sydney for the first Australasian Women Police Conference (*The Age*, 30 July 1996). The federal Attorney-General, Darryl Williams was also there to tell them a few things they had probably already worked out for themselves: 'women are joining police in increasing numbers, but they don't stay'; 'a lot of women are failing to find a career in policing'; 'police services especially needed to . . . implement policies to recruit and retain women in their workforce'. Mr Williams and a number of other speakers quoted the dismally small number of women who are currently amongst the commissioned (senior management) ranks of police in Australia.

The Attorney-General was critical of the police forces and had a stab at why women choose not to make a long-term commitment to law enforcement: 'the reason might be as simple as the shift work and the difficulties of work and family . . . However it seemed more likely that it could have something to do with the "highly gendered" nature of police organisations'. Hmm, 'highly gendered'. Girlie wonders just what Darryl is getting at with that phrase. He's already told us that there are lots more men than women in police forces, so maybe he means that the management ignore that women police are sexually harassed and sometimes raped by their male colleagues and that the culture of police organisations is hostile to women and condones systematic discrimination against them. Or maybe those were issues the conference par-



ticipants had worked out for themselves and discussed when he'd gone.

The Victoria Police certainly showed their support for senior women in their ranks. The Force paid the airfares and conference fees for two women officers, but declined to fund two of its most senior female commissioned officers, who were forced to take annual leave to attend and pay their own way to the conference.

DEALING WITH MORE INAPPROPRIATE COMMENTS

The Chief Magistrate in Western Australia, Mr Con Zempilas has pre-empted possible government action to deal with complaints about Perth-based stipendiary magistrate, Ron Gethring, by barring him from hearing restraining order applications for 'the foreseeable future' (*The Australian*, 31 July 1996). Mr Gethring attracted some negative attention earlier this year when he was reported to have described an alleged stalker as 'a little puppy dog who meant no harm' to the woman he had pursued for seven years. In 1993, in a case where a man was accused of injuring his de facto wife, the same magistrate made the comment that 'to my mind she shouldn't complain about being punched'. Mr Zemplias agreed that 'some of Mr Gethring's comments were totally inappropriate and any views he wished to convey should have been couched in more sensitive and restrained language'.

Dealing with 'inappropriate comments' from the bench with an administrative decision to effectively rig the roster has advantages. In an immediate way, women who have already been victimised by male violence are less likely to have it verbally reinforced by someone in a position of authority. A more permanent removal would take a lot longer and inevitably run into problems with the government intervening and risking compromise of the separation of powers and the independence of the judiciary. As the WA Premier, Mr Court commented, 'it would take extreme circumstances for the Parliament to vote for the removal of a judge or magistrate', and it's anyone's guess whether being unable to disguise your sexist attitudes beneath appropriately sensitive language would be considered 'extreme' enough. The disadvantage is that it does not address the underlying problem of bias and the under-representation of women in the judiciary.

A more hopeful development is the current trend towards acceptance of judicial 'education', exposing judges to other points of view, testing their own conditioned assumptions about life, human interactions and the legal process. On that score, *The Australian* also reports that the stipendiary magistrates in WA will be attending a gender awareness workshop in November. The wheels turn slowly . . .

And it's not a new problem. What to do when those entrusted with the task of upholding the slippery notion of justice for all start making utterances unbecoming to their position? *The Bulletin* (9 July 1996) reported on the decisive action taken to silence an English judge in 1890. In a trial of a woman for the murder of her abusive husband, Justice Stephen ensured a guilty verdict by repeatedly referring to the accused as 'that horrible woman, the epitome of all that is loathsome and evil'. No mucking about, a year later a verdict was handed down on the judge. He too was locked up — in a madhouse.

VERY PERSONAL INJURIES

Social change over the last 20 years may have had *some* positive effects on the way women are regarded by the law (and the lawmakers). However, Girlie recommends you read an article by Karen O'Connell in the Autumn issue of *Refractory Girl* (Issue 50 1996) which looks at judicial attitudes to some basic human functions. O'Connell argues that there is still a long way to go before compensation awards for personal injuries reflects more than 'dominant perspectives . . . in which male sexuality is identified with the penis, and (heterosexual) sex with the penetration of the female body'.

The author identifies a number of personal injury cases that highlight the different values placed on the expression of male and female sexuality. For example, a recent case where the payout for an 18-year-old boy injured in a car accident allowed for him to be visited by a sex worker once a week for the following 47 years. The trial judge decided that this compensation would 'go some way to satisfying this young gentleman's sexuality needs'. In Queensland, the Court of Appeal awarded \$20,000 to a woman injured as a result of medical negligence, for the loss of her ability to have pain-free sex. The respondent argued against the award and suggested that the woman should remain celibate — 'she need not suffer

any pain . . . if she abstained from sexual intercourse'.

Other cases cited point to the capacity of the judiciary to display huge depths of compassion and empathise closely with certain plaintiffs, resulting in exceptionally high payouts for injuries to penises, testicles and ejaculatory function.

Girlie is with O'Connell when she challenges the law to 'recognise that the diversity of human sexual behaviour defies the narrowness of its current definitions, and to value male and female sexuality equally'.

MORE ON MEMBERS

One Hollywood film studio is not taking a chance on having to sue for compensation for the loss of sexual function for one of its employees (*Australian Financial Review* June 1996). They have taken out an insurance policy worth \$1,000,000 in case of accidental injury to Steven St Croix's hard working member. The risk for the studio was just too great when Steven, their top porn star, bought a motorcycle, and refused their unconscionable demand to not ride it while he was under contract to them to perform more socially relevant and meaningful work.

Sal Lacious

Sal is a Feminist Lawyer

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against whom awards of damages are made generally are indemnified by the police force, and the state, meaning that the award as an instrument of specific deterrence or general deterrence of police wrongdoing is almost meaningless. A further difficulty is that in most Australian jurisdictions, those few damages awards, together with costs orders, that are made do not come directly out of police budgets, precluding even that form of fiscal accountability. The result of all these factors is that civil litigation of the kind brought in *Gordon v Graham*, particularly when the decision maker is a judge rather than a jury, does not operate as a significant means of making police accountable or of breaking up the police culture of inappropriate loyalty, resort to force and failure to respect minority individuals' rights and liberties. Change to this situation so that civil damages actions operate as a means of changing police cultures of violence does not appear imminent.

References

1. It is also relevant for the institution of such proceedings that Legal Aid Commissions understandably impose as a criterion for funding that there is a reasonable likelihood that a plaintiff will recover a sufficient amount of damages. In Victoria, this figure is currently \$5000.
2. This, of course, would also formally constitute a defence for police or the state in relation to their potential vicarious liability.
3. See, for instance, *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 216; *Carson v Citizen Finance Ltd* (1993) 178 CLR 44 at 55.
4. Stone, J., 'Double Count and Double Talk: The End of Exemplary Damages?' (1972) 46 *Australian Law Journal* 311; Luntz, H., *Assessment of Damages for Personal Injury and Death*, 3rd edn, Butterworths, Sydney, 1990, p.68ff; Mendelson, D., 'Backwell v AAA' (1996) 4(2) *Journal of Law and Medicine* (forthcoming); see also Daniels, S. and Martin, J., 'Myths and Reality in Punitive Damages' (1990) 75 *Minnesota Law Review* 38.
5. *XJ Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 57 ALR 639 at 655 per Brennan J. See also *Backwell v AAA*, unreported, 20 March 1996, Victorian Court of Appeal per Ormiston JA, p.23.
6. The same sum was awarded to a shopper who was found to have been falsely detained by Myer employees and police and to have endured a wrongful search of his house: *Myers Stores v Soo* [1991] 2 VR 597.
7. See Clayton R. and Tomlinson, H., *Civil Actions Against The Police*, Sweet and Maxwell, London, 1987, p.367ff.
8. Compare the 29 June 1996 decision of a Victorian County Court jury in *Rupa v Harrison* where a drunk train commuter was awarded \$3500 in general damages, \$3500 in aggravated damages and \$3000 in exemplary damages for an assault by a police officer.
9. Unfortunately, in spite of the fact that the sums involved come out of the public purse, no comprehensive figures are available on the number of civil actions brought against police, their grounds, the percentage of them abandoned, settled, or proved or the amounts of damages awarded or the terms on which they are settled.
10. See Chevigny, P., *Edge of the Knife*, The New Press, New York, 1995, pp.104-5.

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10. See, for example, the Ministry of Public Security Notice on Putting in Order People Being Held in Detention for Investigation passed on 26 April 1993; and Cui Ming, above, at 93.
11. Ministry of Public Security Notice on Rectifying Living Conditions of Detainees in Watch Houses, Administrative Detention Centres and Detention for Investigation Stations, issued on 18 December 1983.
12. Fan Chongyi (ed.), Xiao Shengxi (vice ed.), above, p.145.
13. Administrative powers are used by public security personnel against people who do not carry out their legal duties, breach state regulations concerning public order or have committed a minor unlawful act which is not sufficient to constitute a criminal offence. Li Huayin, Liu Baiyang (eds), above, 174-5, Dai Wendian (ed.), *Gongan Fagui Jiaocai* (Teach-

ing Materials on Public Security Regulations), Zhongguo Renmin Gongan Daxue Chubanshe (China Public Security University Press), 1988, Beijing, pp.133-4; Mou Shihuai (ed.), *Gongan Xingzheng Guanli yu Xingzheng Fuyi Susong* (Public Security Administrative Regulation and Administrative Review and Litigation), Zhongguo Renmin Gongan Daxue Chubanshe (Chinese People's Public Security University Press), Beijing 1992, pp.3-4.

14. Zhang Jianwei, Li Zhongcheng, above, pp.55-6.
15. Zhang Jianwei, Li Zhongcheng, above, p.58, see also general discussion in Zhang Xu, above, p.20 and Sun Jiebing, above, pp.27-8.
16. [85] Gongfa #50 Document article 8 provides: Detention for investigation work must be directly subject to the supervision of the People's Procuratorate.
17. Fan Chongyi (ed.), Xiao Shengyi (vice ed.), above, p.149.
18. Wang Xixin, above, p.110.
19. Zhang Jianwei, Li Zhongcheng, above, p.58.



MORE MENTIONS

POLICING VICTORIA SEMINAR

On Thursday, 11 July 1996, the *Alternative Law Journal* in conjunction with the Victorian Council for Civil Liberties held the first in a series of seminars on socio-legal and civil liberties issues. The purpose of these seminars is to encourage debate about topics which are of concern and raise issues of civil liberties and human rights as well as to raise the profile of both the Alt.LJ and the VCCL.

Three speakers, Jude McCulloch, Ian Freckleton and Carmel Guerra led the discussion exploring issues such as military approaches to policing, civil liability of police, and policing youth.

The success of the inaugural seminar will hopefully lead to similar joint ventures in the future. The organisers are hoping that the next topic will be *Aboriginal People and the Justice System*. Stay tuned.

LEGALITY OF NUCLEAR WEAPONS

On 8 July 1996, the International Court of Justice handed down an advisory opinion on the legality of nuclear weapons after a sustained international campaign by peace activists.

The Court held itself required by the current state of international law to find that the use of such weapons was neither specifically authorised nor universally prohibited. It decided that '... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict'. The Court was unable to conclude definitively whether the use of such weapons in 'an extreme circumstance of self defence' would be lawful.

While this decision was welcomed by some parts of the peace movement, others noted that it falls well short of the complete prohibition on the use of chemical and biological weapons in international law. In this context, the Court's finding that states have an obligation to pursue negotiations leading to nuclear disarmament in good faith is cold comfort, made colder still by the stalling of the Comprehensive Test Ban Treaty negotiations.

WOMEN

Women's congress in Adelaide

**MARGARET CAMERON and
HELEN MACDONALD report on the
6th International Interdisciplinary
Congress on Women.**

The 6th International Interdisciplinary Congress on Women, held in Adelaide between 21 and 26 April 1996, attracted a large field of activists and academics. Over 700 people made a commitment to present papers as participants, on panels and to perform. Participants came from Asia and the Pacific Rim, India, Africa, as well as from Russia, the Middle East, Europe and Scandinavia, and from all over Australia.

The conference organisers successfully co-ordinated the extensive program. Unfortunately, a large number of people made a last minute withdrawal. Nevertheless, the organisers competently managed the changes.

The invited speakers explored contemporary issues in law. Two speakers critically assessed the Hindmarsh Island Bridge Royal Commission. Mary Ann Bin-Salik likened it to a witch-hunt, and Marcia Langton examined 'how Aboriginal religiosity has become an administrable subject'. Tina Dolgopol spoke on her recent research on comfort women in a paper entitled 'Pragmatism, International Law and Women's Bodies'.

Other contributors gave papers in the areas of law, law-making, crime and punishment. The diverse range of papers followed the conference themes of cultural representation, global restructuring, health and sexuality, indigenous peoples, women's studies and making feminist politics. The topics ranged from Maricel Sulas Torres' study of sexual harassment in a Costa Rican work place, and RuthAnn Parvin's analysis of 'Interpersonal Dispute Resolution : A Feminist Analysis of Mediation as practiced in the United States', which made reference to the particular needs of lesbians, to Kevan Nousiainen's theoretical paper entitled 'Violence/Ego Construction', and Fola Odebumi's analysis of the relationship between poverty and violence in Nigeria. The conference offered opportunities to reinvigorate enthusiasm, regenerate ideas and develop networks.

The conference drew together participants from many disciplines, but another difference probably concerned the presenters. Activists and academics came together, and this required consideration of what level to pitch the presentation. This seemed to particularly concern presenters of theoretical papers. The difficulties may leave one wanting either more theory or more empirical data, but plenty of opportunities existed to explore points raised, to take discussion to a deeper level, and to exchange papers.

This leads to another important observation. The conference offered fantastic food, which helped facilitate the business that goes on outside the lecture theatres. The caterers supplied paper bag lunches, containing healthy food that appealed to all tastes, which could be enjoyed in a formal meeting or as a picnic on the banks of the River Torrens. At the breaks good coffee and inviting cakes encouraged people to mingle and exchange ideas. The organisers excelled in their thoughtful preparation of this essential ingredient of any successful conference.

The 6th International Interdisciplinary Congress on Women was successful in organisation and the stimulation of ideas. If the Adelaide conference is an indication it would be worth people interested in women and law to consider attending the 7th International Interdisciplinary Congress on Women to be held from 20 to 26 June 1999, in Tromso Norway. Watch for the conference's Internet home page, currently under construction. Professor Gerd Bjorhovde, the convenor, may be contacted at the English Department, School of Language and Literature, University of Tromso, N-9037 Tromso, Fax + 47 776 45625, and Email: gerdb@isl.uit.no

Margaret Cameron teaches legal studies and Helen Macdonald teaches philosophy at Flinders University of South Australia.

COMPENSATION

Gun money

**GRAEME ORR argues that
compensating gun owners may be a
futile undertaking.**

Background to the bans

At the centre of much of the recent concern and outrage over the proliferation of unnecessary arms in Australia, has been the quickly put together Federal/State agreement over the uniform national regulation of guns. A centrepiece of this package is an ambitious buy-back scheme covering semi-automatic and self-loading rifles and shotguns, which will now be contraband to most citizens.¹ Whilst State governments — which have the power to impose and implement such bans — are not under any constitutional obligation to provide just compensation for forced acquisitions of property, nor to offer a 'fair' market price for any voluntary buy-back program, the Federal Government under some pressure from State Ministers, has proposed a special, taxpayer funded scheme² to finance the buy-back and compensate gun owners, who surrender their now highly restricted semi-automatic, self-loading, pump-action and military style weapons, during an amnesty lasting until September 1997, with market-related prices. The Federal Government has issued a price list which values most weapons, depending on age and type, between \$60 and \$7500, with an option for

owners of weapons rated as worth more than \$2500 to be compensated according to an independent valuation. Gunsmiths and dealers will also receive significant compensation, both for the loss of banned stocks of guns and ammunition, and for any decline in the capital value of their businesses.³

In a time of fiscal austerity, especially federally, many will wonder why such compensation for such dangerous goods should not be limited to some minimal value, such as the cost of an ordinary, less restricted weapon, like a Category A single barrel shotgun, or be limited to a specific class of owners, such as those farmers who could show they had a legitimate business reason for owning a semi-automatic in the first place. After all, has a government ever, in criminalising 'recreational' drugs because of the risks they may pose to health or public morals, offered compensatory payments to producers, suppliers or consumers who hand over their stocks of those drugs?

The government, for political and utilitarian reasons, seems hardly to have countenanced anything less than a well-funded buy back program. Politically, a 'fair' buy back will go some way to minimise the anger and confusion amongst gun owners, especially the average farmer, and mute the response which the 'gun lobby' is otherwise able to orchestrate. Over time, most gun owners will come to accept these new restrictions, but in the short term it is considered expedient to quieten their concerns about being forced to lose a valuable chattel. This may especially be the case for poorer gun owners, to whom the loss, without consideration, of an item worth many hundreds or thousands of dollars would be especially galling. For utilitarian reasons, it has been logically assumed, the ultimate aim of the scheme — the reduction and elimination of semi-automatics in Australia with a view to public and private safety — may require a buy back. The argument goes that such guns are so numerous, and so well entrenched a part of some people's lives and communities, that no simple ban, even with an amnesty giving owners a period of grace in which to turn in their weapons, will be effective in flushing out the majority of weapons unless financial incentives are offered. Rather, it has been suggested, most owners, upset at the criminalisation of their weapons and unwilling to part with them for less than market price, will simply hide them. Of course the 'gun lobby' goes further, and claims that regardless of the prices offered, some owners will stockpile, sequester and trade in semi-automatics on a black market. The 'gun lobby' has threatened to mount a legal challenge to any scheme that provides less than a completely individuated valuation for *every* weapon surrendered.⁴

The limits of compensation

Robert Goodin of the ANU separates compensation into two categories: means-replacing and ends-displacing.⁵ Compensation is an attempt to replace something that is lost or destroyed, in circumstances where it is felt just to do so (for example, because the thing was wrongly taken, or because fairness or equal treatment requires some attempt at rectification). Compensating someone therefore involves an attempt, not to exactly replace what is lost,⁶ although that might be possible if only money is lost, but to achieve some practical equivalence. Whether a reasonable equivalence is possible, depends on whether what is being replaced was a means to an end, or an end in itself.

In the first category — the replacement of means — take the example of someone injured at work. They can have their lost earnings and medical expenses covered. Money is generally not an end in itself, but a means to intrinsically valuable goals, and is easily replaceable. If the victim is seriously injured, say having lost a leg, it is also possible to try and compensate the loss of the utility of the limb such as the mobility it afforded. Thus, providing prosthetics, rehabilitation and taxi vouchers will go some way to replacing the lost functionality of the limb. Compensation that is means-replacing is fairly uncontroversial.

The second category — the displacement of ends — is less simple. The person who loses a leg cannot have their body made whole again. A limb represents more than functionality — it represents an integral part of something irreplaceable. No amount of money can approximate the loss of the leg as an 'end' in itself. This is not to say that some of the hurt, pain and anger associated with its loss should not be assessed. Indeed if some payment, and a public acknowledgment of the responsibility of the wrongdoer, may assist the victim overcome and deflect some of the psychological problems they now suffer, including the desire for vindication and retribution, these are defensible compensatory steps, since they remove some of the negative means, or incapacities, generated by the accident.

A clearer example of an attempt at ends-displacing compensation, is the work of the Sunshine Club, and similar organisations, that organise trips to Disneyland for children with terminal cancer. Such children are losing their health, and with it the means to enjoy a long and fruitful life. All medical science can do is temporarily ease their physical pain, by giving them the means to better enjoy what time they have left. Nothing can compensate them for their loss of life expectancy, and with it their loss of the means to enjoy this world. Life is, in this sense, almost an end in itself. Instead, as a form of 'compensation', society offers these children an alternative end, in the form of the enjoyment of something 'special' like an overseas holiday that few children will experience. Such attempts at compensation are poignant and noble, but few would claim they achieve any satisfactory equivalence of what is being lost.

Guns as means or ends

To many people, guns represent a means to some other end, whether real or imaginary. They could be farmers with feral animal problems, or elderly urban residents afraid of violent break and entries. In dispossessing current owners, and limiting future access to guns, governments can seek to compensate the owners by replacing those means. Thus, alternative forms of pestilence control can be provided in rural areas, and in urban areas, the government can undertake other measures to improve public safety, of which the overall reduction in the number of guns in private hands will hopefully be one. Similarly, people who own guns simply as investments or have them lying about as inheritances, can have their value replaced in the form of monetary compensation. In that light, monetary and other schemes will adequately compensate the functions that the guns served.

Unfortunately, for many owners, guns do not just represent some utilitarian means. They are owned as ends in themselves: that is they are fetishised for what they represent as guns. Guns may represent power, destructive violence, or martial rule. They may even represent self-reliant protection, or safety, especially for isolated people, or those paranoid

about violent personal attacks. Such symbolic associations are not functions of the gun which can be easily replaced. We may lament that some men, in particular, glorify weapons in such a way, but we cannot ignore that their egos, and their bodily images and sense of masculinity are bound up in such connotations. Guns to such people are psychological symbols that are ends in themselves, that cannot easily be replaced or displaced. They are highly personalised forms of property, with which the person mingles a part of their personality and identity, and with whom, in a real sense, the person has 'a relationship'.⁷ Offering such people monetary compensation for the market value of the gun is not going to salve them, any more than would offering them a lifetime's supply of violent videos, free passes to 'Skirmish' outings, or a Neighbourhood Watch sticker.

Nor should society, in a time of budgetary cost-cutting and ever widening poverty, be attempting to compensate such incompensables. Indeed, any attempt to do so may only deepen the underlying problem, which is the fetishisation of violent symbols. The purpose of this essay is not to deny that some monetary compensation should be offered. On the contrary, I would argue that a single set amount, limited say to the value of the average rifle, should be offered to induce a maximum hand over of *all* guns, not just those semi-automatics which are being highly restricted.⁸ But we should be wary of expecting and wasting large amounts of money to solve our society's gun problem. Precisely because guns have such a hold over so many, many are not going to hand them over no matter how much 'compensation' is offered, since no amount will be enough to replace or displace their psychological value. Inevitably such people will take to hiding their weapons, and in the process deepen their fetished association with them.

More hopefully, we must think of turning to the future, and weaning present and later generations off the weapon fetish. This may be a Sisyphean task, as long as the media (in all its forms but particularly television and cinema) continues to glorify the weapon culture by replicating gun battles as a source of ultimate, suspenseful action, by representing guns as symbols of power and decisiveness, and by perpetuating at an inordinately high level the fear of random violence that leads some to keep and carry guns as symbols of safety and protection.⁹ It is only when guns cease to be psychologically buttressing ends in themselves, and they return to being lumps of inanimate metal — replaceable, functional tools — that we will be able to begin to rid civil society of them.

Graeme Orr teaches law at Griffith University.

References

- Only police, certain government agencies and professional shooters will have access to self-loading and military style rifles, shotguns, and pump-action shotguns (Category D); only primary producers will have access to low capacity semi-automatic rifles, shotguns and pump-action shotguns (Category C), and then only in limited circumstances. Each acquisition of a gun, whether by purchase or gift, will ordinarily have to occur through a licensed dealer, and be formally permitted and registered. The permit will be contingent on the acquirer showing a genuine need for that gun and being a 'fit and proper person'. The licensing system for gun owners

will be improved, licences will only be available to those with 'genuine reasons' for possessing weapons, and controls on collectors tightened. Handguns and machine guns were generally, and remain, prohibited. See the Resolutions of the Australian Police Ministers' Council (AMPC) Special Firearms Meeting, Canberra, 10 May 1996, and for example, *The Weapons Amendment Bill 1996* (Qld).

- Through a one-off 0.2% increase in the Medicare levy — an ironic way to frame the impost, given that the impetus for gun reform in the past decades has always been public outcry after a massacre.
- See Resolution 11 of the AMPC meeting, above, ref. 1.
- See Ted Drane, Sporting Shooters Association of Australia, reported in 'Shooters Flag Court Action over Guns Compo' in *The Australian*, 30 July 1996.
- Goodin, Robert, 'Theories of Compensation', in *Utilitarianism as a Public Philosophy*, Cambridge University Press, Melbourne, 1995, especially p.164.
- Replacing the very thing that was wrongly taken is restitution — a more direct form of compensation. Compensation generally, which is what we are considering here, is the wider practice familiar to contract law, tort law and the law relating to forced acquisitions.
- Compare with Margaret Radin's theoretical work on personal versus fungible property, and the consequences of such a distinction for government takings: Radin, M., 'Property and Personhood', in *Reinterpreting Property*, University of Chicago, Chicago, 1993, especially pp.43-4 where she attempts to distinguish fetishised personal property.
- This should occur on safety grounds alone: domestic murders and suicides, which account for the vast majority of gun killings, tend to occur with ordinary rifles and handguns, and not semi-automatics.
- Of course the media does not fully determine culture, and obsessional gun toting both pre-dates Lumière, and exists in societies (for example, Liberia at present) much less tainted by Westerns and network news. We should also be wary of drawing direct parallels with United States culture. However, for a brilliant essay account of the relationship between the gun fetish and US culture, see Mottram, Eric, "'The Persuasive Lips': Men and Guns in America, the West", in *Blood on the Nash Ambassador*, Hutchinson Radius, London, 1983.

ABORIGINAL DEATHS IN CUSTODY



The Australian Archives has produced a Guide to records of the Royal Commission 1987-91 for use by Aboriginal people, Aboriginal studies students and legal practitioners.

Royal Commission records have now returned to their states of origin and the Guide details where all the material can be found. To buy your Guide (\$10 each plus \$3.50 postage), send this coupon and cheque to Public Programs, Australian Archives, PO Box 34 Dickson ACT 2602.

Australian Archives

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PLEASE SEND ME COPIES OF *Aboriginal Deaths in Custody*.

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Letter

Dear Editor,

Re: Letters to the Editor on Whistleblower Legislation, April and June 1996

I'm scared. I don't know if the whole world is full of wise men bluffing, or fools who mean it!

I don't recall who uttered the quote, but it describes the first thought that crossed my mind after reading Matthew Goode's responses (April and June 1996) to Dr De Maria's article, 'Whistleblowing' (December 1995). In fact, Dr De Maria's reply to Goode appears almost prophetic — predicting precisely what was awaiting South Australians seeking protection under the *Whistleblowers Protection Act 1993* (SA) (WPA).

But firstly to the Ombudsman's letter (June 1996). If he were not a creature of the State, how is it he receives full legal representation *from the Crown Solicitor* in any actions against his office. No conflict of interest, he would suggest? Guilt by association, I'd say!

To illustrate just how 'miserably conceived' the Act has been; Goode insists that Dr De Maria was wrong to maintain that the WPA utilises the concept of 'good faith' to determine the merits of a disclosure. Goode was right! By design, 'good faith' has nothing to do with it, because the Crown reserves the right to act contrary to any such concept; lest the same criterion should be applied to judge its own actions, or call those actions and motives into question. To illustrate the point, recently two people brought their complaints before the Equal Opportunity Tribunal (EOT), seeking protection from victimisation by the Ombudsman under the WPA. Both complainants were accused by the Crown of acting vexatiously, but in so doing offered no evidence to support that allegation. The Crown's strategy was solely based on maligning the reputations of the complainants and challenging the Tribunal's own authority. By contrast, our members listed very specifically the exact nature of their grievances against the Ombudsman, and his response to their disclosures, without one reference to any perceptions of the Ombudsman's character or personality. The Crown, shamefully, went on to argue that the Ombudsman was entitled to decline dealing with 'purported disclosures'. Not surprising then, that the Ombudsman denies receiving any complaints from whistleblowers; but what does he really know of their 'purported' nature when he hides behind the cloak of 'discretion'? However, we know that 'discretion' is all too often used to justify quite deliberate acts of omission or commission that result in victimisation, discrimination and detriment to others.

Consistent with this observation and Dr De Maria's concern that 'appropriate' refers to *process* rather than merit or motivation', on a number of occasions, the Crown's representative made reference to the fact that the merits of each case was not the issue in determining the Tribunal's jurisdiction and that evidence regarding individual cases should be presented '*when, and if*, the merits of the case are heard'. Here, we are left with little doubt that the merits of neither case were, in fact, ever investigated; nor were the findings of any such (even preliminary) investigations ever offered to the Tribunal to justify the accusation of vexation against the individuals.

Goode made at least two references to injunctive relief being available — either through the courts or EOT. Predictably, the Crown Solicitor's office fought tooth and nail to keep both actions *out of that forum* allegedly because the Tribunal did not have jurisdiction because the WPA does not give the Tribunal such jurisdiction. However, the Act states under s.9(2) that:

- An act of victimisation under this Act may be dealt with —
 - (a) as a tort; or
 - (b) as if it were an act of victimisation under the *Equal Opportunities Act 1984*.

Similarly, the Act *does not deny* the Tribunal jurisdiction, by implication or otherwise, in any other part of the Act. Section 5(2) even says that an 'appropriate authority' may not be the only authority to whom it may be reasonable and appropriate to make a disclosure. The Former Commissioner for Equal Opportunity, Ms Josephine Tiddy, was quoted in Hansard (27 January 1994) as saying to the Select Committee on Public Interest Whistleblowing, that she would personally undertake to hear complaints from whistleblowers about *victimisation by the Ombudsman*. Hence, the Former EO Commissioner had no question as to the clarity of her role in receiving such complaints or that such complaints might arise. Whilst the Former Commissioner dismissed the complaints brought before her, she did instruct that they be taken to the Tribunal if unhappy with her response. It was through this invitation that our members approached the Tribunal.

Indicative of the Tribunal's uncertainty about its powers and affirming Dr De Maria's comment that 'injunctive relief ... is still an unfamiliar remedy for the courts and the process is bedevilled with formality and high costs', the Tribunal has reserved its decision on the matter of its jurisdiction. Hence, it appears that our members have indeed been sent to 'an unconnected forum' where they might get the relief they are seeking, but then again — might not!

However sagacious, I suspect even Dr De Maria could not have foreseen the extent of desperate argument that would be put up by the Crown to (as he put it) 'exploit statutory ambiguity' and, in turn, dismantle any authority contained by the WPA (as well as the very spirit in which Mr Goode would have us believe it was drafted). In an astounding, all-out effort to render the WPA null and void, the Crown argued that, *if taken literally*, protection cannot be afforded to a person under the Act if the act of victimisation is perpetrated by the 'appropriate authority' (namely, the authority to whom one makes a disclosure about wrongdoing) as illustrated by the following:

The respondent submits that ... [the] Act does not, as a matter of Statutory interpretation, *and cannot have been intended to*, include in the definition of 'a person' at the beginning of Section 9 the person who is 'an appropriate authority' ... [If the definition] is expanded to include the full information for the definition of [Section 9] ... it is clear that the appropriate authority is a different person from the person first named in Section 9. This section 9 would in effect read:

A person (A) who causes detriment to another (B) on the grounds that [(B) made a disclosure] ... to a person (C)

LETTER

[who is a reasonable and appropriate authority] . . . commits an act of victimisation. It is clear from the above paragraph that the persons (A), (B) and (C) are, *and are intended to be*, different persons and that Section 9 does not apply to the 'appropriate authority'. [emphasis added]

This is in spite of the fact that a 'public officer' (who may be the subject of a disclosure for wrongdoing under s.4(2)), is defined so exhaustively as to include '*any other officer or employee of the Crown*'. In offering South Australians this banal and misleading logic to neutralise the effects of the WPA, instead of acknowledging that persons A and C can be the same person, but at different points in time, the Crown once more demonstrates ill-faith in its actions. In fact, when I asked the Crown's representative whether our members could expect a similar challenge if they took their issues before a court, I was told that it was a loaded question, and that I would not get an answer. Suffice it to say, then, that Goode's own office *will not rule out* further challenges to attempts by our members to have their disclosures investigated — even by a court.

Even more frightening was the argument that 'appropriate authorities' should be exempt from actions against them under the Act because:

authorities . . . appointed by statute . . . [and] persons with *high status in the community* . . . must have been selected on the basis that they are *presumed* to be persons who can be entrusted with the investigation process and *are unlikely to abuse their power*. *It is submitted that it is entirely unlikely that the fact that an authority receives a disclosure would motivate that authority to victimise the person making the disclosure, when it is their statutory duty to receive and deal with such disclosure.* [Emphasis added]

Is the Crown suggesting that there is some arbitrary socio-economic threshold of status that one must cross before being regarded as being of sufficiently 'high status' within the community as not to warrant (or preclude the public from carrying out) the scrutiny of their functions? If so, surely I have a right to be informed of the criteria for this obscure threshold; as I would like to know when I might cross it!

On the subject of defamation, Dr De Maria asserts that Goode's 'neat catch-all phrase "... incurs no civil or criminal liability . . ."' does nothing to allay concerns of reprisals in the form of litigation. It is, however, anything but 'superfluous' to whistleblowers that they should be given absolute privilege against reprisals by the State, since the Crown has already threatened our members with legal costs — for pursuing their public interest disclosures. How sad that whilst Goode would have us believe we incur no liability for our actions under the Act, it can still be used to destroy us when we place faith in the good intent of the legislation and exercise our right to be heard.

Of further significance, and consistent with concerns expressed by Dr De Maria that the Act is too ambiguous and lacking the specifics necessary to protect whistleblowers, is the Crown's observation that:

The Whistleblowers Act is silent as to what any persons receiving a disclosure must do, with the exception of section 5(5) where a disclosure of fraud or corruption must be passed on to the bodies named in that section. Section 6 assumes the relevant authority will carry out an investigation *but does not prescribe how and with what powers such an investigation will take place*. It is submitted that it will depend on the authority chosen and what powers and functions such authority has, whether by statute or otherwise. [emphasis added]

What on earth would these 'authorities' see as their responsibility and purpose, for goodness sakes? Is not the Ombudsman aware of his 'Royal Commission powers' or the implications of disclosure for whistleblowers and the community? Astounding! How does Goode propose the WPA can work when it does not compel authorities to investigate claims? If Goode had even the most basic understanding about the nature of whistleblowing and if he really did represent the whistleblower's best interests, he would advocate the needs of whistleblowers rather than becoming defensive about criticisms by Dr De Maria (who more truly represents the views whistleblowers). In so doing, he would also acknowledge that failure by authorities to investigate complaints is by far the most common/predictable form of reprisal (or act of victimisation) experienced by whistleblowers because it: denies the most preliminary access to justice; serves to contain the disclosure; perpetuates the collusions and deceptions generated by the wrongdoers; diminishes the apparent merits of the matters being disclosed with the passage of time and resultant destruction of vital evidence; demoralises and frustrates the messenger; and, prolongs their suffering in countless other ways (for example, financially, socially, emotionally).

Space does not permit further substantiation of massive problems, not just with the WPA, but Government accountability processes in general (or the lack thereof). Nevertheless, if something looks, walks, quacks and smells like a duck; in all probability, it is not a cow. We are, therefore, looking for a reason to believe that, what we perceive to be indicators of government corruption and maladministration, are in fact not so. In a truly accountable system of government (which the Westminster system is touted as being), we would have been given such reason by now. So, when Dr De Maria recently predicted that within a year Victoria would probably be the only State left in Australia without a whistleblower's act, I suspect he was once again wrong, as South Australia may very well have joined Victoria in this distinction from the rest of the country.

Matilda Bawden

*National Secretary, Whistleblowers Australia Inc.
on behalf of SA Branch*

[Quoted passages are from 'Respondent's Outline of Argument' as submitted to the Equal Opportunity Tribunal (No. 31 of 1996), in the matter of Mrs Jean Sutton (complainant) and The State of South Aust (respondent), 18 June 1996, pp.2,3 and 3-4 respectively.]

Australian Constitutional Law and Theory Commentary and Materials

Tony Blackshield, George Williams and Brian Fitzgerald; The Federation Press, 1995; 1070 pp; \$85.00 softcover.

In late 1995, my colleague Isabel Karpin and I were given the demanding but welcome task of designing a pilot constitutional law course at the University of Sydney. Our aims were to put together and deliver in Semester 1, 1996, a constitutional law course which was critical and contextual, which employed interactive, student-centred learning principles, which integrated skills training with the teaching of a substantive law subject, and which used 'best practice' continuous assessment models. It was a daunting brief; Federation's announcement of the impending publication of Blackshield et al's book looked like a godsend.

How was the promise of this text borne out?

Australian constitutional Law & Theory: Commentary & Materials is a version of the classic law school 'Cases and Materials' format — a teaching text. While its politics are cutely telegraphed in the Preface in the following sentence:

The law is stated as at 11 November 1995,

and in subheadings like 'The Murphy Catalyst', it nowhere matches this implicit criticism of its competition for the hearts and minds of Australia's constitutional law teachers (and the pockets of their students) with a critical reflection on its generic model.

Post-*The Quiet Revolution* it seems disappointing that a student text which so clearly seeks to break new ground and which often succeeds in doing so is not equally thoughtful and challenging about the pedagogic contexts in which it might be deployed. And of the kinds of legal subjects it will play a part in forming. It is even more disappointing given that in Graycar and Morgan's *The Hidden Gender of Law*, Federation had published a variation on the cases and materials format which performed precisely this kind of critical collapsing of the crude substance-form dichotomy which still bedevils Australian legal education like the ghost of legalism past.

This is a text which explicitly challenges the High Court's coy *Realpolitik* in *Mabo* by calling the issue of sovereignty in this country what it is — a constitutional issue of critical significance. That it can do this and still extract the '*rationes*' of constitutional cases in digestible chunks and paraphrase 'material facts' of cases, and so fail squarely to address the ways in which the law that constitutes our nation is constructed in its reading and writing is a crucial blindspot particularly visible in a critical project. That the work includes sections on 'Feminism and Constitutionalism' and 'Postmodernity and Postmodernism' in its chapter on 'Theoretical Approaches to constitutional Understanding' makes this lack of self-referentiality by Blackshield and his co-authors verge on the ironic.

This is a major criticism. I have other, less significant and more traditional ones. For example, its list of exceptions to the *Boilermakers'* principle is thin and oversimplified. Despite quite a useful chapter on 'Characterisation and the Trade and Commerce Power', it does not take up Arthur Glass's lead in *Federal constitutional Law: An Introduction*, and make the question of constitutional interpretation an Australian as well as a US constitutional law commonplace.

However, there are many things which this text does that are new and useful. It is well and thoughtfully structured. Its range of extracted materials is much wider and more thought-provoking than that of most casebooks. It historicises both its approach to the question of constitutionality and its account of shifts in constitutional interpretation by the High Court. It does a very good job indeed of rationalising 'manner and form', so often a nightmare of incomprehension for students of Australian federal constitutional law. The authors' decision to combine their account of the appropriation and nationhood powers is intelligent, and its juxtaposing of this chapter with that on the taxation and grants powers thought-provoking. The

chapter on the High Court is welcome, if more circumspect than it might have been on issues such as the method of appointment of federal judges and on judicial sociology and judicial discourse in Australian constitutional cases. And I suspect that despite its length it is more accessible to student readers than its principal competition.

Reader, we set Blackshield et al. as our casebook. But we supplemented it with a tome of our own.

PENELOPE PETHER

Penelope Pether is a feminist lawyer who teaches constitutional law at the University of Sydney.

The Dark Room

by Minette Walters; Allen & Unwin 1995; 398 pp; \$18.95.

For a crime fiction junkie a punchy beginning is always a good sign. And punchy is what the reader encounters in the prologue of *The Dark Room*. Minette Walters provides a disconcerting start to the book in order to set up the discovery of the body. She then launches into the telling of the twisted story revolving around Jinx Kingsley who wakes from a coma to find that she has apparently tried to commit suicide twice within a week and that her fiancé has abandoned her for her best friend within weeks of their wedding. The fact that the bodies of her fiancé and best friend are soon discovered and that her previous husband had been murdered after an affair with the same best friend means that all roads point to Jinx. Or do they? A raft of other characters also appear to have motive, means and opportunity and the appearance of more bodies along the way leaves the reader to untwist a number of tangled leads and subplots.

Jinx is portrayed as financially successful but with little control over her emotional well being. Despite this character flaw, or perhaps because of it, this reader found her high fashion, high class English ways eminently irritating. Not that any of Jinx's relatives or friends are any more redeemable. Greedy, spoilt, selfish, and plain stupid are merely some of the terms that could be applied to the other characters in this book. Indeed, as you progress through the plot

there is almost a sense of hoping that particular characters are responsible for the murders in order to see them reap their 'just desserts'.

An interesting aspect to this book is the way Walters tells the story. Straight narrative text is broken up with the insertion of newspaper clippings, police reports and doctor's memoranda so that background information is delivered without the need for dialogue. Dialogue when used also operates on a number of levels, there is the spoken objective level and the unspoken subconscious level. The use of these parallel voices, as it were, creates a multi-layered text for the reader as you work your way through the maze of characters and plot twists. Just as you think you have reached a way out you discover that it's a dead end.

What is disappointing about this novel though, is the handling of the relationship between Jinx and her doctor. At times I felt I had swapped a mystery novel for a romance as the doctor/patient romance lacks plausibility and is at

odds with the previous personality and behaviour of the characters. The romance seems to have been thrown in at the end as an afterthought rather than serving any real plot function. Having not read any of Walters' other works it is hard to tell whether this is merely a one-off slip.

The strong points about *The Dark Room* lie in the fact that it is an interesting exploration of the dark side of human behaviour within a well plotted murder mystery. *The Dark Room* of the title clearly refers to the dark side of the human psyche and Walters is not afraid to explore the twisted lines of the psyche in creating this story. What let this novel down for me was the unnecessary add-on romance and the fact that I despised all the characters. Weak, nosy, selfish, spoilt or just plain irritating the characters detract from an otherwise enjoyable mystery.

ANNEMAREE McDONOUGH

Clockers

by Richard Price; Allen & Unwin 1995; 655 pp; \$14.95.

Strike is 19 and already earns between \$1500 and \$2000 a week. He manages a crew of workers and along with his boss Rodney epitomises the workings of the American free market economy. Identify a market and supply that market. Rocco Klein on the other hand is 43, jaded, drinks on the job and goofs off when he is on duty. He is cruising out the last years of his employment waiting to take his retirement.

In *Clockers* Richard Price juxtaposes the lives of Strike the crack cocaine dealer with that of Rocco the homicide detective in a gritty, no holds barred look at life in the projects of Dempsy, New York. The device through which the two are drawn together is a murder to which Strike's brother Victor has confessed. Rocco is convinced that Strike is the real killer and Price skilfully utilises the murder investigation to subtly confront the reader with a range of strongly drawn characters who flesh out the life of the street. The street life and the characters who populate it quickly grab the attention of the reader in a way which almost makes the narrative role of the murder investigation obsolete.

In *Clockers* there are no easy solutions, no white heroes, no black villains. The war on drugs as it has come to be euphemistically known is represented for what it is, a daily charade of arrests on minor charges amongst a litany of dealers, deals and cops on the take. The daily raids by the police on the crews, with their verbal and physical humiliations are represented as little more than shadow boxing for both police and clockers. In some senses the contact between police and crews is elaborately scripted dance although it is a dance in which a wrong move carries dangerous risks. The representation of violence in the book is at odds, however, with common myths of American urban violence. Violence on the streets and amongst the crews is represented not as random or as unexpected but as serving two major purposes: an effective method of social control by both dealers and cops and as a tool of revenge. Random 'undeserved' physical and sexual violence on the other hand is represented as occurring mostly within the structure of the justice system in police cells and in detention.

Price de-constructs the phrase crack cocaine dealer removing it from the

realm of myth and stereotype. Strike is a skinny and young 19-year-old, Horace is 13 and uses the money he makes to buy brightly coloured toys and stores his bottles in his backpack with his schoolbooks covered in his childish writing. Futon stores his bottles in the bottom of a jar of gummy bears. These are 'kids'. The stark lives of youth in the projects make the act of dealing not only a sensible, but perhaps the only, option available. For Strike and the others dealing is work, and difficult work at that. They do not see themselves as criminals; clocking is just what they do, *their best shot* at building a life, like going into the army or working for the United Parcel Services. Strike considers that he will leave clocking when he earns enough money but as his mother asks, how much is enough, how much do you need to retire? Strike's youthful desire to get out is mirrored in Rodney his boss, who also talks of getting out and getting into housing but for whom the power of being the man with the bottles is an addiction as equal to that of the customers he supplies.

Initially appearing to be a contrast to Strike is his brother Victor working security during the days and in the greasy Hambones restaurant at night in order to move his family out of the projects. When Victor confesses to the murder it allows Price the opportunity to portray a character who in many respects is the flip side of both Strike and Rocco. However, as the novel progresses, the reader becomes aware that the three main characters share many characteristics of which the desire for attention and affection is perhaps the most poignant. Price's rendering of his subjects is the highlight of the novel. His exploration of the lives of the main characters is a multifaceted one in which the inherent complexities in each of the protagonist's lives are drawn with insight and in a way that shakes up the reader's preconceived notions of victims and victimisers.

Clockers is a novel in which the journey the reader takes along the way is far more important than the end destination. If the reader regards the murder as a metaphor for American society than the culmination of the murder investigation cleverly leaves open as many questions as are answered. For the reader who wants to explore the dark side of the American dream *Clockers* is a fine place to start.

ANNEMAREE McDONOUGH

Annemaree McDonough is a Sydney lawyer and a crime fiction junkie.

Dissonance and Distrust: Women in the Legal Profession

by Margaret Thornton; Oxford University Press 1996; 323 pp; \$34.95; softcover.

Dissonance and Distrust is a goldmine of anecdotes about women in the legal profession. The word 'anecdote' may sound derogatory but it is not intended to be. The technocentric, pseudo-scientific masculine discourse of law, that Margaret Thornton critiques so well, would have us believe that anecdotes or brief stories are a lesser form of knowledge. They are subjective, specific and in this book, feminine, as opposed to real knowledge which is objective, non-specific and masculine.

Once we dismiss this false hierarchy of knowledge we can appreciate the enormous value of Margaret Thornton's documentation of women's experiences in the Australian legal profession. Thornton's central thesis is that while women have been let into the legal profession in ever increasing numbers, legal knowledge has remained unchanged. 'Add women and mix' is not an adequate recipe to alter the masculinist institution of law and its attachment to the Western intellectual tradition 'in which the feminine has traditionally been debased'.

Thornton begins her book with an account of the early attempts by women to enter the profession and the resistance that they encountered. She then focuses on the contemporary profession examining various sites of legal knowledge. She argues that law schools operate as education for corporatisation with their focus on technocratic or 'hard' law and their denigration of 'soft' or non-commercial, non-masculine law. She draws on the experience of women students who to greater or lesser degrees experienced law school as a sexist, racist and/or classist assault on their psyches. She documents the all too familiar figure of the confident, private school boy for whom legal education is an hereditary privilege.

Thornton then examines law schools from the other side — the perspective of women academics. As an academic this chapter is fascinating, though somewhat disturbing when you recognise yourself in one of the categories of women she defines. Thornton argues the relatively undisputable point that while women have been employed in law schools, they are still not accepted as 'legal knowers' in the way that their

male colleagues are. They are predominantly employed in junior positions, teaching large compulsory courses that leave them little time for their own research. When they do have time to research, their work, particularly if feminist, may be trivialised and dismissed by their colleagues because it is different from the benchmark male scholar's.

The exception to this general rule is the Queen Bee, the token woman who has made it in a man's world and has been co-opted by the organisation to up-hold its masculinist values. She is the 'I made it, what are you complaining about?' woman. It has to be said that Thornton displays real courage in her description of academia. The political is of course personal, so that while her comments about the Queen Bee make a general political point, they must also relate to individual women that Thornton knows and possibly works with.

In the final half of the book, Thornton examines women's experiences as judges, barristers, solicitors and public servants. Anecdotes from practising lawyers illustrate the exploitation of women in all kinds of legal practices, large, small, corporate and community. Women practitioners are expected to be docile and accepting of the benchmark male. Any attempts to step outside this role are not tolerated.

For women who have spent any time in the legal profession, none of the anecdotes are surprising. We have heard it or experienced it all before. But that is the value of this book. It actually documents all those things that, God forbid, we may have begun to take for granted. It records all those insidious acts of discrimination that we know most male lawyers are oblivious to and would dismiss as paranoia were they brought to their attention. Perhaps the best example of this is Thornton's discussion of the role of sport in cementing homosocial bonds in law firms. Most men simply would not accept that their rugby fraternity adversely affects the careers of their female colleagues. The existence of this book will not change this, but at least it represents an authority we can refer to when trapped in a dinner party argument with a successful male

solicitor with the IQ and imagination of a rock.

Overall, *Dissonance and Distrust* is a satisfying read. Thornton's argument is well-structured and thoroughly documented. It could be said that the book lacks subtlety but that is probably inevitable given the subject matter. Discrimination in the legal profession is anything but subtle — it is obvious, all-pervasive and shows few signs of changing.

The anecdotes from women make for a distressing, anger-provoking but sometimes highly amusing read. One that could not fail to raise a smile from women in the profession stuck in my mind:

I think there were only about three women [at the Bar] and I felt uncomfortable in social situations because it was all men and you know how men stand in groups with their hands in their pockets and they flex their buttocks and they rock backwards and forwards. They're so big and it's very difficult to muscle your way into the group. I think that's just men, or maybe male lawyers are an extreme example of how men behave anyway.

So, beware men of the profession, you may be trying to keep us out, but remember, we are laughing at your buttocks.

CATHY SHERRY

Cathy Sherry teaches property and equity at the University of New South Wales Law School.

BITS continued

This book is written for a broad audience — it hopes to meet the needs of lawyers, professional advisers and those individuals actually running the associations and clubs. Overall, it succeeds in this difficult task. The language and format are simple, but the content is sufficiently detailed to resolve relatively complex legal issues.

The chapters cover general information on the implications application to both forms of association. Each head of discussion has a helpful in-depth analysis of statutes and case law relating to the relevant area.

One of the best features of this book is that it deals with relevant laws in all States and Territories in Australia, and New Zealand. Anyone trying to deal with associations interstate will find the comparative table of statutes a helpful companion. SL



Issues for the Nineties

Volume 22 — Children's Rights

Volume 41 — Sexuality

edited by Kate Healey; The Spinney Press; \$14.50 each.

The Issues for the Nineties series includes over 60 titles on a wide range of social issues such as the environment, racism, genetic engineering and the drug debate. Each title is a compilation of relevant articles from newspapers, reports and journals.

The Spinney Press promotes the series as a resource for students, professionals and community groups. Their aim, as stated in the preface to each volume, is to 'offer up-to-date information about important issues in our world'.

By its very reactive nature journalistic material tends to date quickly. Although *Children's Rights* was published in 1994, many of the articles remain pertinent and provide a good beginners' guide to core material, for example, chapter 1 on the UN Convention on the Rights of the Child.

Sexuality, published in 1995, includes sections on teenage sexuality, celibacy, transgender sexuality and homosexuality. These topics do not traditionally receive much space in mainstream publications so this volume is a particularly welcome resource.

Editors of these types of publications are inevitably at the mercy of the quality of the primary material to some extent. The material in volumes 22 and 41 is well selected and juxtaposed. Each volume has a useful index and lists organisations that can provide further information. The series, *Issues in the Nineties*, is a good starting point for senior school students and undergraduates when researching social issues. ● FW

Stay Out of Trouble

by Owen Trembath; ABC Books 1996; 134 pp; \$14.95 softcover.

Friend and confidant of rock stars, occasional thespian and presenter of Triple J's legal talkback program, Owen Trembath is Australia's quintessential 'funky young lawyer'. His casual radio

style translates well into his new book, *Stay Out of Trouble*.

Pitched at the Generation-Xers who inhabit Triple J's demographic, the book starts with an overview of the Australian legal system (*Players in the Legal Game, Tangling with the Law*), looks at law in action across a range of human endeavours and experiences (*sex, neighbours, health, shopping at the mall, running your own business*) and ends with a few oddities (*Silly Laws*). Well researched and extremely readable, *Stay Out of Trouble* gives practical words for specific situations (for example, how to conduct yourself in the courtroom, writing a will) while sketching the wider picture and placing this information in context.

On the whole, Owen Trembath manages to avoid the traps of over-simplification and over-generalisation which are constant hazards in writing for this audience. His skill at including an abundance of interesting digressions while not obscuring his central theme is one of the main strengths of this book.

In his introduction Owen seems to promise controversy and conspiracy — '*there may be some things about the law in this book that some people would prefer that you didn't know. If you are in trouble don't wave THIS book at them.*' Unless the system reacts dangerously to threats to de-mystify it, I think his warning is overstated. Sensible advice prevails. What he has done is written a great book for young people with an interest in things legal. It might even (gulp) turn some of them into lawyers. ● ME

Construction Claims

by Philip Davenport; The Federation Press 1995; 226 pp; \$40.00, softcover.

With this book, Philip Davenport has provided a useful compendium of information and issues for anyone seeking to understand the concepts and detail, both legal and commercial, which surround the area of construction claims.

Although the book is intended primarily for students in the legal, building and engineering disciplines, its usefulness is much broader. It provides a good introduction for any professional —

architect, engineer or builder — to the exotic and labyrinthine pursuits which occupy the time of construction lawyers. Being of that ilk himself, Davenport, no doubt draws on his extensive experience in developing a logical framework for the subject matter with many useful examples to illustrate key points.

The various chapters of the book cover most recognised categories of claims, including variations, time related matters, defective work, interest and *quantum meruit* claims. The fundamental issues of available defences to claims and the proper legal analyses to be applied in different situations, are also dealt with in sufficient detail so as to provide a useful reference source.

This book is necessarily limited to what experienced practitioners would consider 'basic' information. However, even for the experts, there is still worthwhile assistance to be gleaned from the manner in which the material is organised, analysed and presented. There are extensive case references and background facts to flesh out the skeletal framework of concepts.

The cover text represents the book as being 'a completely new approach to construction claims'. It is hardly that. Nevertheless, it is a book which all those who are involved in the area of construction claims could find useful, particularly as a starting point. GE

Associations and Clubs Law in Australia And New Zealand

by A.S. Sievers; The Federation Press 1996; 164 pp; \$25; softcover.

There seems to have been a recent surge of books on this topic. This is a welcome phenomenon for the large number of clubs and associations trying to manage their affairs, often with little knowledge of the regulatory framework that governs them.

Continued on p.198

BITS was compiled by Graham Easton, Michael Easton, Sabina Lauber and Frith Way.



MENTIONS

CALL FOR CONTRIBUTIONS Where will law be in the year 2525?

The editors of the December 1996 issue of the Alternative Law Journal are seeking many brief but varied responses to the above question. Responses will be published in the December issue which will pursue the theme Law into the Future.

We envisage the approaches will range from playful to serious—but will be thought provoking, imaginative and visionary. Please keep responses to 10 lines maximum. Include your name and a brief description of occupation.

Topics of interest include the legal profession, information, copyright, family law, information, technology, crime, courts, evidence, policing, cyberspace, human services, arts, immigration, administrative law, legislation, dispute resolution, children, etc.

Some questions which might help you answer the question:

- What will be the issues?
- What do the trends indicate?
- Do definitions need revisiting? Will there be increasing specialisation or globalisation?
- What will be the effect of human and socio-economic factors?
- Are there potential positives or negatives or both?

What are the potential domestic and international issues?

Please reply by 30 September to:

Alternative Law Journal,
c/- Law Faculty, Monash University,
Clayton, Vic 3168 or Email:
L.Boulton@law.monash.edu.au

ALRC GOES ONLINE

The Commission has established a home page on the Internet at

<http://uniserve.edu.au/alrc/>

The site is being developed as a location for electronic access to the Commission's publications and other law

reform sources as well as a place to contribute to and keep in touch with current Commission inquiries. The home page provides access to the five most recent ALRC reports with the remainder to follow in the near future. All future reports will be available online.

HIV/AIDS SENTENCING KIT

by Geoffrey Bloom, Amanda Hall and Alida Stanley; AIDS Council of New South Wales; 2nd edn 1996; 21 pp; free on request.

A prison sentence for a person with HIV may be more burdensome than for a person with long life expectancy. Alternatively, a person with HIV charged for cannabis use may escape a sentence, if the use was for therapeutic purposes.

The HIV/AIDS Sentencing Kit explains the various ways in which a person's HIV status may be relevant to a court's sentencing discretion. It is addressed to legal representatives of people with HIV/AIDS. The kit:

- gives basic information about the transmission of HIV, life expectancy and the progression from HIV to AIDS.
- details the ways in which imprisonment may be more burdensome for people with HIV/AIDS than people without, for example weakening of the immune system, breaches of confidentiality and the likelihood of psychological trauma. It also lists the type of medical evidence relevant to sentencing decisions.
- explains why HIV/AIDS may be a mitigating factor to reduce sentences or an aggravating factor when for offences which involve a risk of HIV transmission.
- examines why people with HIV/AIDS using cannabis for therapeutic purposes may be treated more leniently than others charged with cannabis offences.

A sample letter from the AIDS Council of NSW to sentencing courts outlining the burdens of imprisonment particularly relevant to people with HIV/AIDS is contained in the kit. The letter can be adapted to fit the circumstances of a particular case and has been used successfully in the past.

The full text of relevant case law and contact list of HIV organisations and

drug rehabilitation agencies complete the kit.

The HIV/AIDS Sentencing Kit is available on request from the HIV/AIDS Legal Centre at the AIDS Council of NSW, P.O. Box 350 Darlinghurst NSW 2010, tel 02 206 2000; fax 02 206 2069.

ABORIGINAL LAW BULLETIN

We regretfully advise that the *Aboriginal Law Bulletin* and the *Alternative Law Journal* are to part company after many years of happy association. Those with current subscriptions to the *Alt.LJ* will continue to receive the *ALB* until the end of their subscription period. When your renewal is due we will send you details of how to subscribe directly to the *ALB*.

Our association will continue in that if you are a subscriber to the *Alt.LJ* you will get a \$10 discount on a subscription to the *ALB*.

WORKPLACE REFORM — A MOTHERHOOD ISSUE

The National Women's Justice Coalition's submission on the Government's Workplace Relations Bill highlights regressive effects on women's maternity rights. The NJWC is calling for amendments to the Bill to ensure that existing maternity rights are not reduced in the award 'stripping down' process, and to insert a right to 12 weeks paid maternity leave for all employees.

Copies of the submission are available from:

Marian Sheridan, Executive Officer, National Women's Justice Coalition, tel 06 247 2075 or fax 06 257 3070 or GPO Box 3148, Canberra, ACT 2601.

CONFERENCE

Cultural Heritage Conference: Legal and Philosophical Aspects

Date: 3-4 October 1996

Venue: Lincoln College, North Adelaide

Cost: \$70 full, \$35 concession

Further information:
tel 08 201 3198 or email
helen.macdonald@flinders.edu.au

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Cover: Illustration by Jacky Fleming. Reproduced with permission.

Jacky Fleming's books include: *Be a Bloody Train Driver*; *Never Give Up*; *Falling in Love*; and *Hello Boys* (all Penguin). Her postcards are available from PO Box 162, Leeds, LS4 2XF, UK.

OPINION

A Motherhood Statement

Why ‘motherhood’? Why ‘motherhood and the law’?

Isn’t talking about motherhood a little passé these days? After all, we know that a motherhood statement is all about being bland and banal but utterly lacking in substance. It just doesn’t grab us. Does it?

No. But it should.

Motherhood and the law is not bland and banal. Far from it. How the law treats motherhood is the critical test of equality. It is at the coal face of feminism.

We need to use feminist methods to look at motherhood and the law. We must keep asking the ‘woman’ questions. Where are women? What is happening to women? Where is it going wrong? What can we do about it? Where are we headed?

Where *are* we headed? We are headed to some new place where a woman’s biology does not determine her place in society. Where the discourse of ‘woman’ does not mean that women are inferior. We are headed to a place where women are not inferior. That simple.

So how do we get there? That is not so simple. Getting our hands dirty and working out how to fix the problems is not as easy as making the ‘clean’ polemical statements of principle.

But many women are getting their hands dirty. Much has been written about motherhood and the law. You only need to look at any feminist reader on feminist legal theory. The ‘equality riddle’ of pregnancy generates lively debate. Should we pursue a model of special treatment or equal treatment when dealing with the ‘case of pregnancy’? Should we ‘transcend’ such a dichotomous approach altogether? More needs to be written. We need to think more and write more and talk more.

We need to look at women now. Too many still consider that the essential role of woman is mother. Society bestows considerable social approval on women who become mothers. But that social approval is contingent on mothers becoming mothers in the ‘right’ circumstances. Society imposes huge social and economic disadvantage on women who become mothers in the ‘wrong’ circumstances. The single mother. The lesbian mother. The migrant mother. The Aboriginal mother.

Women re-entering the workforce after having children have limited options. It is difficult to get part time and/or flexible working hours. Women are often faced with a ‘take it or leave it’ option of full time work. Women in the workforce struggle with unequal pay, childcare problems and the added burden of unpaid work in the home. Women take the major responsibility for caring for children at the

expense of their careers. Men have not accepted the responsibility of shared parenting. So it remains that women cannot put in the male hours or they lack male mobility or they have to abandon the hope of decent wages and career progression by taking part-time or casual jobs. The mummy track yawns ahead of them ...

Heard it all before, haven’t you?

Yes. But it is astonishing that some recent legal reforms and debates assume that gender equality exists. No evidence supports the view that such a radical shift in gender relations has occurred. Even if we use the least onerous model of equality — that of formal equality — there is no evidence to support such a view.

We must deal with the false notion that gender equality has been already achieved. This notion informs public policy. Take these three examples. First, the changes to custody and access in the recent amendments to the Family Law Act assume that fathers will play an equal role in their children’s lives after divorce, despite their reluctance to do so before divorce. Secondly, lesbian mothers now can be parents. Sure. But only when the State is getting them to cough up the cash for child support, not when substantive rights like custody or access are being handed out. Thirdly, gender blindness and systemic discrimination against women in superannuation schemes remains. Many women don’t even have a foot in these schemes usually because of years spent carrying out caring commitments.

And yet, men argue that *they* now are disadvantaged. One of the recent opinion pieces in *The Weekend Australian* blared the absurd headline ‘Men: The New Second Sex’.

So, that is where women are and what is happening to them. What can we do about it? We need to re-vision parenting. We need to re-vision the workplace. We need to keep thinking of new ways. These ideas are not new but we need to keep repeating them because change is not happening and it simply must. There is another way. We *will* find it.

One day the intersection of law and motherhood will not be such a bad place.

One day it won’t only be women who face agonising choices and regrets about having children and working.

One day women won’t say ‘I think I’ve changed my mind’.

Catherine Hawkins
Alex Heron
Sonja Marsic

On behalf of the ACT Editorial Committee

Separating MOTHERS and CHILDREN

Dominique Hansen and Marg Le Sueur

Australia's gendered immigration law and policy.



Australia's current immigration law and policy appears to be non-discriminatory at first glance. Its effect, however, is gendered and mothers are often discriminated against and separated from their children.

Family migration

Family migration includes spouse, parent, child, special need relative, orphan relative, aged dependent relative and last remaining relative visa categories. On 3 July 1996 the Minister for Immigration and Multicultural Affairs announced a cut to the family migration intake of 10,000 places in 1996–1997.

More women than men tend to enter under the Family Migration category, whereas more men than women tend to enter under all other categories.¹ The other categories are economic and skills based and fail to recognise skills such as child rearing which many women have acquired at the expense of acquiring trades and other qualifications. A cut to the Family Migration category is, therefore, a form of indirect discrimination which will result in fewer women migrating to Australia in 1996–1997.

A common case scenario presenting itself to the Immigration Advice and Rights Centre (IARC) is that of the unlawful mother with an Australian citizen child. The Australian father has disappeared and the mother has custody of the child. How does the mother become an Australian in order to care for the child?

The obvious solution is for the Australian citizen child to sponsor the mother for a parent visa. Unfortunately there are many obstacles to be overcome.

The mother must leave the country to get a visa

Unless the mother is over the retirement age and not unlawful she cannot be sponsored onshore and must apply for the visa outside Australia. This process is very costly and can result in the separation of the mother and child or in the child being forced to live in the mother's country of origin often with substandard health care and education while the visa application is being processed.

The balance of family test must be met

This test was introduced to create an artificial limit to the number of parent visas issued. The argument was that the more children the parent had residing in Australia, the more likely they were to settle well in Australia. On 3 July 1996 the Minister for Immigration announced changes making the test even tougher than it was already. The balance of family test previously required that at least half of the applicant's children lived in Australia. The test now requires that *the majority of children of the parent are now required to be Australian citizens or permanent residents and must be usually resident in Australia*.

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SEPARATING MOTHERS AND CHILDREN

Where an unlawful mother has one Australian Citizen child and another, unlawful child from a non-Australian father, the Australian citizen child will be unable to sponsor the mother on a parent visa as she fails the balance of family test. The test results in grave injustices. In many cases application of the test will involve the separation of mothers and children.

An assurance of support must be provided and a \$3500 bond must be lodged

The provision of an assurance of support is a mandatory requirement for the parent visa category. An assurance of support is a contract which is signed by an Australian citizen or permanent resident in full-time employment which guarantees to reimburse the Government for any social security benefits obtained by the parent in the first two years of residence. The assets and income of the assuror are assessed by the Department of Immigration to ensure that repayment of any debt which arises is feasible.² A \$3500 bond must also be lodged with the Federal Government and it will be returned at the end of the first two years of the parent's residence if no social security benefits have been claimed by the parent. A non-refundable health services charge of \$942 must also be paid on top of a \$600 application fee.

Where any of these requirements are not met, the application will be rejected. Australian citizen children from poor families are seriously disadvantaged by these provisions which can result in the separation of families.

An unlawful Fijian single mother with an Australian citizen child has previously been rejected for refugee status and now has to go to Suva to lodge a parent visa application. She has a factory job in Australia. She cannot find anyone to sign the assurance of support and she also needs to find about \$7000 to pay for the bond, health services charge, application fee and airfare for her and her child to go to Suva. She cannot save this kind of money and support her child on her factory wage and so she will have to remain unlawful and risk apprehension, detention and deportation.

The health requirements must be met

Applicants for all permanent Australian visas must meet the health requirements. In the Parent visa class there is no provision for waiver of these requirements and where a parent fails to meet the health requirements, the application for a visa will be rejected. The only way to overcome this rejection would be by direct intervention on the part of the Minister for Immigration, which happens very rarely. This means a family can be separated because the mother is in poor health or an Australian child can be forced to live outside Australia in order to be with the mother.

The current health requirement is contained in schedule 4 of the Migration Regulations and reads:

4005 The applicant:

(a) is free from tuberculosis; and

(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and

(c) is not a person who has a disease or condition that, during the applicant's proposed period of stay in Australia, would, be likely to:

(i) result in a significant cost to the Australian community in the areas of health care or community services; or

(ii) prejudice the access of an Australian citizen or permanent resident to health care or community services; and

(d) if the applicant is a person whom a Medical Officer of the Commonwealth has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

A single mother with an Australian citizen child has a renal condition of which she is unaware. When she applies for a parent visa a medical officer of the Commonwealth assesses that her kidney condition will deteriorate such that in 10 to 20 years she will require dialysis and perhaps a kidney transplant. She is rejected for her visa and her child has to join her in the mother's home country where health and education standards are lower and the Australian child will be disadvantaged.

The sponsor must be a citizen

On 3 July 1996, the Minister for Immigration announced an additional hurdle to the reunification of families. He said that from 3 July 1996, only Australian citizens will be able to sponsor people under the Preferential Family category. Mr Ruddock said, 'The right to sponsor family members to become part of Australian society is a privilege that should only be available to those who have made a public commitment to Australia by becoming an Australian citizen'. Mr Ruddock's attempts to 'encourage' citizenship directly contradict that other oft-touted Liberal ideal — the importance of the family unit.

The only exceptions will be:

- The 'immediate family' of refugees who were known to the Department of Immigration at the time the refugee visa was granted (immediate family is defined as: spouse of refugee, dependent child of refugee or parent of a refugee who has not turned 18).
- Dependent children under 18 years of age who were born outside Australia to a parent who has permanent residence at the time of birth or whose permanent resident parent has been granted custody of the child either in Australia or overseas or whose overseas parent dies or becomes incapable of caring for the child and the Minister is satisfied it is appropriate in the circumstances for the visa to be granted.
- Permanent residents may still sponsor children under or over 18 where the child was included in the application of the parent that resulted in the grant of permanent residence to the parent.

Spouses of permanent residents where the permanent resident sponsor made an application for permanent residence before 3 July 1996 and where the spouse relation-

ship existed and was known to the Department of Immigration before that date. This exception will be open only until October 1997. After that time only Australian Citizens will be allowed to sponsor their spouse.

Special provisions for some unlawful spouses of Australians

In May 1996 the Minister for Immigration announced special provisions for some unlawful spouses of Australians which would commence from August 1996. Unlawful persons who are in Australia and who are married or in a *de facto* relationship with an Australian citizen will be able to lodge applications onshore for spouse visas where they can show 'compelling circumstances'. The problem is that any unlawful persons who have already made a prior application for permanent residence and been rejected will be excluded from these special provisions. Most unlawful persons have at some stage made some sort of application for permanent residence so that the special provisions announced in May 1996 have given false hope to many families where one parent will still have to go overseas and apply for a spouse visa from offshore because they don't fit the requirements for the special provisions. Where families are poor and mothers have very young children this creates particular hardship.

Changes to the meaning of de facto relationship

At present *de facto* couples have to prove they are in a genuine and continuing relationship and while it is unusual for *de facto* visas to be issued where there is less than six months co-habitation, no particular length of co-habitation is required by law.

The Federal Government has indicated that it intends to toughen up the *de facto* provisions to require applicants to show two years of co-habitation prior to lodging a *de facto* spouse application. A two-year co-habitation requirement is almost impossible to satisfy if one partner is not Australian and both partners cannot easily get temporary visas either in Australia or the non-Australian's country of origin. Those who can marry will therefore marry. This social engineering is out of step with Australian social norms. A mother of an Australian child who has been in a *de facto* relationship with the child's Australian father for less than two years will be unable to apply for a spouse visa unless she and the Australian father marry. This brings to mind Australia's earlier more blatantly prejudicial immigration policies. In 1960, the then Minister for Immigration Mr A.R. Downer said about *de facto* entry to Australia: 'An immigration policy which smiles on illicit unions would not be in the interests of the Good Life of the Australian community. Those who wish to live in such a way should not expect an easy entry into this country.' (Department of Immigration file 72/77443)³

Domestic violence

Women who marry Australians and apply for residence onshore in the spouse visa classes have to stay in the relationship for two years from the date of the visa application in order to get permanent residence. Where they can prove they or their children are victims of domestic violence in the relationship, the regulations currently allow them to be granted permanent residence if they leave the relationship before the two years have expired.

These changes are very important to women and children and are comparatively recent. Before July 1995 if a woman left a relationship because of violence perpetrated by the Australian husband towards her child, she stood to have her visa cancelled. Since July 1995 special provision was made

in the Migration Regulations allowing violence against a child as a ground for obtaining permanent residence where the relationship breaks down before two years have passed from the date of the visa application.

The Federal Government is currently reviewing the domestic violence provisions in Immigration Law and has already announced an intention to restrict the operation of the provisions by toughening evidentiary requirements. It is crucial that the importance of these provisions to women and children is recognised and that any narrowing of their operation is resisted. In fact there are strong arguments to extend the operation of the provisions. The domestic violence provisions attach to onshore marriage and defacto visas. In the case of fiancee visas the domestic violence provisions can only be accessed after the fiancee has actually married the Australian citizen.

In IARC's experience many Australian men have already exploited this loophole in the operation of the provisions and are sponsoring women (and in cases where they have dependants, their children) on fiancee visas, and refusing to marry them, forcing them to remain in violent *de facto* relationships and allowing their visas to expire so that they become unlawful. In this way the women are unable to access the existing domestic violence provisions. If they try and leave the relationship or contact the police they will be removed.

Women who suffer domestic violence in an overseas country and apply to migrate to Australia with their children also face problems due to Australian immigration policy. In order to sponsor children to Australia a parent must show there is no overseas parent with access, guardianship or custody rights which would be prejudiced by granting the child a visa to come to Australia. Where a woman and her children leave a relationship due to domestic violence it is often impossible to obtain the agreement of the father to grant her full legal custody and the right to take the children out of the country.

A woman who has separated from her husband overseas due to domestic violence has a young child of the relationship. All her relatives are now Australian citizens or permanent residents and so she is eligible to apply for a last remaining relative visa. She wants to come to Australia as soon as possible as she is without protection in the overseas country. The police are assisting her ex-husband instead of protecting her. She cannot get a court order granting her sole custody, guardianship and access rights to the child and her ex-husband refuses to sign away his rights to the child thereby preventing her from being able to obtain a visa for the child. If she comes to Australia she will have to leave her child behind.

The capping of parent and preferential family visas

On 1 August 1996, the Minister for Immigration announced that the number of visas available for the Preferential and Parent visa categories would be capped at 6000 for the 1995-96 financial years. Given that the total number of applications for Preferential Family visas in the last financial year was 36,107, this decision will have disastrous consequences for family reunification. Most of the people affected by this will, of course, be women and children.

Mothers with adult children face problems too

The Balance of Family Test which was explained earlier causes particular hardship for ageing mothers who have cultural ties to their Australian children. The balance of family test is stringently applied even where culturally the Australian child is recognised as being the child who is supposed to look after the parent in old age.

The balance of family test needs to be reformed to take account of the psychological and financial ties between an applicant and the sponsoring child as compared with other children and the impact of cultural norms on that relationship.⁴

An elderly woman from Chile approached the Centre (IARC) about her case. She had one child in Australia, one in Argentina, one in Brazil, one in the USA and one in Chile. She had been living for some time with an elderly friend in Chile and they had been supporting each other. Her friend had become sick and was no longer able to offer support. The child living in Chile was extremely poor and lived in a house with three families. The child in Australia had been sending some money to support her mother. The mother had previously been rejected for immigration as an aged dependent relative (where the balance of family is not required to be met but financial emotional or physical dependency must be shown to have existed for 'a reasonable period') and did not pass the balance of family test.⁵

Australian immigration policy and refugees

Most refugees are women and children and yet fewer refugee applications are lodged in Australia by women than by men.⁶ This means that recent cuts by the Federal Government to Australia's offshore refugee program will hit women and children the hardest.

Over 80% of the world's 20 million refugees are women and children. Yet the number of onshore refugee visas granted to women and children is nowhere near 80% of the onshore refugee visa program. The reasons for women and children's under-representation in the onshore refugee category are numerous, but the most obvious reason is the difficulty faced by financially destitute and physically vulnerable women and young children trying to travel. For example how do women and children stranded in a war-torn region such as Somalia or Iraq find the airfares and obtain the documents for themselves and their children to travel to Australia.

Women and children's lack of access to onshore refugee visas means that cuts to Australia's offshore refugee program announced on 3 July 1996 will hit women and children the hardest.

If women do manage to arrive in Australia against the odds and lodge applications for refugee status they are detained while their refugee application is being processed. Their children are usually found foster homes in the community during the period of the mother's detention as most mothers would rather their children did not spend time in a detention centre or prison. This results in the separation of refugee mothers and children.

Many onshore refugee applicants arrive as a 'family representative'. Family members have pooled scarce resources to send someone to Australia to seek asylum. A male relative is usually sent. Women and children wait behind in the home country or in refugee camps. It takes months and sometimes

A Kurdish woman arrived from Turkey with her two children, aged 7 and 9, in early November 1995. On arrival they were taken into custody and detained at Villawood Detention Centre where they lodged an application for a Protection Visa. Regulation 2.20 of the Migration Regulations provides for the release of minors from detention where the relevant child welfare authority has certified that it is in the best interests of the child and adequate arrangements have been made for the care of the minor outside detention. There is no provision in the migration legislation for the release of a custodial parent or guardian so the mother agreed to the release of her children into the care of their grandmother, a permanent resident. Her only other option was to subject her children to a lengthy period of detention. The mother was separated from her children for approximately five months. At the second of two interviews with the Department of Immigration the woman expressed her despair at the prolonged separation. In response the interviewing officer said it was her own fault that she was separated from her children as she was the one who had requested they be released.

one or more years for the refugee applicant to have their claim processed. Once they are granted refugee status they now have to wait a further two years before they can become citizens in order to sponsor their wives and children. During this long waiting period the wives and children are exposed to dangers such as political reprisals, famine, rape and robbery in the home country or in a refugee camp.

There is an obvious solution. *Once a refugee applicant is granted a protection visa, visas should automatically be issued to their family members also.* Prior to 1994 this was the case. It seems that when the 1994 Regulations were introduced, this provision was omitted by an oversight. Two successive Federal Governments have not seen fit to rectify the error. Instead the current Federal Government is allowing the already lengthy period of separation of refugee families to be exacerbated by introducing a new requirement that all sponsors be citizens. (Currently it takes two years of residence for a permanent resident to become eligible for citizenship.)

Conclusion

Australia's immigration policy results in the separation of mothers and children in many instances. Several of the discriminatory policy initiatives described in this article have been introduced as recently as July 1996. The Australian community needs to be made aware of the discriminatory nature of these changes in order to enable effective public debate on immigration policy to take place.

The recent changes have resulted in the reconvening of the National Immigration Forum, a group made up of community organisations with an interest in the immigration debate. Hopefully this forum will stimulate public discussion.

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Who's rocking the cradle?

Therese Macdermott

Maternity rights in Australia.



Integrating work and family is currently a strong theme of Australian social policy. So called 'cutting edge' corporations have a plethora of 'family friendly' policies and flexible work arrangements. To be 'family friendly' is now seen as making good business sense.¹ What has not been caught up in this rhetoric is the need for paid maternity leave as a fundamental prerequisite to achieving equality of employment opportunities for women in the paid workforce. Until very recently maternity rights in Australia principally have taken the form of an employment-based entitlement to leave from the paid workforce. In the private sector this leave has been largely unpaid. Because the focus of maternity rights has been on granting leave from the paid workforce, little attempt has been made to address the question of how to compensate women for their loss of income during a period of leave associated with the birth or adoption of a child. Only very recently have these leave arrangements been supplemented by a social security payment called the Maternity Allowance, the role of which as a form of income replacement is doubtful.

This article examines the development of maternity rights in Australia. It traces the evolution of maternity rights as an employment-based entitlement, and also seeks to position the new Maternity Allowance within the wider debate on maternity rights. A discussion of the Maternity Allowance does raise the issue of maternity rights of women who are not in the paid workforce. It is not the intention of this article to debate the manner in which the economic and social value of unpaid work in the home should be recognised and rewarded. The principal focus is on paid maternity leave as a means of facilitating women's participation in paid employment. The current state of maternity rights in Australia will also be considered in the light of Australia's international obligations under a range of international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and various International Labour Organisation (ILO) Conventions. Finally, the article considers the prospect of achieving more widespread paid employment-based maternity rights through the use of anti-discrimination measures. Before turning to these issues, it is useful to examine the economic and social rationales for paid maternity leave.

The rationale for paid maternity leave

It is not difficult to advance a rationale for paid maternity leave based on its numerous economic and social benefits.² Reduction in turnover costs and the preservation of the investment made by employers in training and expertise form part of the justification for paid maternity leave on economic grounds. A worker who has satisfied the 12-month qualifying period that currently applies to most forms of parental leave will have gained considerable experience and training in the course of her employment. Evidence from the maternity leave survey conducted by the Australian Institute of Family Studies in 1988 shows that women who were eligible for maternity leave had been employed with their

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employer for a considerable length of time prior to the birth of their child, with the median number of years for public sector and private sector employment being 7 and 5 respectively.³ Paid maternity leave can also be a means of overcoming the perception that women workers have a high labour turnover because of the impact of child rearing. The absence of paid maternity leave, in combination with other factors affecting women's participation in the labour market, only serves to fulfil this expectation.

In terms of social benefits, a lack of paid maternity leave overlooks the important social function of childbearing and parenting.⁴ Instead, this function is treated as an entirely private activity for which women primarily must bear the economic cost. A period of paid maternity leave would decrease the immediate financial penalty in terms of loss of income from paid employment imposed on women by childbirth. In the absence of some form of income replacement the act of giving birth necessitates a period of economic dependence of a woman either on her partner or on social security.⁵

Access to leave currently is expressed in terms of a gender-neutral entitlement to parental leave, to encourage 'at least the idea, if not the actuality, of shared parenting'.⁶ But like part-time and casual work, parental leave is the domain of women.⁷ The norm is that women are the intended beneficiaries of 'family friendly' policies and it is in fact women who avail themselves of these policies. However, a scheme for paid maternity leave, as distinct from paid parental leave, could operate as a disincentive to employing women, or contribute to a further casualisation of women's work if current eligibility criteria are retained. A gender-specific entitlement may also serve to reinforce gender-based roles in child rearing and identify difficulties associated with combining employment and child rearing as a women's issue rather than a parental issue. As the Preamble of CEDAW states '... the role of women in procreation should not be a basis for discrimination but ... the upbringing of children requires a sharing of responsibilities between men and women in society as a whole ... [and] ... a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'.

It should be acknowledged, however, that the notion of a gender-neutral leave entitlement that enables a 'choice' of which parent takes leave to care for young children is premised on an idea of abstract, ungendered individuals making rational and autonomous choices. It takes no account of the fact that a woman's choice is limited by the job opportunities available in a labour market affected by occupational and industrial segregation. As Marcia Neave argues, the breadwinner/dependent spouse relationship can be seen as a natural consequence of lower wages paid to women, occupational and industrial segregation, and limited support for family responsibilities.⁸ Added to this are the social and cultural expectations regarding the 'social role' of women as primary care givers, supplementing the 'biological role' of childbearing.⁹ Moreover, equal access for men to work in the home is a prerequisite to achieving equal access for women to paid employment.¹⁰ Recent studies indicate that changes that have occurred in the gender make-up of domestic responsibilities has come about by a reduction in the number of hours spent by women on work in the home, rather than any specific increase in the time spent by men on such tasks.¹¹

Employment-based maternity rights

The various test cases by which the Australian Industrial Relations Commission (AIRC) has set the standard for maternity-related leave have made no provision for access to paid leave. The *Maternity Leave* case (1979) 218 CAR 120 made provision for women to take unpaid leave up to 52 weeks. The *Adoption Leave* case (1985) 298 CAR 321 provided for 12 months unpaid leave for adoptive mothers. The *Parental Leave* test case (1990) 36 IR 1 granted for the first time paternity leave and made changes to the existing standards of maternity leave and adoption leave. The standard set by the *Parental Leave* test case enables either parent¹² of a dependent child to obtain leave to act as the primary care giver of a child, up to a combined total of 52 weeks leave, with a right to return to work after the period of leave. A qualifying period of 12 months continuous service applies.

While the *Parental Leave* test case standard of unpaid leave has on the whole been the norm for private sector employment, a significant differential exists in the standard of parental leave between public and private sector employment in Australia, most notably in terms of the entitlement to a period of paid maternity leave. A statutory entitlement for women employed in the Australian Public Service to paid maternity leave was first introduced by the Whitlam government in 1973.¹³ However an entitlement to paid maternity leave in public sector employment is by no means universal, particularly with current trends towards the privatisation of public instrumentalities.

The system of parental leave established as part of the minimum entitlements of employees under the *Industrial Relations Act 1988* (Cth) by the *Industrial Relations Reform Act 1993*,¹⁴ adopts generally the standards set by the AIRC in the *Parental Leave* test case, although the legislative standard does not include the system of part-time work available under the test case standard. The legislative provisions operate as a minimum entitlement available to all employees, supplementing entitlements under other federal, State and Territory legislation and awards. As the legislation generally adopts the standard set by the AIRC in the *Parental Leave* test case, which is a standard that has been adopted in many State and federal awards, and which forms the basis of the statutory entitlement in some States, it is unlikely to be of any significant benefit to those subject to such awards or statutory provisions. It may benefit those who work in circumstances where this standard does not apply, for example, those in award-free employment, provided that person is not a casual or seasonal worker, whose employment is specifically excluded from the standard.¹⁵

'Atypical' work arrangement

The coverage of the minimum standards dealing with parental leave is indicative of the traditional preoccupation of labour law with the paradigmatic employee; that is, the male breadwinner.¹⁶ This is evident in the exclusion of casual and seasonal workers, and the imposition of a qualifying period of 12 months continuous service. These replicate the parameters set by the AIRC in the various test cases. The restrictiveness of the provisions seriously undermines the ability of the legislation to provide anything approaching a comprehensive standard, given the large percentage of women whose employment is casual. Ironically, it is far easier for men than women to qualify for entitlements such as parental leave that are based on employment status.¹⁷

Enterprise bargaining and paid maternity leave

Some proponents of enterprise bargaining have argued that more decentralised bargaining may in fact be beneficial to women as it provides the opportunity for greater flexibility in negotiations about work arrangements. The validity of this argument depends largely on the perspective of 'flexibility' adopted. From an employer perspective, flexibility is likely to include a greater spread of working hours and extended availability of employees, whereas from an employee's perspective, it may mean, for example, greater flexibility in accommodating family responsibilities. Whatever flexibility has been attained through enterprise bargaining, it has not extended to greater access to paid maternity leave, despite the considerable publicity for those institutions where paid maternity leave has been introduced.¹⁸ Details from the Department of Industrial Relations Workplace Agreements Database indicate that of 7255 registered federal agreements only 67 agreements make provision for paid maternity leave. Paid maternity leave could of course be implemented in a workplace in the absence of an agreement through a change in employment policy, as occurred with Westpac Bank, although this practice is unlikely to be common.

There are a number of prerequisites that must be satisfied in order for paid maternity leave to be part of the agenda of enterprise bargaining. The most crucial is the valuing of the skills of women workers and a desire to retain those skills through policies that facilitate a return to the paid workforce. This is less of a problem for those women whose skills are highly valued and sought-after in the marketplace. But for the majority of women this will not be the case. Another important factor is whether there is a strong trade union presence in the workplace, and whether that trade union's industrial agenda gives some priority to issues affecting women. Overall, the advent of more decentralised bargaining is unlikely to open the floodgates to paid maternity leave. Further, the introduction of the Maternity Allowance may have a detrimental effect on bargaining over paid maternity leave, although it is intended to supplement rather than compete with other entitlements. The existence of a maternity benefit outside the employment framework may be used in negotiations as a way of deflecting attention from paid leave as a workplace issue and an employer responsibility.

Workplace Relations Bill 1996

The minimum conditions of employment for employees provided under the proposed Australian Workplace Agreements essentially replicates the current standard in the *Industrial Relations Act*. The legislation clearly indicates that the entitlement will be to leave *without pay*.

The Maternity Allowance

The new Maternity Allowance, effective from 1 February 1996, is a means-tested lump sum social security payment that is not tied to workplace participation. Interestingly, it began as an in-principle commitment by the federal government under the Accord Mark VII to providing 12 weeks paid maternity leave to all employees in line with ILO Convention 103. In March 1994, the National Council of the International Year of the Family raised in its Discussion Paper the idea of a young child/infant parenting allowance for all parents taking care of a new born or adopted child in the first 12 weeks, payable through the social security system.¹⁹ In June 1994 the then Prime Minister Mr Keating indicated that:

For next year's budget, the government will have further negotiations with the ACTU about ways to assist families, and in that context give consideration to introducing a maternity allowance paid through the social security system, in the spirit of ILO Convention 103 (maternity protection).²⁰

This notion of a maternity payment formed part of the renegotiated Accord agreement between the Federal Government and the Australian Council of Trade Unions (ACTU) as part of a wage trade-off in 1994. The ACTU advocated a universal 12 weeks payment available to all women who did not have access to paid leave. In its Final Report in November 1994 the National Council of the International Year of the Family maintained a commitment to a universal social-security-based maternity payment.²¹

It was not until the May 1995 Federal Budget that the Maternity Allowance came to fruition. By then the Government had abandoned its commitment to a payment of 12 weeks duration. The notion of universal paid maternity leave had also by then somehow transformed into a lump sum 'baby bonus' subject to a means test on family income. The ultimate form of the Maternity Allowance is a lump sum payment equivalent to six weeks of the Parenting Allowance. The Family Payment income and assets means test applies to the Maternity Allowance. The means test currently provides for a maximum gross family income of \$63,766 a year in the case of one child, with an incremental scale for each additional child. It has been claimed that 85% of women who give birth will be eligible for the payment.²² The current lump sum payment is fixed at \$857.40. It is payable in respect of any child born on or after 1 February 1996. Payment for maternity leave from other sources does not preclude a person from claiming the Maternity Allowance, but the amount received must be included as income for the purpose of the means test.

The nature of the Maternity Allowance needs to be carefully examined. Paid maternity leave is generally viewed as an income replacement mechanism, compensating for the loss of income from the paid workforce. A lump sum payment of \$857.40 is equivalent to a payment of \$142.90 for a period of six weeks. In this form the payment is clearly not income replacement, unless one is in receipt of income well below the poverty line. The average weekly wage of women in full-time paid work is \$575.50.²³ A weekly payment of \$142.90 represents only 25% of that income. Looking at it from the perspective of combined family income, the maximum family income for payment of the Allowance is \$63,766 a year in the case of one child. As a maximum family weekly income this translates as \$1226.27. A payment of \$142.90 a week amounts to only 11% of this income.

At best it could be described as income support given the manner in which the amount of the payment is linked to Family Payment. However, unlike other income support payments which are payable on an on-going basis for as long as the criteria of eligibility continue, the Maternity Allowance is a lump sum payment payable once (in respect of each child) on the occurrence of a particular event. The Department of Social Security Guidelines specifically state that the Allowance is to be paid as a lump sum and not in instalments. In that sense it does not fit the typical model of social security entitlements. A better indication of the nature of the payment is the fact that it has been popularly referred to as a 'baby bonus'. Whatever may have been originally intended with the Maternity Allowance, its true character appears to be a one-off payment designed to offset some of the costs associated with the birth of a child. This conclusion is supported by the position adopted by the ACTU when the Allowance

came into effect. In its Press Release of 1 February 1996 the ACTU distributed an outline of what the Maternity Allowance would buy and indicated that:

The \$840 Maternity Allowance gives people extra money when they need it, at the birth of a child. We have costed a package of essential items for the new baby and the Allowance goes a long way to paying for what is required.

Included amongst other things on this itemised list is a pram, a highchair, four pilchers, two dozen cloth nappies, baby powder, baby shampoo, three jump suits, four singlets, a teddy bear and a bottle of champagne.

The Maternity Allowance is not employment related. It does not depend on employment status, nor does the rate correlate to income forgone by a period of leave. An entitlement in this form is not a measure that promotes equal employment opportunities for women workers. It does not facilitate continuous employment, nor promote on-going attachment to the paid workforce. The fact that the Allowance ultimately took the form of a non-employment-based entitlement could be interpreted optimistically as a first step in the recognition of the value of women's caring role in the domestic sphere. A more cynical explanation is that the Allowance formed part of a wider political strategy by the Federal Government in seeking to secure another term in office. The Government sought to present a more 'family friendly' front, specifically seeking to attract the votes of single-income families with male breadwinners and full-time female carers working in the home.

The Maternity Allowance is presented as part of the developing notion of a safety-net in Australian social policy. But it cannot be regarded as the equivalent of paid maternity leave for workers in the paid workforce as it does not satisfy the criteria of income replacement. At best it is a maternity bonus designed to offset expenditures in relation to the maintenance of a child. Such an allowance is often paid in European countries as distinct from, and in addition to, paid maternity leave. As there is now little likelihood of paid maternity leave eventuating from the industrial arena through enterprise bargaining, for the reasons outlined above, alternative avenues such as anti-discrimination remedies need to be considered. However, before turning to the anti-discrimination context some assessment should be made of the current state of maternity rights in the light of Australia's international obligations.

The international context

Australia does not meet international norms in terms of parental leave, most particularly in respect of paid maternity leave. On average, 14 to 16 weeks paid maternity leave is provided by the majority of OECD countries. The adoption of the European Community Directive on Pregnant Workers²⁴ in October 1992 requires the provision of a minimum of 14 weeks paid maternity leave, at least at the statutory level of sick pay. In addition to paid maternity leave entitlements, some European Union countries have also made provision for parental leave, in certain cases as a paid leave entitlement.

Australia has not ratified the most relevant international instrument dealing with maternity leave, ILO Convention 103 Maternity Protection (Revised) 1952, although it now maintains to have made a commitment to the 'spirit' of the Convention through the introduction of the Maternity Allowance. The Ratification of ILO Convention 103 was considered in 1992, but was rejected on the basis of widespread non-compliance at State and federal levels, the cost of such

a measure, and the lack of a European style social insurance scheme by which to implement it.²⁵

Article 4 of ILO Convention 103 states that a woman shall be entitled to receive a cash benefit while absent from work on maternity leave. The rate of the cash benefit is unspecified, but is to be fixed 'by national laws or regulations so as to ensure *benefits sufficient for the full and healthy maintenance of [a woman] and her child in accordance with a suitable standard of living*'. Article 4 states that the benefit is to be provided either by means of compulsory social insurance or by means of public funds. It specifically provides that 'in no case shall the employer be individually liable for the cost of such benefits due to women employed by him [sic]'. Hence reliance on ILO Convention 103 may not ground an employer-funded scheme of paid maternity leave. One advantage of this Convention is that it does not preclude access to maternity benefits for women who work casually or with service of less than 12 months. Further, access to maternity benefits is largely a matter of right, there being only limited circumstances in which a means test can be applied.

ILO Convention 103 deals with other maternity-related issues that have not yet been tackled in Australia. For example Article 5 entitles a woman to interrupt her work without penalty for the purpose of nursing a child. However, not all aspects of the Convention are positive. For example Article 3 mandates a period of compulsory leave after confinement. It has not been uncommon for international instruments to be used to justify forms of 'protective' legislation which serve to deny women access to employment opportunities. A compulsory period of six weeks leave following the birth of a child is dictated by the *Parental Leave* test case and by some State statutory schemes, although the minimum entitlements of the *Industrial Relations Act* are silent on this point. A 'protective' compulsory leave requirement in this form, in the absence of paid leave, has been identified by the Human Rights and Equal Opportunity Commission as directly discriminatory in a recent review of award provisions. If a compulsory period of leave can be forced on a woman, then clearly the norm should be paid leave.

Australia has also sought to avoid the full rigours of its international obligations by maintaining a reservation to CEDAW as regards paid maternity leave. Article 11.2(b) of CEDAW requires all appropriate means to be taken to introduce maternity leave with pay or with comparable social benefits without loss of employment, seniority or social allowances. Similarly, Article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that 'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits'.

Current Australian practice regarding employment-based maternity rights uses as its reference point the Workers with Family Responsibilities Convention and Recommendation, rather than the instruments referred to above. The current minimum entitlements dealing with parental leave in the *Industrial Relations Act* apparently comply with the Workers with Family Responsibilities Convention. The obligations under this Convention are very general in their 'family friendly' focus and make no specific reference to paid maternity leave. The most relevant obligation is expressed in Article 7:

All measures compatible with national conditions and possibilities ... shall be taken to enable workers with family responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities.

It appears to have been a deliberate policy on the part of the government to avoid implementing those international instruments that mandate some form of paid leave.

However, even when one turns to those international instruments which deal specifically with paid maternity leave it is apparent that the obligations regarding payment are not necessarily onerous. Wide scope is allowed for national practice in terms of the implementation of various obligations. In most international instruments the option of making payment for maternity leave available in the form of a social security benefit is available. Although the Maternity Allowance may not be a genuine form of income replacement or income support, it is unlikely that it would fail to satisfy the very general classification of a social security benefit. Australia could argue it has now meet its obligations under various international instruments, including CEDAW, through the Maternity Allowance. However for this to be the case, provision must be made for maternity leave 'with pay or with comparable social benefits' for the purposes of CEDAW, 'with adequate social security benefits' for the purposes of ICESCR, and a benefit '*sufficient for the full and healthy maintenance of [a woman] and her child in accordance with a suitable standard of living*' for the purposes of ILO Convention 103. Whether the Maternity Allowance satisfies these stipulations is debatable.

A fundamental problem with using the implementation of international instruments as a means of acceding equality of employment opportunities for women is the generality of the obligations. International instruments that express obligations in the form of 'promotional standards' allow scope for the subordination of issues relevant to women.²⁶ In the case of maternity rights, Australia has clearly selected international instruments with the most general obligations to avoid paid maternity leave obligations. Similarly, in introducing the Maternity Allowance the Government has only paid lip-service to the obligations under other international instruments, which it has not ratified or to which it currently maintains a reservation, by giving minimal effect to these obligations. Ironically, the introduction of the Maternity Allowance could possibly enable Australia to withdraw its reservation to CEDAW in respect of maternity leave. It is unlikely that Australia would also take this opportunity to ratify ILO Convention 103 for a number of reasons. There are obligations in ILO Convention 103 that the present government may wish not to impose on employers, such as nursing breaks. But perhaps more importantly, the current Federal Government appears to have adopted an ideological stance opposed to the 'corruption' of Australian law by foreign standards, particularly those emanating from the ILO.

The anti-discrimination context

The inherent problem in dealing with maternity rights within the anti-discrimination context has been the issue of comparability. In order to substantiate a claim of direct discrimination on the ground of pregnancy, or more generally on the ground of sex, the test is usually framed as whether a woman is treated less favourably than a man in comparable circumstances. Hence where the issue of maternity leave arises, a comparison might be made to a man seeking leave for health

reasons. In this analysis pregnancy is treated as a form of disability, rather than a biological process unique to women. Alternatively, pregnancy is often identified as a 'lifestyle choice', comparable to leave sought for the purpose of fulfilling voluntarily assumed study or sporting commitments. Neither of these approaches gives sufficient credence to the social function of childbearing.

One way around the comparability problem is to follow the European Court of Justice approach which identifies unfavourable treatment on the grounds of pregnancy as direct discrimination on the grounds of sex, irrespective of the treatment of any male comparator.²⁷ In the words of the Court:

... there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy ... of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons ... pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex.²⁸

The difficulty with following the approach of the European Court of Justice in Australia is that most legislatures have enshrined comparability into the definition of direct discrimination, thereby limiting the scope for an expansive interpretation of direct discrimination, although the *ACT Discrimination Act 1991* is evidence of a contrary trend.

Indirect discrimination is also steeped in the tradition of comparability, generally involving a consideration of whether members of a particular group, identified for the purposes of anti-discrimination protection, are comparatively less able to comply with a requirement or condition that is unreasonable in the circumstances. However, recent changes to the federal *Sex Discrimination Act 1984* (Cth) move indirect discrimination away from the issue of comparability. The emphasis is now on the imposition of a condition, requirement or practice that has the effect of disadvantaging persons of the same sex as the aggrieved person, or women who are pregnant or potentially pregnant. In the case of indirect discrimination the essence of the inquiry is to identify an apparently neutral requirement that has a disparate impact on the group in question and evaluate it in terms of reasonableness. In the case of maternity rights the requirement could be identified as one that requires parental leave to be taken as unpaid leave. It is clearly arguable that such a requirement has the effect of disadvantaging women, because of their biological role in childbearing and because of the fact that it is predominantly women who take parental leave and suffer a consequential loss of income. The sticking point with indirect discrimination is generally the issue of reasonableness. The question boils down to whether it is reasonable to require women to take leave associated with childbirth as unpaid leave. The *Sex Discrimination Act* sets out the factors to be taken into account in determining reasonableness, including the nature and extent of the resultant disadvantage, the feasibility of overcoming the disadvantage, and whether the disadvantage is proportional to the result sought to be achieved by the imposition of the requirement. Ultimately it is a question of how we as a community value the social function performed by women in childbearing and whether we see the costs associated with that, including loss of income, as a private or public responsibility.

Another perspective on maternity rights in the anti-discrimination context is to view the issue of unpaid leave as potentially a form of discrimination on the basis of family responsibilities. The *Sex Discrimination Act* was amended in 1993 to include family responsibilities as a proscribed ground of discrimination. Unfortunately the proscription has only a limited application to direct discrimination in the form of dismissal from employment. Consequently there is no prohibition on indirect discrimination on the basis of family responsibilities in the *Sex Discrimination Act*, although an expansion of the coverage of family responsibilities has been mooted for some time. A number of State anti-discrimination systems cover the equivalent ground of status as a parent or carer, and apply this ground to both direct and indirect discrimination. For unpaid parental leave to constitute direct discrimination on the basis of family responsibilities one needs to be able to point to less favourable treatment on this basis, again raising the comparability issue. What is probably more effective is to point to the disparate impact of an unpaid leave requirement on those who have the status of a parent or carer, leaving the reasonableness question open to the same considerations as outlined above.

Conclusion

Ideally the fact of childbirth and the responsibilities of parenting should not impinge on the paid working life of women to any greater extent than men. But the current reality is somewhat different. The accommodation of pregnancy and maternity rights in the workplace is an essential part of facilitating women's participation in paid employment. Successive governments have shown a reluctance to impose the cost of social measures such as paid maternity leave on 'innocent' employers, in contrast to its attitude to such issues as superannuation or training levies. It is clearly within the legislative power of the Federal Government to confer a specific right to paid leave. Instead there has been a general acceptance of the status quo of unpaid leave, with a new supplementary entitlement to a Maternity Allowance. Although this payment does provide some benefit to those who are not in paid employment, and who would, therefore, never have access to employment-based maternity rights, it does little for women in the paid workforce. The Maternity Allowance leaves a large part of the income lost by women in taking maternity leave as a private cost for women. Women suffer sufficient labour market disadvantage simply from breaking their employment as a consequence of fulfilling the social function of childbearing. It is unfair to also require them to bear the cost of this community responsibility.

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Shared Parenting: POSSIBILITIES ... AND REALITIES

Juliet Behrens

Exploring the impact of the recent family law reforms on women.

Recent reforms to the *Family Law Act 1975* (Cth) (FLA) have changed the bases for making orders allocating parental responsibilities. The implicit general goals underlying the new provisions are shared parenting and private agreement. This article is concerned with how these family law reforms will impact on women's equality. The reforms will be examined in light of some of the social and economic realities for many women.

Some realities

The birth of a first child is a life-changing event for most women, not least in that it is the 'highwater mark in the division of paid and unpaid work by gender amongst couples'.¹ A woman's hours of unpaid work increase by an average of 91% on the birth of a first child.² On average, new fathers do not increase their unpaid work by a single minute.³ 'Egalitarian marriage' is often far from reality. We are in the midst of a 'stalled revolution' in that women's paid work contributions have increased, but there has been no significant change in the proportion of unpaid work that men do in the home.⁴ Following in part from this gendered division of unpaid labour, women often lack economic independence during a relationship.

The primary care of children continues after separation to be largely done by women. Further, the economic disadvantage of women as compared to men following separation is well documented.⁵ Women do not receive adequate compensation after separation for the economic costs to them of the gendered division of labour within a relationship.⁶ Approximately 90% of single parents are women, and social security is the main source of income for about two-thirds of these women.⁷ Poverty is commonly associated with single parenthood.

In many relationships, physical violence and other behaviours are used by the man to exert power and control over the woman. This behaviour can have a wide range of ongoing consequences for women, including physical injury, damage to self-esteem and isolation from sources of emotional, practical and financial support.

These are realities for many women that we need to work to change. However, they are realities that decision makers need to understand in the development of legal policy. As will be argued in this article, it seems that the recent amendments to the FLA were developed without properly addressing the realities of the social and economic disadvantage of many women.

Changes to the law

Until the recent reforms, the FLA provided that the paramount (in reality, the sole) principle to be applied in decisions about children was the welfare of the child. The legislation now uses the phrase 'the best interests of the child'. This change in terminology is unlikely to bring about substantive change. The list of relevant 'best interests' factors is

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similar to the earlier 'welfare' list except that family violence is included. The change in terminology probably reflects the fact that 'best interests' is the language used in the United Nations Convention on the Rights of the Child, and that the language of 'welfare' is seen as inappropriate in the light of growing recognition that children have rights.

In the FLA amendments, there is an increased emphasis on private agreement. For example, the legislation provides that 'parents should agree about the future parenting of their children' (s.60B(2)(d)) and that 'primary dispute resolution methods' should involve the resolution of disputes out of court. The amendments also encourage private agreement by providing for parenting plans.

The FLA amendments replace the old concepts of custody, guardianship and access with the broad concept of parental responsibility and specific aspects of it, for instance, residence and contact. The Act provides that each of the parents of a child has parental responsibility for the child, despite any changes in the nature of the relationship of the child's parents (s.61C). The extent of this responsibility can be affected by a parenting order or agreement dealing with residence, contact and more specific issues.

The previous law provided that, subject to any order of a court, each of the parents of a child was a guardian of the child, and the parents had joint custody (former s.63F). Guardianship and custody covered all parenting responsibilities, so that an order for custody, for example, carried with it all the rights and responsibilities associated with the daily care and control of the child, except when the child was on an access visit. The new forms of court orders with respect to children have changed so that the most common orders will be residence and contact orders. However, residence orders do not automatically carry with them sole responsibilities for day-to-day decision making. A woman with a residence order will need to obtain a specific issues order to have the exclusive right to make other decisions concerning the children.

While the Act does not introduce a statutory presumption of joint parenting post-separation, the presence of the objects and principles at the beginning of Part 7 are aimed at influencing the way the court, and the parties, approach the resolution of issues. As indicated, the objects of Part 7 focus on shared parenting. Further, the language of continuing joint parental responsibility suggests that parental responsibility will be interpreted to be co-operative rather than independent.⁸ This may mean that parents must make decisions co-operatively about parenting matters not covered in any order or agreement, or obtain a specific issues order concerning them.

There is also an end to the 'silence about violence' in the FLA amendments. I have documented these changes in detail elsewhere.⁹ They include making family violence relevant to the best interests of the child. Also, the need to ensure safety from family violence is included in the guiding policy principles for the Family Court.

Impacts on women's equality

There may be potential benefits from encouraging shared parental responsibility after separation. Perhaps something can be achieved after separation that, in most relationships, does not happen before, that is, real sharing of the caring. For example, a potential benefit of genuine shared parenting in appropriate cases could include reducing the burden of child-care on single mothers. Other benefits for the mother (and

children) of shared parenting after separation may include the possibility of pursuing economic independence, time freed for other pursuits in the 'public' sphere,¹⁰ having someone to share the responsibility for care of children who are sick or on school holidays, and having another source of life experiences and emotional support for children. It seems to me that these are important, but scarcely addressed, potential benefits of the policy change.

We must be wary of thinking, however, that by putting something in a law we make it happen. As Susan Boyd, a Canadian feminist writer in this area, has commented: 'It is ... largely beyond the power of statutory language to make parents behave better or co-operate in child custody disputes'.¹¹ If we accept this view, then the gains from the language of co-operation and shared parenting are vastly outweighed by the costs of failing to address sufficiently in the legislation inequality and power imbalances.

Feminist commentators have long challenged legal presumptions of joint custody post-separation (increasingly built into legislation in the United States) as failing to promote women's substantive equality. Australian women's groups, including the National Women's Justice Coalition, have expressed concern about the emphasis on shared parenting in the new legislation.¹² Recent empirical work carried out by English feminist Carol Smart supports claims that the UK *Children Act* (on which parts of the Australian legislation are modelled) is having disadvantageous effects on women.¹³

Issues of women's social and economic inequality and power imbalances in domestic relations are not accommodated under the amended provisions of the FLA.¹⁴ As some feminist theorists have pointed out, formal equality does not result in substantive equality because formal equality fails to take account of the subordinated position of women within society. The legislation, in focusing on shared parenting, denies the reality that it is women who are usually the primary caregivers of children. Thus the vast majority of the caring for children before and after separation is done, and is likely to continue to be done, by women. Yet women are denied the legal authority needed to carry out this responsibility.

Further, the emphasis on private dispute resolution and agreement is predicated on the negotiating parties having equal bargaining power. Power imbalances, particularly resulting from the social and economic disadvantage of women and the violent and controlling behaviours used by some men, may well be exacerbated by the legislation.

Other specific concerns about the potentially subordinating effects on women of the new FLA legislation relate to the following:

- the interpretation of the best interests of the child;
- the potential for continuing control of women by men;
- the negotiating position of many women;
- the notion of the idealised family; and
- the fairness to women of the new provisions.

Interpretation of best interests

The FLA amendments provide new opportunities for the 'best interests of the child' to be interpreted in ways which are adverse to women's interests and which fail to reflect women's realities. For example, the new legislation implies that it could be in a child's best interests for that child's custodial parent to be exposed to a risk of family violence (s.68K(l)). To take another example, recent decisions of the

Family Court under the old legislation recognise the importance of mobility for women (see *I and I* (1995) FLC 92-604). The new emphasis in the legislation on joint parental responsibility and contact could mean that judges become more reluctant to grant orders allowing a parent with a residence order to move out of the jurisdiction (even if this is necessary, for example, to find work or family support, or to escape from violence). In a recent Canadian test case on the relationship between the best interests test and rights of equality under the Canadian Charter, it was argued that lack of mobility for the custodial parent is an equality issue (see *Goertz and Gordon*; Factum of Women's Legal Education and Action Fund, lodged in the Supreme Court of Canada, November 1995).

Potential for continuing control

Violent and controlling men are likely to use the language of the legislation in ways which continue to oppress and manipulate women. For example, the legislation provides that 'children have a right of contact, on a regular basis, with both their parents ...' (s.60B(2)(b)). It is easy to see how this language could be used to claim a father's right to contact. The legislation is also likely to result in a need for more detailed orders than was the case before the amendments. The amendments will put more power into the hands of those fathers who do not assume real responsibility, but who take advantage of the notion of joint parental responsibility post-separation to exercise continuing control over the mother and children. Yet fathers cannot be required under the legislation to co-operate and provide the child with the 'right to contact' that the legislation so lauds. Thus, assuming that women will continue to be the primary caregivers of children after separation, the language of co-operation has gendered impacts. Mothers can be required to 'co-operate' with fathers, but the obligation is not reciprocal.

Women's negotiating position

Because women are usually the primary caregivers of children they will often have a greater stake in the outcome of decisions about children. If both parties want the mother to continue primary caregiving, legislation granting men increased 'responsibilities' (entitlements?) for children can be used by men to bargain for financial outcomes which advantage them and disadvantage women and children.

Further, the potential for unfair outcomes is increased with the greater emphasis on private dispute resolution in the legislation and the very limited availability of legal aid funds to litigate disputes.

Confronting the idealised family

The new reforms are immersed in an ideology of the idealised family in which, with a bit of encouragement, the adults will put the best interests of children first and rationally negotiate how those and their own interests will be met. Confronting this ideology will be enormously difficult. There is no explicit preference for 'no order' as there is in the UK *Children Act*. However, the language of agreement in the FLA, accompanied by new moves toward private forms of dispute reso-



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lution, will undoubtedly make it more difficult to bring cases to court. The exhortation that 'parents should agree about the future parenting of their children' (s.60B(2)(d)) is on one level laudable, encouraging, and supportive of healthy parent/child and ongoing family relationships. However, when this language is applied to a relationship involving a power imbalance, such as the many relationships involving domestic violence, it may be used in subtle and not so subtle ways to pressure the vulnerable parent into accepting outcomes that advantage the father more than the mother and children.¹⁵

The idealised view of family and shared parenting which underlies the legislation can be used to paint women whose family experience does not reflect the ideal as deviant. Combined with increased moves towards mediation, mothers may be painted as difficult and unco-operative for refusing to agree to fathers having control in an area in which the father has never been significantly involved. Add to this the likely financial disadvantage of many women compared to men, and the very limited availability of legal aid funds for litigation, and the likely subordinating effects of the legislation for women become clear.

Fairness to women

The absence of reference to fairness to women in the debate about family law reform is one of the points Carol Smart makes in her work. Carol Smart interviewed mothers as part of a pilot study into the outcomes from the UK *Children Act* in relation to decisions about the care of children after divorce. In her interviews with mothers, she found that:

... they felt that they were losing the most important role they had in their lives, that of being mothers. They felt especially cheated in that they had assumed that they had entered into a socially recognised contract in which they would give up careers and pensions in return for this role. The response of the new family law to their expressions of unfairness has, however, been

to accuse such women of selfishness for putting themselves before the future interests of their children. Little or no weight has been given to the gender contract they entered into in good faith. These mothers did not wish to deny their husbands contact with the children, nor did they expect to receive large amounts of maintenance. But they were astonished to discover that, having done what social policy and political rhetoric required of them, at the point of divorce it counted for nothing and indeed began to appear to have been socially, financially and emotionally imprudent.¹⁶

What about the children?

I have argued that the new amendments to the FLA may adversely impact on women. A possible challenge to my argument is that the new amendments should be applauded as they require post-separation disputes about the parenting of children to be resolved in the best interests of the child, having regard to children's rights. Children's best interests and children's rights of course are important. However, this language can easily be co-opted by some men to silence women.

The rhetoric of children's rights has the potential to disguise value-laden decision making. Many commentators have pointed to the indeterminacy and subjectivity of the best interests of the child test. There is potential for the best interests of the child test to reflect gender biases and presumptions based on particular perspectives, rather than evidence about what actually does promote best interests (even if this was 'objectively measurable' within the discipline of psychology, for example).

The recognition that children have rights does not import 'objectivity' into decision making. Children's rights may be subject to selective use and interpretation. The amended FLA, for example, is very selective in its use of parts of the United Nations Convention on the Rights of the Child. Initially the 'objects' section of the Act (s.60B) was drafted in such a way that the child's right of contact was not explicitly expressed to be subject to the best interests of the child, which it is in the United Nations Convention. This was a concern as this right of contact could easily have been co-opted by non-custodial fathers. Effective lobbying by women's groups had this changed. Even so, s.60B makes no mention of the child's right to protection from physical and mental violence.

There is a great deal of work to be done to the legislation if the rhetoric of commitment to children's rights in family law is to become a reality. The limited reference to provisions in the Convention on the Rights of the Child does almost no part of this work.

The subjectivity and indeterminacy of both the 'best interests' and 'children's rights' tests, combined with the inextricable link between children's best interests and those of their primary caregiver, demonstrate the need to bring the discourse of women's equality into Australian family law.

Promoting women's equality: making appropriate shared parenting a reality

We need to look at ways to better promote women's equality in the new legislative context of shared parenting responsibilities after separation.

I suggest four ways to bring women's equality into this area of family law. First, there need to be sufficient and readily available legal aid and case management processes to ensure that women who need to litigate to have their own

and their children's interests protected can do so, and without being forced into endless private dispute resolution. Second, test cases raising issues of women's equality must be brought as early cases on the interpretation of the new Act will be crucial in establishing the parameters within which cases will be settled and litigated. Third, gender awareness programs for the judiciary and legal community need to accompany the reforms particularly to promote a fuller understanding of violence and its effect on women and children.

Finally, if the *Family Law Act* is to present an ideal model of shared parenthood post-separation the legislation should be accompanied by policies to make genuine shared parenthood both post and pre-separation more of a reality. We need to restart the stalled revolution by further politicising the 'private' world of 'intact' families. It is also vital that the legal system recognises and protects women for whom shared parenthood is not a possibility.

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My home is my haven, my home is my workplace

Annie Delaney

The failure of the legal system to prevent exploitation of outworkers in the clothing industry.



A report titled 'The Hidden Cost of Fashion' was launched in 1995 by the Textile Clothing and Footwear Union of Australia (TCFUA). This report collates, for the first time, detailed information about the number of homeworkers and the true extent of the use of home-based work in the textile manufacturing industry in Australia. It documents the daily work reality for most outworkers including reported violence and sexual harassment, not being paid for the work done, suffering from work-related injuries and working to tight deadlines, often forcing women to involve their children in the production process.

Homework has emerged as a major feature of the global economy. The International Labour Organisation (ILO) has documented home-based work in Australia, Europe, North and South America, New Zealand, Canada, Africa, Indonesia, India, the Philippines and many other Asian countries. It is estimated that every year for the last 10 years the number of home-based workers in the clothing industry in Australia has doubled. Ten years ago the estimated figure was 30,000 nationally. There are now 330,000 which means that for every worker in a factory, there are approximately 15 home-based workers.

Homework has become a cheap option for industrialised countries, as foreign competition increases, trade barriers are lifted, and transnational and national monopolies increase their market share. As a consequence, factories have closed and the manufacturing sector has shifted to a home-based workforce.

The majority of homeworkers are women, who are often the main income earner of the family. In Australia, refugee and immigrant women from non English speaking backgrounds (NESB), make up the majority of home-based clothing workers. Women in rural areas also constitute a significant proportion of homeworkers. They are a captive, often invisible and vulnerable workforce, and they make up a significant part of the informal global economy. Based on gender and racial discrimination, homeworking exploits people who have difficulties working in the open labour market.

Homeworkers in the garment industry work for as little as \$1-\$2 an hour, typically 12 to 18-hour days, seven days a week, and have no access to even the minimum conditions factory workers receive. This is long way from the award rate of \$10 an hour for a 38-hour week. Often they have to pay for the equipment, such as sewing machines and cottons and cover all costs of power for lighting, heating and running the machines. Employers usually put unrealistic time lines on the production time, compelling the workers to work around the clock. Many outworkers are forced to unlawfully claim social security in order to survive. The consequent fear of being caught can be exploited by employers to discourage outworkers from attempting to recover award wages.

It has been said that home-based work is ideal for women, as it enables them to cook, clean, care for children or elderly relatives and work at the same time. For most women, however, home-based work

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Photo: Sharon Jones

means working longer hours, receiving under-award wages, having less time to spend with their children, being increasingly isolated and exposed to dangerous work practices, and an overall decline in quality of family life.

The current legal position

The TCFUA faces many difficulties in enforcing existing awards under the current legal system. The most significant barrier is that few outworkers are aware of their legal rights. If the proposed *Workplace Relations Bill* is passed, these problems will only increase.

The Clothing Trades Award 1982 attempts to provide some protection. Clause 26 requires conditions of work given outside the employer's premises to be no less favourable than the award. Clause 27 extends to an outworker all the benefits of the award provided to factory workers, other than the sick leave benefits. Clause 27A requires employers using outworkers to be registered with the Australian Industrial Relations Commission and to provide details on all contractors and outworkers. Under this clause employees are also required to keep appropriate records, such as, the number of garments sewn, number of hours worked, and the price paid for each garment.

There are significant barriers to outworkers accessing this protection. The agencies responsible for the policing of existing award provision are the Department of Industrial Relations and the TCFUA. The Department only acts on complaints that are brought before it by exploited workers. As outworkers are often isolated and intimidated, very few cases come before the Department.

The TCFUA also faces many difficulties in accessing the outworker industry, which is often invisible and difficult to find. The power of the TCFUA under the *Industrial Relations Act 1988* to access and enter employers' premises to inspect employee records and conditions of work is of limited use where widespread noncompliance with the award by employers continues. Even where outworkers are reached by the TCFUA, remedies are often difficult to find. The practice of subcontracting is widespread and it is not uncommon for shelf companies to be set up to employ the outworkers, therefore creating difficulties in recovering unpaid wages, and making prosecutions time consuming and costly. In spite of these difficulties, the TCFUA has initiated some prosecutions against companies abusing outworkers and is currently the only organisation proactively working to end the exploitation in the industry.

The *Workplace Relations Bill* contains proposals to place limits on the existing rights of unions to gain access to employer premises. Clauses 286 and 286A of the *Workplace Relations Bill* provide that unions may only gain access to working premises on invitation from an employee or employees. Of significant concern is the requirement in subclause 286(8) that employees who have raised the complaint must identify themselves to their employers before a union can be granted access to work premises. These proposals will severely limit the ability of the TCFUA to engage in preventive policing against outworker exploitation. The majority of the Senate Economics References Committee, which tabled its report into the *Workplace Relations Bill* on 22 August 1996, recommended that clauses 286 and 286A not be implemented. The majority considered that the limitations on rights of entry in these clauses were burdensome, bureaucratic and could permit intimidation of employees. Concern was also expressed by the majority that the restrictions on union right of entry could be in breach of our international obligations. The government members of the committee, however, disagreed with the majority recommendation.

There is also concern that the intention of the *Workplace Relations Bill* to limit awards to 18 'allowable matters' (see clause 89A) will probably result in specialised provisions such as clauses 26, 27 and 27A of the Clothing Trades Award being removed. Those clauses are vital for the TCFUA to be able to provide protection to outworkers and to allow the union to monitor work practices.

Over the past two years the TCFUA began a new campaign to inform outworkers of their rights and where to get assistance. A national phone-in was conducted over two months in 12 languages. The phone-in and community seminars held in 1994 resulted in contact with over 4000 outworkers. The most common inquiry from homeworkers was how to get the award rate and how to recover money owed to them once they had completed the work. Other concerns raised included, fear of revenge if they complained, fear about coercion from employers forcing them to remain on social security payments while working, problems and uncertainty about taxation, having a licence to work, and their employment status.

The Department of Social Security, for its part, held an amnesty for outworkers from December 1995 to May 1996. The amnesty proved to have a very limited outcome because multilingual information for outworkers was available only two weeks before the end of the amnesty period, and no

complementary concessions were made by the Australian Taxation Office. Fear of repercussions from their employers and limited understanding of government departments left outworkers reluctant to take up the amnesty on offer by the Department of Social Security.

In 1994, the Labour Government funded an information campaign for outworkers. In the 1995 budget, a further \$400,000 was allocated, over two years, to continue the work the TCFUA had begun to inform outworkers of their rights, employers of their responsibilities, encourage companies to enter into ethical deeds of co-operation with the union, increase community and consumer awareness around the issues, and develop effective models of working with outworkers. The campaign was launched in February 1996 and cancelled in April 1996 by the new Coalition Government without any explanation for the decision.

Current government policy

In June 1996, International Labour Organisation Convention No. 177: The Homework Convention 1996 (the Convention) and accompanying recommendations were passed. The Convention requires governments to develop national policy for home-based workers and asserts the principle of equal remuneration for home-based workers as for the enterprise-based workforce.

It appears that the Australian Government may not ratify the Convention. Correspondence from Peter Reith's office to the TCFUA on the Convention and recommendations, stated that whilst:

the government is concerned about the exploitation of all workers, including homeworkers, it does not consider that home work is a suitable subject of regulation by a binding international instrument. Homework offers advantages to both employers and employees, including flexibility of work arrangements, improvements in productivity and the creation of employment opportunities. It is therefore important to avoid restrictions which could hinder employers and employees from enjoying the benefits of these advantages.

The proposed changes by the Coalition Government to the *Industrial Relations Act* in the name of a 'flexible workforce' will provide less protection to workers and will remove the role of unions in organising and representing workers. The proposed individual contracts in the *Workplace Relations Bill* known as 'Australian Workplace Agreements' have the potential to enshrine the exploitative work practices as documented in the textile industries into a legitimised process. Outworkers have no capacity to negotiate with their employers. In fact, it is a nonsense to use the word 'negotiate' as homeworkers either accept the work as it is offered or not at all. Moreover, it is expected that these changes would further contribute to an increase in home-based work in other industries. The changes will make union action on behalf of workers even more difficult than it currently is.

The position taken by the Australian Government is in contrast to the government initiatives presently under way in the United States. The discovery of 72 Thai immigrants held in virtual slavery in El Monte California working 17 hours a day for as little as 60 cents an hour, sewing garments for the country's major retailers resulted in a national outcry. The US Labor Secretary has personally led a program to deal with the widespread increase of sweatshops in the garment industry.

The US Department of Labor has launched a national campaign of enforcement starting with the nations retailers.

They have focused on enforcement of a 'hot goods' provision of the *Fair Labor Standards Act*. The Secretary of Labor called a retail summit to ask some of the nations major retailers to help deal with the sweatshop problem. The Department has since launched its Fashion Trendsetters list: it includes 36 retailers who have committed themselves to eradicate sweatshop conditions among their manufacturing contractors.

Senate Economics Committee Inquiry 1996

In April of this year, the Senate Economics Committee commenced an inquiry into outwork in the garment industry. This inquiry was initiated by Democrat Senator Sid Spindler. The committee will report on the outwork inquiry by the end of the year.

The TCFUA's submission recommended that a 'Sale Of Clothing Act', modelled on the *Trade Practices Act 1974*, be enacted so as to ensure that outworkers in the clothing industry receive conditions of employment which are fair, just and reasonable. This proposed Act would be similar to the *Fair Labour Standards Act* in the US. The TCFUA recommended that a monitoring body be established under this proposed Act, which would monitor industry compliance with the conditions of employment set for outworkers. The TCFUA also strongly recommended that a provision similar to Schedule 1 of the *Industrial Relations Act 1996* (NSW) be incorporated into the 'Sale of Clothing Act', so as to deem outworkers to be employees for the purposes of industrial relations legislation. Other recommendations put forward by the TCFUA included proposals for government ethical sourcing procedures, programs to assist NESB women workers in relation to childcare and overseas qualifications recognition, and labour adjustment programs for retrenched clothing industry workers. It was also recommended that current award provisions to protect outworkers be maintained, and that proper resources be provided to the unions to assist outworkers.

As a consequence of this inquiry, some employer groups have acknowledged the existence of exploitation within the industry and have submitted a proposal called a Code of Practice for the industry. The proposal is currently being discussed with the TCFUA. It has the potential to develop into a substantial system of regulation. It would include an accreditation process for manufacturers, a garment sewing time manual to standardise sewing times, and a 'clean clothes' labelling system. Retailers would commit to use suppliers who provided proof that their goods were produced by award paid workers, whether they be factory or home based.

Industrial action

The TCFUA recognises that it is crucial to develop strong links with community-based organisations to reach outworkers and to find ways to inform them of their rights.

A recent example of combined union and community-based action was a demonstration held outside a Melbourne Westco store. This action was an attempt to recover moneys allegedly owed to an outworker by a Westco contractor. Had the outworker been paid, the TCFUA says she would have received \$1 a shirt, which Westco sells for \$39.95. It was successful in that shoppers were supportive of the action and alarmed to learn that women are sewing in their homes for next to nothing, as major retailers in Australia are making record profits. However, the TCFUA says the company still

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Part-time work & indirect discrimination

Rosemary Hunter

Can indirect sex discrimination provisions be used to demand availability of part-time work in a wider range of occupations and on decent terms and conditions?

Working hours have traditionally been the subject of industrial regulation in Australia, while anti-discrimination laws have tended not to be used to question the way that jobs are defined and structured. Indeed, when anti-discrimination laws were first enacted, the industrial arena was largely exempted from their operation. With the gradual removal of these exemptions, what scope is there for women who wish to work part-time due to family responsibilities to argue that part-time work arrangements, or the lack thereof, are discriminatory?

Availability of part-time work

Around 75% of part-time workers in the Australian labour force are women, and of these, the majority are mothers working part-time in order to maintain an income and/or job skills while taking primary responsibility for child rearing. It would seem that there is plenty of part-time work available for women. More than half of the 1.8 million jobs created between 1973 and 1993 were part-time positions.¹ In the period 1978-93 there was an 89.6% increase in part-time employment, compared to only a 14.2% increase in full-time employment. Part-time employment grew from 16.0% to 23.9% of total employment.² Moreover, part-time job growth largely occurred in female-dominated industries, such as retail, finance, community services and recreation and personal services.³

Part-time employment has, however, been confined to low paid occupations such as sales and clerical work, and occupational sex-segregation has been shown to be directly related to the use of part-time labour.⁴ 'Women's ...access to occupations is highly dependent on whether they offer themselves for part-time or full-time work.'⁵ Managerial and professional positions (for example, in law firms) have been seen as incompatible with part-time work;⁶ there have been few attempts to redefine these positions to suit women's needs.⁷

In this context, some women have turned to anti-discrimination law to claim the right to part-time managerial or professional work. The first success was achieved in the case of *Home Office v Holmes* [1984] ICR 678, under the UK Sex Discrimination Act 1975. Ms Holmes was a single parent and civil service executive officer, whose contract required full-time work. On returning from leave after the birth of her second child, Ms Holmes applied for a transfer to part-time work, which was refused. She then complained to an industrial tribunal that the full-time requirement indirectly discriminated against women. That is, it was a requirement with which a higher proportion of men than women were able to comply, and it was not justified in the circumstances. The tribunal's decision in her favour was upheld on appeal.

Two subsequent Western Australian cases reached a similar result. In *Speering v Ministry of Education* (1993) EOC 92-513 and *Nicholls v Minister for Education* (1994) EOC 92-573, the complainants were temporary teachers who were unable to work full-time because of

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family commitments. The Ministry of Education introduced a scheme to enable temporary teachers to convert to permanent employment, on completion of one year's full-time probation. The Western Australian Equal Opportunity Tribunal accepted that the requirement of full-time probation was indirectly discriminatory.

It might be queried, then, why these decisions have not had more of an impact. One possible reason is that indirect discrimination provisions are not widely used or understood in Australia.⁸ Another reason is that permanent part-time employment options have been restricted by industrial awards (so as to protect full-time jobs for male breadwinners).⁹ Many awards made no provision for permanent part-time employment, or limited the allowable proportion of such employment. In the Australian Public Service, for example, the former award imposed a service-wide quota of 6% permanent part-time staff.

As noted above, the provisions of awards were generally exempted from anti-discrimination legislation. Western Australia was one of the few States to remove this exemption at an early stage, which enabled the *Speering* and *Nicholls* cases to be brought there. Most jurisdictions have now followed suit, however. It is possible, for example, to lodge a complaint under the *Sex Discrimination Act 1984* (Cth) in respect of allegedly discriminatory action under an award. The Australian Industrial Relations Commission is also required to remove discriminatory provisions from existing awards, and must take account of the principles of the *Sex Discrimination Act* in making new awards.¹⁰ The Government's *Workplace Relations and Other Legislation Amendment Bill 1996* maintains these arrangements. Thus, the unavailability of or limit on permanent part-time work in a federal award (or certified agreement) or in many State awards would now be open to challenge. In future, the *Workplace Relations Bill* will not allow award clauses restricting the proportion of part-time work to be made (proposed s.89A(4)(a)). The terms of enterprise or workplace agreements (as well as individual contracts) are also fully subject to anti-discrimination law. Women seeking to argue that limits on part-time work are indirectly discriminatory will also be assisted by recent amendments to the *Sex Discrimination Act*, which place the onus of proving the reasonableness of a challenged requirement on the respondent.¹¹

Conditions of part-time work

Where permanent part-time work was not provided for or was limited in an award, part-time workers were employed as 'casuals' and paid a casual loading in lieu of benefits and entitlements. In 1993, 67.2% of part-time workers were employed as casuals.¹² In recognition of the disadvantages of casual employment, much effort was made in the award restructuring process in female-dominated industries to convert casual to permanent part-time employment, thereby giving women pro rata access to leave entitlements, superannuation, redundancy pay, rights against unfair dismissal, and in some cases, opportunities for job mobility and transfers to full-time work.

The evidence from recent enterprise agreements is that the category of permanent part-time work is continuing to expand, but at the same time, the terms of such work may be deteriorating. To date, part-time workers have been less likely than full-time workers to be covered by enterprise agreements,¹³ leaving them unrewarded for productivity increases and reliant on safety-net wage rises. Training and

promotion may still not be available.¹⁴ Even in the much lauded Sheraton Agreement, the available training is scheduled on rostered days off, making access very difficult for women with family responsibilities.¹⁵ In banking, the boundaries between permanent part-time and casual employment have been blurred, with agreements providing for pro rata benefits on specified minimum hours, with a casual loading payable in lieu of benefits on hours worked above the minimum.¹⁶

Here again, anti-discrimination laws may be called on to challenge inferior terms and conditions for part-time workers. In the *Nicholls* case (above), the unavailability of promotion for part-time teachers, and a preference for full-time applicants, were also held to indirectly discriminate against women. In the European Union, part-time workers have successfully challenged denials of sick pay, severance payments and access to occupational pension schemes, lower hourly rates, and longer qualifying periods for salary increments, on the basis of indirect sex discrimination.¹⁷ In *R v Secretary of State for Employment; ex parte Equal Opportunities Commission* [1995] 1 AC 1, the qualifying thresholds in the *Employment Protection (Consolidation) Act 1978* (UK), which distinguished between part-time and full-time workers in determining eligibility for compensation for unfair dismissal and redundancy pay, were held by the House of Lords to constitute indirect sex discrimination.

Hours of part-time work

Under the award system, permanent part-time workers were employed for a fixed number of hours per week. Enterprise bargaining has given employers, above all, greater control over the hours of work of part-time women employees, through mechanisms such as averaging hours over a four-week period, or rotating shifts. The consequences for women have been less predictability and shorter notice of changes in hours, which are inimical to stable and cost effective childcare arrangements.¹⁸ Under the *Workplace Relations Bill*, part-time work will be completely deregulated, with the Industrial Relations Commission unable to specify maximum or minimum hours of permanent part-time work, and Australian Workplace Agreements prevailing over awards in any case.

In *Zurek v Hospital Corporation Australia Pty Ltd* (1992) EOC 92-460, several women complained to the Victorian Equal Opportunity Board that the implementation of permanent part-time work pursuant to award restructuring discriminated against them because of their sex and/or parental status. The complainants had been employed for a number of years as casual workers on weekend-only shifts, which enabled them to combine work and weekday childcare. When they were redefined as permanent part-time, they became subject to rostering arrangements that did not apply to casuals, and which required them to work some weekdays. Their case failed due to the exemption in the former *Equal Opportunity Act 1984* (Vic.) for actions pursuant to a lawful industrial agreement. The single mother complainant in *London Underground Ltd v Edwards* [1995] ICR 574 was more successful. There, a rostering change which clashed with the complainant's childcare arrangements was held to be unlawful indirect discrimination. Thus, where industrial agreements are not immunised from the operation of anti-discrimination legislation, part-time working hours which make it impossible to fulfil family responsibilities are also open to challenge as indirectly discriminating against women.

Conclusion

Permanent part-time work is one way for women to combine work and family responsibilities, although it is not necessarily the best possible solution. It does not cater well for school holidays, for example. Nor does it enable women to achieve the feminist ideal of economic independence. Other measures are also needed, such as subsidisation and/or tax deductibility of commercial childcare,¹⁹ and a breakdown of the gender division of labour in the workforce and in the home. Likewise, a series of indirect discrimination cases would not, in isolation, achieve a systemic improvement in the status and value of part-time work. Nevertheless, the potential of indirect discrimination provisions to provide access to permanent part-time work, on decent terms and conditions and at family-friendly hours, has not yet been fully exploited in Australia. Current deregulatory moves present both dangers and opportunities, as sex discrimination legislation gains wider coverage of employment arrangements. This is an area that could fruitfully be explored by unions, Working Women's Centres and women's legal services in their efforts to make the labour market more responsive to the needs of women with family responsibilities.

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refuses to pay the outworker. This highlights the limitations for industrial action by outworkers, who are isolated and disorganised. Westco is one example of the 146 labels documented by the TCFUA as being made by below award paid outworkers. A list of such labels was submitted to the Senate Inquiry by the TCFUA, including well known brands: Susans, Katies, Laura Ashley, JAG, Perrie Cutten, Ojay and Anthea Crawford.

The TCFUA has also been working directly with retailers and manufacturers, who have the ultimate responsibility of eradicating the exploitation of their workers. One example of employers recognising this responsibility is the deed of co-operation signed between the TCFUA and Target Australia in 1995. The agreement subjects the company and its suppliers to monitoring to ensure that all Target garments are made by workers who receive their lawful pay and conditions. Companies who sign these agreements are promoted as best practice organisations. The TCFUA is encouraging other retailers and label owners to enter into similar agreements rather than continue to shield themselves from responsibility for the workers producing their products.

Most recently, the TCFUA and the Uniting Church are involved in the Fair Wear Campaign. The Campaign is intended to lobby retailers and manufacturers to adopt a code of practice for the garment industry, to lobby the Australian

Government to ratify the Convention and to educate consumers about the exploitation of homeworkers and ethical shopping.

Conclusion

In conclusion, the nature of outworking links women as workers, mothers, carers and producers into an exploited and vulnerable underclass in Australia today. Conditions for this group of workers are now worse than those experienced by garment workers 100 years ago. Legal protection has gone some way to legitimising outwork, but so far minimum conditions elude the majority of home-based workers. Labour organising has focused on the factory-based workforce which is declining in numbers. The challenge now before unions and the legal system is how to be relevant to this group of workers.

Broader initiatives have begun in earnest in the last two years which now show evidence of the links between ethical sourcing and ethical consumerism and the issues affecting outworkers. Working alliances between the union and community organisations, women's groups, churches and aid organisations have laid the foundations for future work to assure outworkers can access minimum protection.

For more information about the Fair Wear Campaign contact: Uniting Church, 4th Floor, Little Collins Street, Melbourne (03 9654 2488) or Annie Delaney, Outwork Coordinator, TCFUA (03 9347 3377).

CONTEMPT or Confidentiality?

Annie Cossins

Counselling records, relevance and sexual assault trials

Experience from America and Canada has shown that counselling records are sought by defence counsel in sexual assault trials as an alternative way of obtaining access to the same type of 'bad character' evidence that rape shield provisions were designed to address, and as a tactic for intimidating complainants into withdrawing their complaints. In recent years, this tactic has caught on throughout much of Australia with several sexual assault services in NSW and other States reporting an increase in the numbers of subpoenas received in relation to counselling records.¹

In NSW, the issue of protecting the confidentiality of counselling records in response to defence subpoenas may well have remained out of the political spotlight if it had not been for the stand that the Canberra Rape Crisis Centre took and the subsequent imprisonment of their administrator for contempt of court, since, as a direct response, the NSW Attorney-General announced that the NSW Government would draft legislation to address the situation that led to her imprisonment. (See box by Angela Jones for an insider's view of the Canberra Rape Crisis situation.)

Unfortunately, the *Evidence Amendment (Confidential Communications) Bill 1996*, which has been the NSW Government's response to the legal and ethical dilemmas faced by sexual assault counsellors, is severely limited in its ability to protect the confidential communications between a complainant in a sexual assault trial and her counsellor. The Bill, which was released for public comment in June 1996, contains a *general*, non-specific judicial discretion which covers any confidential communications that fall within the definition of a 'protected confidence'.² The discretion *may* be exercised by a judicial officer if he or she is satisfied that the public interest in protecting the confidentiality of particular confidential communications outweighs the public interest in protecting the rights of the accused to adduce all available evidence. However, the Bill has not been drafted specifically to protect the confidentiality of counselling records.

This is because the *main* impetus for the introduction of a judicial discretion in NSW was, in fact, a perceived need to protect journalists' confidential sources of information³ and, as a result, the proposed general judicial discretion is broadly drafted, lacks the specificity needed to address the well-documented disadvantage that complainants face in sexual assault trials, and fails to prioritise the public interest in preserving the confidentiality of the complainant/counsellor relationship over the rights of the accused.

In fact, from the Attorney-General Department's discussion paper which accompanied the Bill,⁴ it is clear that the issue of disclosure of counselling records in sexual assault trials has only been superficially examined by the NSW Government, since it has failed to see the connection between defence access to these records and the subversion of rape shield provisions, and failed to recognise that the judicial discretion will actually provide *less* protection for counselling records.

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The Insider's View

by Angela Jones

'I salute you,' were the comments in one letter of support, 'and encourage you and I want to say thank you and don't give up'. Wrote another, 'What you are doing is outstandingly courageous — and absolutely right'. Such words of solace sustained us at the Canberra Rape Crisis Centre (CRCC) when we chose contempt of court over releasing a client's file to the defense counsel.

We were made starkly aware of this tactic during the First National Conference on Sexual Assault and the Law in Melbourne in November. The keynote speaker spoke of a common Canadian defense counsel habit of subpoenaing the records of sexual assault counsellors. Peculiar timing; whilst hearing of this practice, the CRCC was subpoenaed. We considered this a rather woeful defence ploy, so chose to oppose the subpoena.

And the Queanbeyan magistrate agreed with us. He saw defence counsel on a fishing expedition, hence was not prepared to permit them access to the file. He considered it best, however, if the trial judge ultimately decided the matter and ordered the file be kept at the court house. On this point we disagreed.

One of the primary roles of the CRCC is to provide confidential support and counselling to women who have experienced sexual abuse. In court in December, we merely chose to abide by our policy of confidentiality — any information received in a counselling session remains with the CRCC. Period. This includes access by the court.

While one CRCC worker was incarcerated for contempt, two others hastened from the court room. We departed to defence counsel's bellows of, 'Arrest those women. Arrest them. They have the file.' To which the magistrate proclaimed, 'Just who is it that I should issue the arrest warrants for? Jane Does? Description: two ladies with handbags?'

compared with the protection presently available in NSW under the common law.

The starting point of the judicial discretion proposed by the NSW Government maintains the rule of evidence that a witness is required to answer any questions or produce any document (where deemed relevant) or face prosecution for contempt of court. This means that, when the discretion is exercised, it is merely a *relaxation* of the rule in particular circumstances, so that the *onus* will be on the witness (either the counsellor or the complainant) to make out a case for being excused from producing any counselling records. Remarkably, the Bill represents a reversal of the present onus on the defence to show a legitimate forensic purpose for counselling records or other documents the subject of a subpoena, in circumstances where a counsellor in receipt of a subpoena decides to challenge its terms.⁵

The judicial discretion in the NSW Bill clearly places too great a burden on a counsellor or complainant to establish why a counsellor should be excused from producing the

With legal guidance, a compromise was struck. The CRCC worker was released, but the file remained and still remains in a locked briefcase, unsighted, at the Queanbeyan Court with only CRCC workers knowing the combination.

Our alarm regarding the release of these documents has a number of elements of which I shall note just two. We are concerned that if we produce the documents requested, even more women will be discouraged, not just from reporting the assault to police, which is strewn with its own obstacles, but discouraged from even seeking support to deal with the trauma of their experience.

There is another matter that we found discouraging. When we said no to defence counsel access and no to the file being held by the court, we did so in opposition to legal advice, from a number of different sources, which recommended we do otherwise. The repeated legal response was 'release the file'. We were advised to operate within the law's existing parameters. Therein lay a problem, for the law conflicts with what we see as a quintessential part of our service. Confidentiality. The files at CRCC are made and kept with this undertaking. Yet the law demands a breach of this promise. We could of course, pursue alternative options in conducting counselling sessions. But when does it come time for the law to avail itself to sexual assault survivors and their counsellors?

As those who are not highly legally trained, we did not know what the best legal path was, nor do we now. And so I echo the challenge of Liz Sheehy, Canadian academic, a challenge to step beyond the confines of legal training and what is currently legally permissible. We want to draw doors where none now exist. Then open them. This we cannot do alone. But if we must, we will paint blue sky on jail walls.

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complainant's counselling file. The burden not only has implications for the likely disadvantage to the complainant in a sexual assault trial, but also has resource implications for counsellors and sexual assault services: are sexual assault services and private counsellors sufficiently resourced to hire legal representation or will counsellors be willing to appear in court themselves? If a counsellor is not willing to make out a case to protect her/his client's confidentiality, will complainants have the resources to hire legal representation themselves?

The fact that the NSW Government has chosen a general judicial discretion as the means by which to protect the confidentiality of the client/counsellor relationship gives rise to these and a number of other serious concerns:

A judicial discretion is only as good as the person exercising it and there is an historical judicial tendency to give great weight to an accused's right to adduce all relevant evidence.

There is a substantial risk that stereotype and myth will affect the exercise of the discretion, since there is suffi-

- cient evidence to show that male judges and magistrates (who constitute the vast majority of the judiciary) are likely to adhere to the myths that when a woman says 'no' she often means 'yes', that women often lead men on and then cry rape to protect their reputations and that if a woman has had consensual sex with one man on a casual basis outside of marriage she is likely to consent to sex with any man.
- If disclosure is granted, the records can be used by the defence to prejudice judicial officers and juries against complainants.

Judicial officers will be required to undertake a new balancing process in every individual case which means that variation in approaches by different judicial officers will give rise to inconsistency and an inability to predict when disclosure will occur.

- No guarantee of confidentiality can be given to victims of sexual assault at the time of counselling, since there will be no way of predicting the circumstances in which the discretion will be exercised in favour of the public interest in protecting a complainant's confidentiality.
- A general judicial discretion does not provide sufficient safeguards to adequately address the specific problems associated with breach of confidentiality and its impact on:
 - the personal safety and recovery of victims of sexual assault;
 - re-victimisation of complainants by the criminal justice system;
 - the introduction of potentially unreliable and inaccurate hearsay evidence of counsellors;⁶

If Only I Didn't... Maybe I Wasn't...

by Patricia Easteal

When she talks to the sexual assault counsellor/advocate, the survivor may express feelings of responsibility for the assault and some self-doubt. Such emotions are the by-product of the false mythology about rape that acts to insidiously impinge blame to the victim and to dichotomise sexual assault into 'real' rape with something else perceived as less than genuine or legitimate. The survivor grows up exposed to those fallacious beliefs and internalises them.

'Since it was my husband, (boy-friend, date, neighbour ...) it wasn't really rape,' the client may cry out in confusion. She doubts her status as a 'real' victim due to her relationship with the perpetrator. She is prey to the same doubts about her victimisation as the one quarter, in a national survey, who disagreed that 'women are more likely to be raped by someone they know than a stranger' and the more than half who did not agree strongly.¹

'Maybe I shouldn't have gone there with him. Perhaps I should have worn a different dress,' the survivor confesses to the counsellor. Her shame is derived from myths about the nature of sexual assault that include a perception of rape as a sexual act and male sexuality as uncontrollable if aroused. The onus is therefore on the victim for not only not controlling his libido but probably provoking it. Again, her feelings coincide with those held by some in the community. Almost one third in an Australia-wide survey on beliefs about rape were either undecided or agreed that 'women who hitchhike have only themselves to blame if they are raped' and more than one quarter either disagreed or were undecided that 'there is no behaviour on the part of a woman that should be considered justification for rape'.²

'Why didn't I run away? Why didn't I struggle more?' These questions come from false beliefs about what sexual assault involves — force, a weapon, penetration of the penis and of course resistance by the woman. If the assault didn't involve physical force, her fighting back, and penile penetration — and many don't — more self-doubt and feelings of being responsible will be engendered.

The counsellor can help her to understand that the assault was not about sex and provocation but about violence and the desire to exert power and humiliate. The counsellor can help her to see that many forms of covert forms of coercion and force may be used in rape. That it was her fear of the assault and its outcome or her history of other sexual abuse or her socialisation that rendered her passive — not compliant and not consenting. The counsellor can also show her the studies which indicate that only one-fifth of rapists are strangers.

To shift from victim to survivor, the women must talk about their shame, self-blame and doubt. Given the low trust levels of those who have been violated, beginning to share about what happened is not easy. Rape crisis services were seen as the best source of support by the women who completed a national survey,³ better than family who often judged and better than friends who did not know how to deal with the situation. Can a woman, however, trust if the records of counselling are not privileged and confidential? If not, then the best means of helping her closes.

If she does turn to a sexual assault service and the counselling records are admitted as evidence in court, her initial feelings of shame and doubt are replayed acting to blame her and exonerate the perpetrator. Any erroneous views and stereotypes held by jurors and judges are reinforced. Consequently, the cycle of community mythology, victim blaming and women's self-doubt is perpetuated within the courtroom.

References

1. Office of the Status of Women, 'Community Attitudes to Violence Against Women', Canberra, AGPS, 1995.
2. Easteal, Patricia, 'Beliefs About Rape: A National Survey', in *Without Consent*, Australian Institute of Criminology, Canberra, 1993.
3. See Easteal, Patricia, *Voices of the Survivors*, Spinifex Press, 1994.

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- the use of confidential communications outside of an understanding of the therapeutic and healing process; and
- a decrease in, and continued under-reporting of sexual assault and consequent under-prosecution of offenders.⁷

Counsellors who are charged with the responsibility of resisting defence access to counselling records are, in fact, engaged in a new battlefield with defence lawyers over the respective rights of the complainant and the accused in a sexual assault trial and face the ethical dilemma of supporting their clients or becoming a *de facto* arm of the criminal justice system.

Although the NSW judicial discretion is the only proposed protection of its kind in Australia today, it is, unfortunately, an inadequate response to serious flaws in the way sexual assault trials have been and continue to be conducted as inquiries into the moral worth of complainants. As noted by the NSW Parliamentary Standing Committee on Social Issues,⁸ the judicial response to the NSW rape shield provision⁹ shows how judicial officers can undermine the intention of Parliament to remedy the injustice imposed on complainants in sexual assault trials.

If the NSW Government or any other State or Territory Government is serious about creating a remedy for the situation that led to the gaoling of the Canberra Rape Crisis Centre's administrator, the history of judicial interpretation of rape shield provisions shows that governments must consider a more effective law reform option than a judicial discretion to prevent the discretion succumbing to a similar fate.

Any legislative reforms must have as their rationale the same rationale which saw the introduction of rape shield laws in the 1980s, and must be informed by the likelihood that unless adequate legislation is introduced counsellors will resist defence subpoenas and be willing to risk imprisonment for contempt of court.

An alternative option for protecting the confidentiality of counselling records

Arguments based on both basic principles of evidence and public policy grounds are sufficient to support major legislative reform to protect records from disclosure in the form of a statutory exclusion. A statutory exclusion is a form of protection which would make counselling records completely inadmissible in pre-trial or trial proceedings and is based on the premise that counselling records are not relevant to the facts in issue or the credibility of the complainant in a sexual assault trial. The statutory exclusion would have the effect of preventing the counsellor of a complainant in a sexual assault matter from disclosing the confidential communications of the complainant. This would mean that, at the time of counselling, counsellors would be able to give an assurance to their clients that all their communications were confidential and protected by law. After canvassing other options, it is my view that a statutory exclusion is the best method for adequately addressing the effects of disclosure of confidential communications on victims of sexual assault, counsellors, sexual assault services and the administration of justice.¹⁰

Critics of the creation of a statutory exclusion are likely to raise the objection that such a provision would have the general effect of 'depriv[ing] judicial proceedings of information which would be relevant to the determination of issues and to the interests of justice'.¹¹ In particular, it is likely

to be argued that the creation of an exclusion will be detrimental to the administration of justice on the grounds that confidential communications in counselling records may be critical for determining the innocence of an accused person in a sexual assault trial and that, in the absence of such information, an accused may be wrongly convicted. For that reason, critics will argue that such records are, in fact, relevant and that the public interest in the protection of confidential communications within the client/counsellor relationship does not outweigh the public interest in courts having available to them all relevant evidence. But is such an objection well founded?

The concept of relevance in a sexual assault trial

Relevance, as a legal concept, is founded on the notion of commonsense.¹² By way of definition (but not elucidation), evidence at common law will be admissible in court if it is considered to be directly or indirectly relevant to a fact in issue or to the credibility of a witness.¹³ The NSW *Evidence Act* defines relevant evidence as that which 'if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'¹⁴ or the credibility of a witness.¹⁵ However, because of the persistence of rape myths in sexual assault trials, 'the question that must be asked ... is, why are [counselling] records deemed, or more likely to be deemed, both relevant and necessary in sexual assault trials'?¹⁶ (See Box by Patricia Easteal for a discussion of the mythology.) In other words, what makes such records relevant?

Arguably, counselling records are considered to be relevant based on the hypothetical premise that they may reveal a complainant's statement that the accused did not commit the alleged sexual assault, that she consented to sexual relations with the accused or that the records contain a prior inconsistent statement. Except where it might be assumed that the complainant has made a mistake as to identity, this premise can *only* be sustained by the myth that women are prone to making false claims of sexual assault for the purposes of protecting their reputations or seeking revenge. In this way, by using the sense common to Western cultural and legal thought, the records become relevant. That commonsense, however, is founded on masculinist beliefs of women's unreliability, dishonesty and moral unworthiness but to a holder of that commonsense belief, it would be inherently logical to deem that counselling records are relevant to determining the lack of credibility of a particular complainant. In this way, it can be seen that relevance,

Whatever the test, be it one of experience, common sense or logic ... is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic.¹⁷

Relevance in a sexual assault trial has historically been imbued with stereotypical and mythical notions of 'good' and 'bad' women and girls. In fact, disclosure to the defence and admissibility of a complainant's counselling file must be examined in light of the historical common law legacy which stripped a woman of credibility if she had 'engaged' in sexual activity. As a result of this legacy, a *de facto* 'presumption of guilt' is placed on female complainants in sexual assault trials, so that it can be said that it is the complainant who is on trial and must prove her 'innocence' in that she did not consent to sexual relations with the accused. This is not surprising given the fact that:

The traditional common law position with regard to witnesses who alleged rape, was that women who participated in consensual sex outside marriage could be cross-examined about their sexual activity. *Prior sexual activity was said to be indicative of a propensity to consent to sexual activity at large.* The common law also considered a complainant's sexual activity as relevant to her truthfulness.¹⁸

In fact,

Distrust and contempt for the unchaste female accuser was formalised into a set of legal rules unique to rape cases. The most prominent rule allowed the use at trial of evidence of the complainant's unchaste conduct. *These rules combined to shift the usual focus of a criminal trial from an inquiry into the conduct of the offender to that of the moral worth of the complainant.*¹⁹

That sexual assault trials are still conducted as inquiries into the moral worth of complainants is evidenced by the cases in which 'unchasteness' is considered to be relevant to the issue of consent and a complainant's credibility. Whilst rape shield provisions exist in every Australian jurisdiction to limit the admissibility of a complainant's prior sexual history and, hence, the ability of defence counsel to bring the 'moral worth' of the complainant into question, the increasing limitations of these provisions has been discussed in several reports and papers.²⁰

In light of the cultural context of sexual assault trials, counselling records are likely to contain a range of information that can be used to invoke the stereotype and myth that plagues sexual assault proceedings, such as the number of past sexual relations, the existence of illegitimate children, drug, alcohol and psychiatric histories, rebellious childhood history and so on. From post-trial interviews with jurors, La Free *et al* have documented that 'a victim's nontraditional behavior may act as a catalyst, causing jurors' attitudes about how women should behave to affect their judgments under certain conditions'.²¹ In fact, their findings give weight to the dangers associated with the disclosure of counselling records in sexual assault trials:

Although any evidence that a woman was forced to submit to a sexual act against her will (including use of a weapon or victim injury) might be expected to persuade jurors of the defendant's guilt, neither variable significantly affected jurors' judgments ... In contrast, jurors were influenced by a victim's 'character'. They were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant — however briefly — prior to the alleged assault.²²

On the basis of such evidence, it can be expected that there will be a direct correlation between the amount of 'bad character' information that is introduced by the defence about the complainant and rates of conviction, *irrespective of whether the 'bad character' information is confirmed.*²³ More importantly, for the purposes of this article, it can be expected that there will be a direct correlation between the extent to which information from counselling records is used by the defence to establish a complainant's 'bad character' and low rates of conviction for sexual assault.

In relation to determining the relevance of counselling records in a sexual assault trial, L'Heureux-Dube J in *R v Osolin* has suggested that '[T]he best way to examine the question of relevance is to place the proposed use of psychiatric [or therapeutic] evidence in the circumstances of the ordinary trial' (at 500). In other words, will the issue of the relevance of such records be determined differently in other criminal trials? If the view is taken that such records are more

relevant in a sexual assault trial, will it be because of the conscious or unconscious myth that victims of sexual assault are inherently less credible and more untrustworthy than other witnesses? In addition, '[t]here is no doubt that any attempt by the Crown to conduct a wide-ranging inquiry into the entire medical [or therapeutic] history of a criminal accused would be met with concerns about prejudice to the accused and irrelevance to the issue at trial' (at 491). In a context where a complainant in a sexual assault trial is required to rebut presumptions about her moral unworthiness and the myths associated with women who are raped, the same concerns of prejudice and lack of relevance should have direct bearing on the disclosure and admissibility of counselling records.

A different commonsense view based on empirical evidence and the experience of complainants is that women who report a sexual assault face the risk of further victimisation by the criminal justice system and the risk that they are *more likely* to be disbelieved than taken seriously. Rather than counselling records containing a mine of information for the defence about the 'bad character' of the complainant, this commonsense view would see them as being peripheral to the trial process and a source of probable misinterpretation and bias. In fact, once the basis of relevancy decisions has been shown to be founded on stereotype and myth, information to do with prior sexual history, drug and/or alcohol history, psychiatric history, relationship with parents, feelings of self-blame and the like can have no bearing on the facts in issue in a sexual assault trial or the complainant's credibility.

Further, 'records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability' (at 496) and cannot be equated with other relevant evidence given in the course of a sexual assault trial, such as police statements from the complainant and other witnesses, medical examinations of the complainant, DNA evidence and the like. The unreliability of counselling records is compounded by the fact that complainants do not have the opportunity, as is the case with a police statement, to read the counselling records to ensure that they are an accurate reflection of their communications. Unless the counselling context and the methods by which information is elicited by the counsellor from the client are clearly understood by the judge and jury, the information in counselling records becomes an unreliable and inaccurate guide for ascertaining the facts in issue in a sexual assault trial.

The different commonsense views which can inform the concept of relevance are graphically illustrated in *R v Osolin*. Although, one of the majority judges, Cory J, conceded that the defence's purpose for cross-examination on a notation in the complainant's counselling records 'appear[ed] to be the very sort of improper purpose for which evidence cannot be adduced',²⁴ his Honour found that:

[I]t is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected. The trial judge had before him all the medical records. It would have been appropriate to permit cross-examination with regard to the [notation], particularly to determine if it would throw any light either upon a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances. [at 522; emphasis added]

Cory J reveals the influence of the myth that women are prone to make false allegations of sexual assault in his

appraisal of the relevance of the notation in question. Consider the different commonsense view of L'Heureux-Dube J who directly challenges the myths associated with women who allege sexual assault:

With regard to the ... notation, I am unable to see how this statement, four and a half months after the incident, can be at all relevant to the issues of consent or the appellant's mistaken belief in consent at the time. The complainant's reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent on the part of the appellant. In any event, it is hardly surprising that such statements are to be found in medical records; in this, as in other traumatic situations such as the death of a loved one ... it is not uncommon for people to blame themselves for the event. It is well known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack. [at 506]

Conclusion

The prejudicial basis of relevancy decisions in sexual assault trials clearly supports the enactment of a statutory exclusion to reflect the need to discard such prejudice in the interests of justice. In fact, for there to be any connection between information in counselling records and the credibility of the complainant or a fact in issue it 'must be bridged by stereotype (that "unchaste" women lie and "unchaste" women consent indiscriminately), otherwise the propositions make no sense'.²⁵

For these reasons, a statutory exclusion is the obvious method for preventing the perpetuation of masculinist notions of 'commonsense' about women and girls who are sexually assaulted. The inescapable conclusion is that a failure to legislate to protect counselling records from being disclosed in sexual assault trials will 'only frustrate further our still inadequate attempts to extend to victims of sexual assault the protection of the justice system to which they are entitled'.²⁶ Ironically, where a subpoena results in the disclosure of counselling records to defence counsel on the grounds of relevance and the accused's right to a fair trial, this places the criminal justice system's protection of victims of sexual assault at risk and implicates the criminal justice system as 'the means by which offenders escape prosecution'.²⁷

References

1. See Cossins, A. and Pilkinton, R., 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials', (1996) 19 *University of NSW Law Journal* 1.
2. A protected confidence is defined as '(a) a communication made by a person in confidence to another person (... called the confidant) acting in a professional capacity and who, when the communication was made, was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant, or (b) the contents of a document relating to a communication of a kind referred to in paragraph (a), or (c) information about, or enabling a person to ascertain, the identity of the person who made a communication of a kind referred to in paragraph (a) known by the the confidant': *Evidence Amendment (Confidential Communications) Bill 1996*, Schedule 1.
3. Nason, David, 'State Law Reform to Protect Sources', *The Australian*, 11 April 1996; Simper, Errol, 'Source Protection Proposition Draws Fire from all Directions', *The Australian*, 13-14 April 1996. The author has been able to verify that this was the main impetus from NSW Government sources.
4. NSW Attorney-General's Department, 'Protecting Confidential Communications from Disclosure in Court Proceedings', Discussion Paper, 1996.
5. *R v Saleam* (1989) 16 NSWLR 14 at 18, per Hunt J.
6. Even though a counsellor's notes are hearsay evidence, the notes may be held to be admissible as the result of an application of the following provisions of the *Evidence Act 1995* (NSW): s.43 (prior inconsistent statements of witnesses), s.106 (rebutting denials by other evidence), s.97 (exceptions to the tendency rule on the grounds of significant probative value) and exceptions to the hearsay rule, such as ss. 72, 66 and 69. See also Odgers, Stephen, *Uniform Evidence Law*, The Federation Press, Sydney, 1995, pp.90-3; 120-1. However, defence counsel are at liberty to refrain from tendering counselling records should they decide that the records do not assist their client's case. In fact, defence counsel may only intend to use the records to inform their cross-examination of the complainant.
7. These issues are addressed in detail in Cossins and Pilkinton, above.
8. Standing Committee on Social Issues, 'Sexual Violence: Addressing the Crime (Inquiry into the Incidence of Sexual Offences: Part II)', Legislative Council, Parliament of New South Wales, 1996, pp.25-8.
9. Section 409B, *Crimes Act 1900* (NSW).
10. An alternative option which would have the same effect as a statutory exclusion is a statutory client/counsellor privilege akin to common law legal professional privilege. Such a privilege is based on the premise that the public interest in favour of protecting the confidentiality of a particular relationship overrides the public interest in protecting the accused's right to adduce all relevant evidence. The nature of a client privilege is best exemplified by legal professional privilege, in that, where it applies to confidential communications 'there is no question of balancing the considerations favouring the protection of confidentiality against any considerations favouring disclosure in the circumstances of the particular case. The privilege itself represents the outcome of such a balancing process and reflects the common law's verdict that the considerations favouring the "perfect security" of communications and documents protected by the privilege must prevail': *Carter v Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121 at 133, per Deane J. For more details, see Cossins and Pilkinton, above. However, the issue of whether counselling/therapeutic records should be subject to a privilege in all criminal and civil trials is not within the scope of this article but has been addressed in a recent US Supreme Court case which held that significant private and public interests supported the recognition of a psychotherapist privilege in a civil action for wrongful death: *Jaffee v Redmond*, unreported, Supreme Court of the United States, 13 June 1996. In addition, some form of psychotherapist/patient privilege has been enacted in 50 States in America.
11. Law Reform Commission of Western Australia, 'Report on Professional Privilege for Confidential Communications (Project No. 90)' 1993 p.40-1.
12. *R v Osolin* (1994) 109 DLR (4th) 478 at 499, per L'Heureux-Dube J.
13. Waight, P.K. and Williams, C.R., *Evidence: Commentary and Materials*, Law Book Company Ltd., Sydney, 1995, p.17.
14. Section 55(1) *Evidence Act 1995* (NSW).
15. Section 55(2) *Evidence Act 1995* (NSW). Credibility evidence will be admissible under s.103 of the *Evidence Act 1995* (NSW) if it is of 'substantial probative value'. Odgers observes that the dictionary definition of probative value is the same definition used in s.55(1) of the *Evidence Act* and s.55(2) 'makes it clear that evidence relating only to the credibility of a witness is considered to satisfy this test of relevance': Odgers, above, p.164.
16. *R v Osolin* (1994) 109 DLR (4th) 478 at 499, per L'Heureux-Dube J.
17. *R v Seaboyer* (1991) 83 DLR 193 at 228, per L'Heureux-Dube J.
18. Aronson Mark, and Hunter, Jill, *Litigation: Evidence and Procedure*, Butterworths, Sydney, 1995, p.759; emphasis added.
19. Galvin, H., 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade', (1986) 70 *Minnesota Law Review* 763 at 792-3; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 218, per L'Heureux-Dube J; emphasis added.
20. See Bargen J. and Fishwick E. (for the Office of the Status of Women), 'Sexual Assault Law Reform: A National Perspective', Office of the Status of Women, Canberra, 1995, pp.77-93; Law Reform Commission of Victoria, 'Rape: Reform of Law and Procedure', Appendices to Interim Report No. 42, 1991; Heenan, Melanie, 'Factors Affecting the Prosecution of Rape Cases in Victoria: an Evaluation of the Crimes (Rape) Act 1991', paper presented at the Australian and New Zealand Society of Criminology, 11th Annual Conference, 29 January-1 February 1996, Victoria University of Wellington; Bonney, R., 'Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation', Interim Report No.3, 'Court Procedures', NSW Bureau of Crime Statistics and Research, Sydney, 1987 ; Standing Committee on Social Issues, above ref.8 pp.25-9. The extent to which stereotype and myth still inform sexual assault proceedings in Australia was demonstrated at the recent National Conference on Sexual Assault, 'Balancing the Scales', 20-21 June 1996, Perth in which a number of papers revealed the extent to

- which sexual assault law reform has failed to curtail defence counsel strategies which are designed to undermine the credibility of complainants and failed to educate the judiciary about the dangers of reliance on myth and stereotype to inform issues of admissibility: Kealley, L. and Killey, C., 'We're Going to Light the Bloody Thing Ourselves'; Taylor, S., 'Understanding the Impact of the Legal Process on the Sexual Assault Victim'; and Easteal, P., 'A Masculocentric Reality: The Limits of Law Reform and Choices for the Future'.
21. La Free, F., Reskin B. and Visher, C.A., 'Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials', (1985) 32 *Social Problems* 389 at 400; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 216, per L'Heureux-Dube J.
22. La Free, F. and others, above, p.397; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 216, per L'Heureux-Dube J.
23. Catton, K., 'Evidence Regarding the Prior Sexual History of an Alleged Rape Victim—Its Effect on the Perceived Guilt of the Accused', (1975) 33 *University of Toronto Faculty Law Review* 165 at 173; cited in *R v Seaboyer* (1991) 83 DLR (4th) 193 at 216, per L'Heureux-Dube J.
24. *R v Osolin* at 522, per Cory J. The notation in question indicated that the complainant was concerned that there may have been some conduct on her part that had led the accused to believe she consented. However, at trial, there had been no dispute that the complainant, a 17-year-old, had been abducted by the accused and a companion, tied up, raped and then found naked and hysterical on a highway at 3.30 a.m. in the morning: *R v Osolin* at 574 per McLachlin J.
25. *R v Seaboyer* at 227, per L'Heureux-Dube J.
26. *R v Osolin* at 500, per L'Heureux-Dube J.
27. *R v Osolin* at 501, per L'Heureux-Dube J.

LEGAL STUDIES

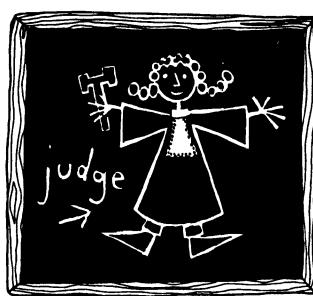
The suggestions for class work and discussions below are based on the article 'Contempt or confidentiality' by Annie Cossins, with additional text by Patricia Easteal and Angela Jones published on p.223 of this issue.

Questions

1. What would be the implications of counsellors not being able to provide guarantees of confidentiality to victims of sexual assault for their counselling sessions?
2. What similarities does the admission of a victim's sexual history have to admission of counselling notes? What can we learn from the rape shield legislation when looking at law reform that limits admission of counselling records?
3. What happened to the Canberra Rape Crisis counsellor? How does Angela Jones believe that the law conflicts with the Service's commitment?
4. What are the limitations of the recent New South Wales Evidence Amendment Bill in dealing with rape crisis counselling notes? What problems (include a discussion of the shifting burden) are associated with the 'judicial discretion' type of option that is outlined in Annie Cossins' article?
5. Explain the connection between rape mythology and the problems that Annie Cossins describes as possible outcomes with a judicial discretion model?
6. What are some of the rape myths which contribute to survivors feeling shame about their experience?

7. Why is counselling vitally important for a survivor of sexual assault and why is confidentiality of the process particularly important?

8. What is some of the damaging (to the victim) information that could be extracted from counsellors records?



9. What model of law reform does Annie Cossins present as an alternative to judicial discretion? What arguments would critics of her approach present.

10. Explain the connection that the article draws between rape mythology and the perception of counselling records as relevant. In other words, explain how 'commonsense' is derived from a gendered reality.

Discussion

The law cannot be seen in isolation from the society in which it is a part. Discuss how the issues involved in admitting counsellors' confidential records in the court and the issues involved in law reform dealing with this subject can be understood in the context of our society.

Look at these issues from both historical and current perspectives.

Research

Research sexual assault in Australia and law reform in the last 20 years. Specifically look at:

- The response that victims have received by the police and variation based on the relationship of the perpetrator to the victim.
- The response that victims have received in the court and variation based on the relationship of the perpetrator to the victim.
- The issues related to consent and how different jurisdictions have dealt with it.
- The issues related to admission of sexual history and the rape shield legislation.
- The issues related to delays in reporting the sexual assault and how different jurisdictions have dealt with it.

Debate

Confidential sexual assault counselling notes are relevant to a sexual assault trial and should therefore be admissible.

Patricia Easteal

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Women with family responsibilities need not apply

Elizabeth Fletcher

Discriminatory practices in the superannuation industry.

From the mid-1980s onwards, superannuation went from being the prerogative of a small number of mainly male workers to becoming a legislatively enforced requirement of all workers, through the introduction of compulsory contributory superannuation. The majority of women in paid employment now have access to some sort of super, but this has raised a whole new set of problems.

The policy shift towards self-funded retirement has always held problems for women. Intermittent paid work combined with unpaid caring work, and lower wages on average than men has posed dilemmas for women and their economic independence. Treasury has estimated that women, on average, earn only 83% of the amount calculated as necessary for self-funded retirement, and 80% of women earn less. The end result of this is that women are poor during their working life, and poor in retirement.

The devaluing of women's work

The relative poverty of women is largely a result of the unrecognised and unpaid work of women.

In 1994, the total value of unpaid work undertaken in Australia by homemakers and volunteers was valued in the range of \$137 billion to \$163 billion. This is worth between 52% and 62% of official national production.¹ Women do more than two-thirds of unpaid domestic work, half of all voluntary work, and, as well, work for wages. Women's unpaid role in maintaining the home and family has significant financial consequences. Their unpaid work reduces their ability to engage in paid work and, therefore, reduces their incomes, not only during their working life but also in retirement.

The devaluation of women's paid and unpaid work is worsened by a taxation system which rewards people who are able to work full time, on high incomes, and with access to generous superannuation. For example, the Australian Council of Social Service has estimated that a person earning \$50,000 a year receives at least five times the tax assistance available to people with incomes below \$20,700 a year,² because super is taxed at a flat 15%. This effectively redistributes income back to high income earners, usually men, and imposes a massive cost on the Australian economy. In 1994-95 it cost \$7 billion, and proposed government contributions to superannuation in 1999 will cost another \$4 billion.

The massive subsidisation of high income earners is particularly offensive, given current policy proposals. Consideration is being given to reducing government pensions — the major support of women in old age — by using the fact that women earn considerably less than men in paid employment. The proposal, not yet accepted by government, to remove the commitment to keep pensions at a level of 25% of average *male* weekly earnings, and instead use total weekly earnings as the benchmark will take advantage of the fact that women earn less than men in employment. This will be used to reduce pension levels,

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These are the author's personal views not those of HREOC.

more often received by women. There is a strong irony in this which should not go unnoticed!

Discriminatory super practices

Even if women do manage to have some sort of super, major problems of sex discrimination exist.

Long standing discriminatory practices by the super industry have made sex equality in super highly unlikely, even when women have spent considerable time in the workforce.

Until 1993, the superannuation industry enjoyed a blanket exemption from anti-discrimination legislation. The changes to the *Sex Discrimination Act* which came into effect in July 1994, have limited the freedom to discriminate once enjoyed by the industry. However, major gaps remain.

Sex discrimination in superannuation continues to be lawful where it concerns:

discrimination based on data about the average life expectancy of women and men as groups;

the denial of the right to provide superannuation benefits to anyone other than a spouse or children (for example, perhaps a sibling or a same sex partner);

differences in the position of women and men in the workforce which disadvantage women in relation to preservation of their benefits, vesting of employer's contribution, or the portability of benefits from one job to another.

This accounts for nearly all the existing discrimination in superannuation schemes.³ For example, let us look at the effect of the actuarial exemption and the vesting exemption.

Different superannuation contributions, benefits and annuities for women and men have been legitimated by the use of actuarial data. In practice, the only demographic factor consistently taken into account in superannuation calculations is sex, even though there are marked differences in the life expectancy of different groups of men (for example, by class and race as well as class-related health issues like smoking). This means that poor women subsidise rich men.

Vesting requirements, which link ability to receive employer super contributions to length of service (generally 10 years but sometimes longer) mean that those workers who have family responsibilities may miss out on employer contributions because they cannot manage to work this length of time. However the employer contribution is part of a worker's wage, even if it is a deferred wage. To refuse to pay this part of the super package to a worker because they have not worked for that employer for longer than 10 years is flagrantly unfair. Yet it is lawful.

Unless these exemptions are removed, there is no chance of establishing women's rights to a fairer system of super in employment.

New government policy and its likely impact on women and super

There are a number of issues which have been flagged by the new government as policy changes. Some of these concern super directly; some concern super indirectly, such as proposed industrial relations changes.

Super related changes

Government matching contribution will go ahead as planned by the previous government.



RORY ZWINS

- Those workers who earn up to \$900 a month will be allowed to 'opt out' of super.
- Spouses who contribute for their partner will receive an 18% rebate for contributions up to \$3000 where their partner earns less than \$10,800.
- Age discrimination legislation will be introduced.
- Retirement Savings Accounts (RSAs) will be introduced.

Some of these changes will have a big impact on women for example, the 'opting out' provisions. These need to be understood in the context of proposed industrial relations changes as well as super changes.

The effects of 'opting out' are significant. Those workers who opt out will lose the government matching contribution (3%) and face effective higher tax rates than those workers who earn above \$900 a month or those who opt to stay in super.

Those workers who decide to opt out need to take into consideration their higher tax rates and loss of the government contribution. Technically, this could be a pay discrimination issue, because it could affect pay equity if pay rates of some workers who opt out of super do not reflect the cost of higher tax rates, and the loss of the government contribution. I note that the government has said that mechanisms will be introduced to allow these workers to 'choose' to take the super as a wage increase instead. However, there are no details of how this will be costed and cashed out.

Industrial relations changes

There will be a drop in the number of people in the workforce covered by super because of likely industrial relations changes. The government proposes to:

remove the requirement in industrial awards and agreements for employers to make minimum contributions for employees; and

remove limits on part-time work in awards.

On current Australian Bureau of Statistics (ABS) figures, the number of people in the workforce earning less than \$900 a month is about 8.2% of employees (ABS 6305.0). Of these workers, 70% are women.

The removal of limits on part-time work (for example, most awards specify minimum hours to be worked, percentage of part-time workers to full-time workers) will increase the number of people who earn less than \$900 a month per employer. This will happen because superannuation legislation assumes employees only have one job. However there have been major changes in the way people work over the last decade. Increasingly, part-time and casual workers need to work for more than one employer in order to make a living. This is an area which has received little attention from government, and the proposed changes to the way part time and casual work is regulated will undoubtedly increase the number of people needing to work in more than one job.

The biggest group affected by this is women. In 1994, nearly 6% of women worked in more than one job (in comparison to 4% of men). This figure has doubled in the last five years.⁴

This will mean that as more people earn less than \$900 a month, and more people hold multiple jobs, but less than \$900 a month with each employer (the new proposed Superannuation Guarantee Charge requirement for contributions), the numbers of people covered by super will drop. It has been estimated that around 9.4% (or 650,000) employees will be affected.⁵

Furthermore, the removal of superannuation from award minimum conditions will increase the number of people not covered by super. It is difficult to estimate what percentage of workers this will affect, but many of them will be women.

A good example of this is workers in the hospitality industry. Many work for more than one employer and earn more than \$900 a month in total. However, because they do not earn \$900 a month with one single employer, they fall outside the SGC safety net. The insertion of superannuation in their industrial award meant that *all* the workers under that award were granted super regardless of their income level. These workers — of whom two-thirds are women — will lose their access to superannuation if the proposals to strip award conditions back to ‘basics’ is made law. Other ‘women’s industries’ like nursing have the same problems.

The other area of great concern is the proposed introduction of RSAs. RSAs have been described as ‘a niche product’ for low-income earners, the self-employed, those with high job mobility and people nearing retirement.⁶ They would have *some* advantages for women — there would presumably be no vesting, portability or preservation problems. However, there would be no trustee structure to guarantee that the prime interests of members are taken into account. And most importantly, RSAs would also be low risk, low return products, like the bank accounts they effectively are.

This poor person’s super vehicle — or rather poor woman’s super vehicle (as the majority of people using RSAs will be women) — will set in concrete the problems of long-term economic security for women. Poor during their working life and poor during retirement, will continue to be

the maxim for those women who have caring responsibilities that limit their continuous participation in employment.

Future directions

Women are a crucial and still growing part of the workforce whose circumstances need to be taken into account

About two-thirds of new entrants to the workforce in the next 20 years will be women and women’s employment will increase on average by 2% a year to the year 2001 while men’s employment will increase by 1.6% a year.⁷

There needs to be recognition that women’s work and family responsibilities impose responsibilities on them which are not experienced by most male workers. Thus the remaining exemptions with regard to vesting, portability and preservation are a particular problem for women.

The gender-based nature of actuarial tables needs research to substantiate whether these tables can reasonably justify the resulting discrimination.

For those women who manage to stay in the super system, even though they have intermittent working patterns, there is some hope of greater fairness. The Senate Standing Committee’s Report No. 17, ‘Super and Broken Work Patterns’, recommended in November 1995 the removal of all the remaining superannuation exemptions in the *Sex Discrimination Act*.

For those women who manage to have some form of super (as opposed to RSAs), it is to be hoped that the Senate Committee’s recommendations are adopted by the Government. They will not solve the underlying problems of women’s economic inequality (for example, the lack of recognition of the unpaid work of women), but arguably they are a crucial early step in the establishment of women’s right to super without discrimination.

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ON THE BOTTOM OF THE PILE

Phillip Swain

Judicial independence and the Victorian Children's Court

The function of the court system is '... to be the forum in which impartial justice is administered according to the law ...'¹ Judicial independence and effective judicial administration are critical for this function to be realised. An independent judiciary should mean that there is freedom from pressure or influence in the making of decisions, which ought to be determined on the basis of legal principles alone.² The means to independence include, first, security of tenure for the judiciary including protection from removal save in clear and unambiguous circumstances and through acknowledged public accountability processes, and second, institutional independence — that is, independence of the judiciary to manage the resourcing and finances of the courts themselves.

Independence is engendered by certainty of tenure and the public commitment that judicial decision making ought not be subject to even oblique political interference. Australia might not have experienced direct interference into the judiciary by political or criminal elements, such has occurred elsewhere, but has endured a series of public assaults on the independence and tenure of judicial officers in several jurisdictions, by governments of varying political persuasions. The Australian experience has included '... the simple expedient of abolishing the [judicial] office which [the officers concerned] have held'.³ In Victoria since the election of the Liberal Government in 1992 there has been public questioning by government and senior public servants of the role and performance of the Director of Public Prosecutions, the Commissioner for Equal Opportunity, the Coroner, The Guardianship and Administration Board, the Children's Court itself and its Senior Magistrate, and, in more recent times, the Victorian Auditor-General. Since the 1992 Victorian election the principal officers of all but the latter of these jurisdictions have resigned, in several instances after extensive political and public questioning of the role of the offices they held.

Legal and practice parameters of the Victorian Children's Court

Legal systems are imperfect vehicles with which to determine disputes involving families and children. These disputes involve such nebulous concepts as 'the best interests of the child' and 'custody' and 'guardianship', and difficult and complex judgments about parental behaviour that justifies state intervention.

Victorian Children's Court practice is governed by the *Children and Young Persons Act 1989* (the Act), introduced in 1989 after the 1984 Child Welfare Legislation and Practice Review (usually referred to as the Carney Report) into Victorian child welfare practice and legislation, which itself came as another in a series of major reviews of child welfare in Victoria since the 1950s.

The 1989 Act covered the jurisdictions of both child protection and juvenile crime, established a set of re-drafted grounds for intervention

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consequent on reports of alleged child abuse or neglect (s.63), and provided an expanded series of graduated outcomes for those children found to be in need of protection.

The Act by s.87(1)(k) requires that the powers of the Court be exercised 'in the interests of the child' and his or her protection: '[t]here is no punitive purpose to be served ... [powers] ... should be exercised ... solely for the purpose of protecting the child'.⁴

The Carney Report

The Carney Report recommended a 'Tribunal' structure for the Family Division of the Victorian Children's Court. It suggested (refer Volume II, p.239) a three-person panel of 'people with experience and expertise in child protection ... one of whom should be a lawyer ... the other two having expertise in child and family welfare and experience in community welfare respectively', and that the Court be presided over by a judge of equivalent status to a County Court judge. Victorian governments since then have been unwilling to adopt either recommendation. The previous Children's Court structure of a senior and other allocated magistrates has been retained, although there has been some support for a separation of the Children's from the Magistrates' Court as a means to greater independence.

Following the Carney Report particular aspects of Victorian child welfare practice have been subjected to a series of investigations and public debate, including the 'dual track' reporting system (under which reports of suspected child abuse could be made either to the Victorian Community Services Department, or to the police), and the mandatory reporting of suspected abuse.⁵ Again, following the death of Daniel Valerio, and the interventions into the 'Children of God' sect, questions have been raised about the capacity of the 'system' to adequately protect children brought to its attention.⁶ The 1996 Auditor-General's report provides further evidence that these questions remain unresolved.

Recent Victorian developments — a rude awakening?

It has been suggested that judicial officers have taken a greater interest recently in court administration, for various reasons — the litigation 'explosion', the implications of pre-trial procedures, and the development and enforcement of expanded remedies and 'far-reaching' dispositions.⁷

Each of these can be seen reflected in the work of the Children's Court in Victoria; each has operated to demand greater efficiencies of that Court.

For example, the mandatory reporting of suspected child abuse and neglect, introduced progressively in Victoria since 1993, is already having a massive effect on demand for the assessment and investigative resources of the child protection system. Reported rates of notification have increased by in excess of 50%, and the annual reports of Health and Community Services (Victoria) indicate that numbers of protection applications lodged in the Children's Court increased by 57% between 1992-93 and 1994-95. Such increases will be reflected in greater demands for adjudication and to further pressure on court facilities and personnel.

In 1993 an amendment to the *Children and Young Persons Act 1989* provided for the appointment of convenors to conduct pre-hearing conferences in disputed matters before the Family Division of the Children's Court. Introduced to reduce waiting time before hearings, and to remove from the court list matters which are able to be settled, the develop-

ment nevertheless has ramifications for the workings of the Court. Pre-hearing conferences, like the various other pre-determination procedures (such as first and second directions hearings, and the like), entail a commitment of administrative time and of the physical facilities necessary for the conferences to be conducted. The conferences also necessitate training obligations both for convenors and for judicial and other court staff unfamiliar with such approaches, and a continuing obligation to provide judicial oversight in order to meet the legislative requirements that all be done in the 'interests of the child' — an obligation which under s.87 of the Act rests on Magisterial shoulders alone. Initially convenors were specialist appointments from outside the existing court personnel; on 16 October 1995 the Melbourne *Herald-Sun* reported the suggestion that registrars and deputies will in the future carry out this role. Notwithstanding the questions of skill and whether such a step would jeopardise the independence of pre-court processes, this development has been rationalised on the basis of the anticipated costs of extension of pre-court conferences to outer-suburban and country regions. The Children's Welfare Association of Victoria described use of registrars in this way as '... a cheap-skate way to conform with the legislation' (*Herald-Sun*, 16 October 1995). The evaluation of pre-hearing conferences in Victoria strongly supported the need for independent specialist staff to undertake the role of conference convenor.⁸

The Victorian Act, too, encompassed a greater range of potential dispositions than its predecessors, and envisaged an increased role for the Court in monitoring the implementation of the orders it makes. So, for example, the Children's Court now must determine whether Custody to or Guardianship to Secretary orders ought to be extended beyond their initial time limit, whereas previously such extensions could be authorised through internal administrative review by the appropriate statutory department.

Each of the above has increased or is expected to increase the demands on the Children's Court, at the same time as the Court — like the rest of the legal system — is being encouraged to improve access and to deal more efficiently with a complex jurisdiction. Other than in relation to the establishment of pre-hearing conferences in the Family Division of the Court, there is little evidence of an increased capacity in the Children's Court to meet the changes and expectations mentioned above. On 2 September 1993 the *Age* reported that:

... the Children's Court is so starved of resources [that] it has been without a typist or receptionist since June, forcing magistrates to handwrite correspondence and reports. The court building is out of date and overcrowded just three years after it was opened, forcing a conference room to be used as a court room. The move to mandatory reporting of child abuse is expected to stretch court resources even thinner.

In the same article the then Senior Magistrate acknowledged that the Court was 'very under-resourced'. More recently the Court has been described as working in crowded and primitive circumstances, making quality outcomes impossible. The resources devoted to the jurisdiction have changed little in recent years.

A threat to judicial independence?

The 1985 Victorian Law Department report into the operation of the courts in that State suggested that, to meet community expectations regarding the administration of justice, courts need to be adaptable, accessible, efficient, effective and comprehensible. Similar sentiments were expressed by



the 1994 Report 'Access to Justice' (the Sackville Report) which argued cogently that reformation of the justice system in Australia ought to be built on the principles of equality of access to judicial services, national equity, and equality before the law. In the light of these analyses, how might the Victorian Children's Court be perceived?

Independence and tenure of magistrates

Being a magistrate in any jurisdiction has been characterised as a 'lonely job', but the Children's Court has been described by magistrates themselves as 'messy', a 'real pain', and 'one of the hardest jurisdictions in which to work'.⁹ The demands of the task of 'judging' are high:

The qualities the community requires in a modern judge are: a person with a strong independence of will, a good knowledge and experience of law, a good legal mind, a good understanding of human nature, and a temperament suited to judicial work. Judges must devote the considerable time, effort and thought necessary to reach correct decisions ...¹⁰

One could ask, given these expectations, who would or could be a judge or magistrate at all? Despite the daunting expectations, morale and commitment amongst the Victorian magistracy has been found to be a generally high but fragile commodity.¹¹

In Victoria, the appointment of all magistrates is governed by the provisions of the *Magistrates' Court Act 1989*. Magistrates are assigned to the various jurisdictions within the ambit of the Magistrates' Court, or to the Children's Court itself, by the Chief Magistrate who in the latter instance must (under s.11) have regard to the particular magistrate's experience in 'matters relating to child welfare', the only requirement peculiar to magisterial appointment to the Children's Court. The assignment can be revoked by the Chief Magistrate at any time (s.11). From within the ranks of those magistrates assigned to the Children's Court the Senior Magistrate is appointed by the Governor-in-Council on the nomination of the Chief Magistrate (s.12).

The potential remains for political or executive influence over the appointment of both the senior and other magistrates to the Children's Court. Whilst under s.14 of the *Children and Young Person's Act* magistrates have the formal protections and immunities of a Supreme Court judge, magistrates have no security of specific tenure to a Children's Court appointment, notwithstanding any personal commitment to that jurisdiction or experience in it. There is no legislative obligation for due cause or reason to be shown should the assignment to the Children's Court of a particular magistrate

be withdrawn by the Chief Magistrate, or should the Chief Magistrate's nomination as Senior Children's Court Magistrate not be endorsed. Although an appointment of the Governor-in-Council, recent Victorian experience has shown that considerable pressure can be brought to bear on the incumbent Senior Children's Court Magistrate through political and media comment. Like the criticism of tribunal and similar appointments that they could be subject to pressures, express or implied, to comply with government policy, the limited tenure afforded to Children's Court magistrates has the potential to undermine independence and public confidence in that independence. The recent Auditor-General's Report has re-affirmed the earlier suggestion of the Carney Report that the Children's Court be established as a separate jurisdiction headed by a judge of County Court status.

Resourcing of the Children's Court

The Australian reality is that the judiciary is dependent on the government of the day for the financial and administrative resources necessary to run the court system. The courts, and judicial and court officers, are funded from the public purse and governments are generally reluctant to give to the judicial system unrestricted and unquestioned access to financial resources. The demands of public accountability for use of the community's resources means that access to them will always be mitigated by economic and political considerations, and by the relative importance with which the judicial system (and particular component jurisdictions within it) is viewed vis-a-vis other priorities of government.

Responsibility for the financing of the Children's Court falls to the Justice Department, under the portfolio of the Victorian Attorney-General. As such, the Court must compete on an annual basis for resources, against other divisions of the Magistrates Court and the various priorities within the Justice portfolio. The Court officers (Principal Registrar, Registrars and Deputies) are appointed under the *Public Service Act 1974* (Vic.) and, as such, are employees of the Justice Department, not of the Court. If additional such staff are required, the Children's Court has no direct power to appoint.

The Victorian superior courts, and even the Victorian Magistrates' Court itself, have undergone a considerable revolution in the use of information technology, computer-based case recording and management, and adoption of case-flow approaches to dealing with the business of the courts. This revolution has not, to date, arrived at the Children's Court. That Court is not computerised; its files and information management are paper-based and to a large

extent manually recorded and extracted; its manual filing system is outmoded and relies on a knowledge of the specifics of hearing dates to locate a particular client file. In this jurisdiction it is still true that:

... the sluggish performance of [the Court] today is due in part to the sludged blood of [its] records systems which, astonishingly, have changed little in two hundred years; modern forms management, storage and retrieval systems, are largely unknown ...¹²

In September 1993 the *Age* reported that resources allocated to computerise the Children's Court were spent instead on the adult court system, and no significant improvements in the information systems at the Court have occurred since. The absence of appropriate information and management systems makes improvement in the efficient administration in the Children's Court jurisdiction more difficult to achieve, but also means that the data on which an argument for change could be mounted is harder to assemble. It has been suggested that the Court facilities are inadequate to meet the needs of families and children, and that some may breach international expectations under the United Nations Convention on the Rights of the Child.¹³

In matters involving children there are international, legislative and ethical principles which suggest that the Children's Court must be sufficiently resourced so as to ensure informed judgments about their welfare.

On the bottom of the pile?

By its very nature, the Children's Court relies on the availability of an active, accessible and competent network of services to support the families and children with whom it must deal, the vast majority of whom continue to reside within the community under supposedly supportive arrangements. Given this unique partnership of Court and community, it is not surprising that the Children's Court is from time to time driven to comment publicly about the effect of government policy on those appearing daily before it. There is, of course, an inherent conflict in such a stance between, on the one hand, the ethical and legal commitment to such principles as 'the welfare of the child' as enshrined in the enabling legislation; and, on the other, the practical reality that the Court is effectively dependent on government for its resources. Hence there is the possibility that any overt questioning of the impact of government policy may jeopardise future funding negotiations or result in interference in the jurisdiction or the assignment of magisterial tasks.

Children, generally, are unable to speak for themselves and are frequently overlooked even in policy debates in which they have a direct interest. Given the nature of the jurisdiction, it is arguably ethical and incumbent on its magistracy to speak publicly about areas of concern, especially as those most affected by the jurisdiction — children — are realistically unable to do so. This is perhaps especially so when legislative obligations are thwarted by paucity of resources and the lowly status of the Court.

The difficulty for the Children's Court is that it is literally 'on the bottom of the pile'. Those who practice in or frequent the Court are acutely aware of the complexity of the matters which it must determine, and of the great potential for good and ill which the intervention of the Court can mean for child and family. For others, though, the Children's Court remains a shadowy domain, knowledge of which comes from the occasional media report into generally extra-ordinary matters of abuse, which do not necessarily reflect the day-to-day reality.

If 'there are no votes in courts'¹⁴ then it could be said that the Children's Court is doubly jeopardised — that there are no votes in children either. Hence the Court's independence and efficient administration is very largely dependent on the largesse of government, and on the status accorded by the community to its children. The separation of the Children's Court from the Magistrates' Court (as suggested by Justice Fogarty of the Family Court, reported in the *Age*, 18 October 1995), together with elevation of the Senior Magistrate to the status of a County Court judge (recommended by the Carney Report a decade ago), would not only assist the independence of the Court, but would acknowledge the critical status of children within the court system and community.

The juxtaposition of the under-resourced and under-valued Children's Court directly opposite the burgeoning lavish development of the Victorian casino, has not gone unnoticed in the current debates about the Victorian child protection system. To date, there is not much evidence to counter the conclusion that, when considered alongside the preoccupations of government and community, children and the Children's Court are still very much 'on the bottom of the pile'. There they will remain unless there are clear and unambiguous commitments to the independence of the Court, and to the provision of physical and financial resources, such that it can meet its legislative and international obligations to children.

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'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

BOO HISS

The *Sydney Morning Herald* (7 September 1996) carried an article about a lunch to which Girlie would just love to have been invited. The fourth annual Ernie Awards lunch was held in the Harbour City recently and one of the awards given was the 'Gold Ernie' for the 'Most Bestial Remark of the Year'. The award is named for former Australian Workers' Union Secretary, Ernie Ecob, and the winner this year was Girlie's favourite, Mr Ron Gethring, the infamous Perth Magistrate mentioned in *Girlie* in August.

Mr Gethring secured the Gold Ernie for remarking, when dismissing a charge against a man who had stalked a woman for seven years, 'I do not think he was intimidating her. He was just being persistent ... like a puppy dog wagging his tail'.

It was a close race, for the second place getter was an unnamed New South Wales magistrate who told a female defendant to 'come back when your IQ is as high as your skirt'.

NEWS FROM THE FRONT

It's still ugly out there, if an article in the Queensland *Courier Mail* (18 September 1996) is any guide. In an article titled '*Mum-to-be fights sacking*' Girlie read of the outrageous demands placed on Salena Batten, a 'person Friday' in an Ipswich panel beating shop. Ms Batten was employed to work in the office of the shop and perform reception duties. Her employer became a little confused about the sort of reception she was meant to be giving and ordered her to jump out of a birthday cake naked at one of her male colleague's birthday party. He then tried to set her up as a mistress for a millionaire on a house-boat on the Brisbane River. Ms Batten told her boss, Mr Sensitive, that she was two months pregnant and ... he sacked her!

Ms Batten has brought an action in the Queensland Industrial Relations Commission for unlawful dismissal and a separate action in that State's Anti-Discrimination Commission for unlawful discrimination on the grounds of pregnancy.

Her employer declined to comment. Its name? S & D Body Works (does that stand for Sexism and Discrimination?)

BOYS WILL BE BOYS ... OR WILL THEY?

The Defence Department is worried, according to a report in the Melbourne *Sunday Age* (11 August 1996). It seems that the Department has a few concerns about the effect of proposed sexuality discrimination legislation on military life. The legislation, which is presently in Bill form, outlaws discrimination on the basis of sexuality or transgender. It allows people to identify themselves as male or female depending on their feelings or appearance rather than on their chromosomes.

The Defence Department, in its submissions to the Senate Legal and Constitutional References Committee, indicated that the proposed law would have two main detrimental outcomes. First, it would be 'possible for a man to identify and dress as a woman in order to avoid combat duties' and second, it would be possible for the opposite to occur and then we would have women dressed as men performing combat duties. The overall impact of all this flurry of fatigues, is a 'prejudicial effect on team cohesion and discipline'. Even more worrisome are those practical difficulties such as 'guidelines for the use of toilets and showering facilities'. (Surely each person in uniform can figure that out by themselves?) Given these concerns, the Defence Force is ready to seek an exemption from the transgender sections of the Bill if it were to be passed, partly because of the 'issue of cross-dressing on the battlefields'. Girlie can see it now — '*Priscilla, Queen of the Barracks*'!

OVERPAID, OVERSEXED AND OVER HERE?

Still on the subject of the armed forces, it seems that the Queensland Government and the Catholic Church are poised for a bit of a fight. The *Courier Mail* (18 September 1996) reports that the Catholic Church in the Sunshine State

has condemned calls for the Queensland Government to relax prostitution laws in time for the expected influx of 17,000 servicemen involved in military exercises next year off the central coast.



Current Queensland law allows prostitutes to work alone from their own home and outlaws all other forms of prostitution, including brothels and street prostitution. The Archbishop, John Bathersby, has said that the existing laws serve 'public morality in Queensland well', and warned that any weakening would cause a threat to families. Townsville-based Senator Reynolds has warned that under the existing laws American servicemen could be arrested during next March's exercise in Shoalwater Bay, causing 'great embarrassment to Queensland'. The Archbishop is quoted as replying 'I think it would be a good thing to be embarrassed about'.

Senator Reynolds is concerned about what services would be provided to educate women and counsel those who contracted sexually transmitted diseases, had unplanned pregnancies or were sexually harassed or assaulted. What about also counselling the servicemen for whom it seems these things are just part of the fallout from their 'R & R'? What about also counselling the idiot who thought of the name of the military exercise which has caused this pre-emptive fuss — 'Tandem Thrust'?

STUDIES HAVE SHOWN ..

A piece in the Melbourne *Sunday Age* (14 July 1996) revealed something that Girlie already suspected. A study by an Australian geneticist, Gillian Turner, published in the 'Lancet' medical journal, has found that women carry the gene for intelligence on their X-chromosome and are solely responsible for passing it on to their sons as boys inherit only one X chromosome. As the *Sunday Age* advised, this finding suggests that men should think with their heads and not other parts of their anatomy when choosing the mothers of their children.

Dee Vyne

Dee Vyne is a Feminist Lawyer.

DownUnderAllOver

A new regular column of developments around the country

Federal Developments

ABORTION AND NEGLIGENCE: THE SUPERCLINICS CASE

In the case of *CES v Superclinics* currently before the High Court, the plaintiff CES is suing the medical centre Superclinics, and a number of doctors, for alleged medical negligence in failing to diagnose her pregnancy until it was too late for a safe termination. As has been amply reported in the media, the case may, however, become a test case on abortion.

At first instance (*CES v Superclinics*, unreported, Newman J, Supreme Court of NSW, 18 April 1994), Newman J, without making any formal findings on the facts, and taking the woman's case at its highest (that is, assuming that she would have proved all the elements of her case) decided that she was not entitled to damages since her case depended on a lost opportunity to do something he determined was illegal, that is, having her pregnancy terminated. The Court of Appeal, by majority (Kirby A-CJ, Priestly JA; Meagher JA dissenting) reversed the decision, but could not agree on the appropriate approach to the assessment of damages (*CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47). According to Priestly JA, the expenses after the birth were not recoverable as the woman decided to keep the child instead of having it adopted. Kirby A-CJ (as he then was) would have allowed the costs of rearing the child but agreed with Priestley JA's approach for the purpose of providing guidance to the next trial judge. (As the trial judge had expressly not made any findings, the case had to go back to trial.) The medical centre and the doctors have appealed the decision, and the woman has cross-appealed on the issue of damages.

On 11 September 1996, on the first day of the hearing, the High Court granted leave to appear as *amicus curiae* ('friend of the court') to the Australian Catholic Health Care Association and

the Australian Catholic Bishops Conference. Leave was granted by statutory majority (that is, Chief Justice Brennan cast the deciding vote) with three judges in favour and three judges against. Leave was granted notwithstanding the objection of the parties. It is also worth noting that Brennan CJ announced in Court that he knew some of the Bishops seeking intervention. Justice Kirby is not on the Bench of the High Court for the present appeal.

On the following day, the High Court granted leave to appear as *amicus curiae* to the Abortion Providers Federation of Australasia. The hearing was then suspended, and is set to resume on 11 November 1996. The Women's Electoral Lobby (WEL) has announced its intention to apply for leave to appear as *amicus curiae* when the hearing resumes.

The Catholic intervenors have expressly asked the High Court to find that *Davidson* and *Wald* (which have represented the law on abortion in Victoria and NSW for the last 25 years), were wrongly decided (*R v Davidson* [1969] VR 667 (the 'Menhennit' ruling); *R v Wald* (1971) 3 DCR (NSW) 25 (the 'Levine' ruling)). They have also asked the High Court to find that the unborn child has legal personality and legal rights, a proposition that courts in England and Australia have consistently rejected. (See, for example, *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276; *Attorney General ex rel Kerr v T* (1983) 57 ALJR 285.)

For an in-depth analysis of the case, see Reg Graycar and Jenny Morgan, "Unnatural rejection of womanhood and motherhood": Pregnancy, Damages and the Law. A note on *CES v Superclinics (Aust) Pty Ltd* (1996) 18 *SydlR* 323. This article, written before the Catholic intervenors were given leave to appear, argues strongly that the case is about medical negligence, *not abortion*; that the so-called 'defence of illegality' raised by the trial judge is doubtful and should not be applied in this case; and that damages should be recoverable for the costs of bringing up the child. The article is now available at <http://www.law.usyd.edu.au/~slr/bhc.htm> and a postscript will be added to this electronic

version, addressing the new issues raised by the High Court allowing the *amicus curiae* application by the Catholic intervenors.

Lisa De Ferrari

Lisa De Ferrari is a researcher at the University of New South Wales.

Postscript: case settled

It was reported as we went to press that the *Superclinics* case has settled out of court. Lawyers for the two parties said they did not want their dispute clouded and costs increased in an abortion test case created by the Catholic bodies and abortion clinics that intervened in their case (the *Australian*, p.3, 10 October 1996).

DAMAGES FOR THE LOST EARNING CAPACITY OF THE CAREER MOTHER PARENT: WYNN'S CASE

Where a plaintiff has suffered serious personal injury, the central and often the largest component in damages awards is for loss of earning capacity. Although the High Court has stated that, in accident cases, damages are for the loss of earning capacity and not for the loss of earnings, in practice, women plaintiffs who are not in the paid workforce at the time of their injury because of 'time-out' for childbearing and rearing, are usually awarded only small sums to compensate them for their loss of the ability to exercise their earning capacity in the future. Even where women are in paid employment at the time of injury, the fact that women earn less than men in all categories of earnings, all components of earnings, all major occupational groupings, and the majority of benefit categories and allowances, makes it likely that they will receive lower awards. In addition, in the past, courts have reduced awards to women to take account of the contingency that they were likely to marry, and withdraw from the workforce to have and care for children.

The impact of childbearing and rearing on a woman's pre-accident earning capacity, and consequently on the amount of damages she should be awarded for the loss of that capacity, was addressed

by the High Court recently in *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485.

The facts

In 1986, Wynn, then aged 30, suffered a serious spinal injury in a car accident. At the time of the accident, Wynn had been employed with American Express for five years and had been very successful — she had been promoted to a managerial position the year before the accident. After the accident, she continued with American Express for a short while and was again promoted, this time to Director of Customer Services, the step below vice-president. She was responsible for three managers and 120 staff and was paid an annual salary package equivalent to \$75,556 net.

Due to a worsening of her symptoms, she had to leave her employment in 1988. Between 1988 and the trial, she worked casually for American Express for a short period, and then worked part-time in the family business. She married her long-term boyfriend in 1990 and gave birth to a son in August 1991.

The trial judge

The trial judge found that but for Wynn's accident she would have continued with American Express to at least the age of 60, and was unlikely to have retired because of marriage or motherhood given the high position she had achieved. The trial judge discounted the sum calculated as her loss of earning capacity by 5% for contingencies on the basis that the possibility that she would need to take maternity leave was balanced by the possibility that she might have been further promoted.

The NSW Court of Appeal

The Court of Appeal decided that the allowance of only 5% for contingencies was 'far too low' as it presupposed Wynn would, but for the accident, have worked full-time at the 'same hectic pace until her retirement' when 'the physical, mental and emotional strain of working indefinitely such long hours and in such a demanding job necessarily involved risks to [her] health and the possibility of loss of job satisfaction and "burn out"'. The Court held there should be a discount of 28%, being 8% for two years absence from the workforce to have two children (a plan she and her husband had discussed before the accident), and the balance of 20% for the

'prospect that the plaintiff would be unable or unwilling to remain in her job which placed such heavy demands on her time, energy and health and the love and patience of her husband'. In the Court's opinion, the award must reflect the chance she would at some stage 'have chosen or been forced to accept a less demanding job' (at 61,742).

The Court of Appeal also reduced her damages to take into account the cost of domestic help for any children she had and for other household duties for the whole of her working life. As Graycar has noted, in an admirable display of gender neutrality, the Court attributed only half of this cost to the plaintiff, with the other half expected to be paid by her husband (Graycar, R., 'Damaged Awards: The Vicissitudes of Life as a Woman', (1995) 3 *Torts Law Journal* 160, 163).

The High Court

In the application for special leave McHugh J asked 'supposing the applicant had been a male, could you imagine a judge making a finding like this?' In its decision on the appeal, the High Court made clear that it would not countenance women being treated less favourably than similarly situated men.

As to the possibility of reduced participation in the workforce, the High Court said '... there is nothing in the evidence to suggest that the appellant was any less able than any other career oriented person, whether male or female, to successfully combine a demanding career and family responsibilities', and noted that the evidence, on the contrary, established that she was ambitious and intended to remain in paid work (at 494). The Court essentially agreed with the trial judge's balancing of the discount for the possibility of maternity leave with the prospect for further advancement.

As to the deduction of the cost of domestic help, the Court said there was 'simply no basis for treating domestic help as necessary for the realisation of earning capacity and, to the extent that the Court of Appeal thought otherwise, it was clearly wrong' (at 495). The Court took the view that childcare costs may be incurred by men or women, and will depend on the circumstances of the individual — essentially the cost of childcare is one of the various costs associated with having children and is properly characterised as essentially private or domestic in character; it is to be treated as any other item of expendi-

ture for personal amenity and is not to be deducted when calculating loss of earning capacity.

Analysis

In argument before the Court, Brennan CJ is reported as having asked counsel why there should be any difference between the assessment of actual loss of earning capacity in the case of a single woman without children and a married woman with two children. The Chief Justice questioned why a *woman who chooses not to work* because she has domestic responsibilities and places the value of those responsibilities at the same level as her earning capacity should not be compensated on the same basis as *another woman* who would have elected to continue at work (at 487; emphasis added).

All that was really won by Ms Wynn was the right to have the 'motherhood discount' removed. The Court failed to take full advantage of the opportunity identified by Graycar to scrutinise a number of the gender-biased assumptions about women which lead damages assessments to be inappropriately depressed, including women's presumed lack of attachment to the paid workforce and the inability to combine careers and children. There have been some workforce changes designed to accommodate the family responsibilities of both women and men (Graycar, p.164) but the Court did not take these into account.

Further, the Court did not address, nor apparently even consider, the issue of why it was that no similar 'fatherhood factor' has ever been taken into account in assessing the damages of an injured male plaintiff in comparable circumstances.

Susanne Liden

Susanne Liden is a Melbourne lawyer and researcher.

DEATH, DRUGS AND DISCRIMINATION: THE DIBBLE CASE

In a decision with interesting ramifications for anti-discrimination law generally, and the *Sex Discrimination Act 1984* (Cth) (the SDA) specifically, the Full Federal Court has recently decided that a complaint can continue after the death of a party to the complaint. In doing so the Court made some interesting observations about the purpose of sex discrimination legislation.

Background

Alyschia Dibble was a 50-year-old woman who was HIV positive. She was refused permission to join some clinical trials on the grounds that, because she was still menstruating, she was classified as being at risk of pregnancy. (She denied being at risk of pregnancy, having not engaged in sexual activity with men for many years and offered to undergo a tubal ligation.) Ms Dibble made a complaint to HREOC that she was being discriminated against on the grounds of 'sex, marital status or pregnancy or potential pregnancy' (s.22 of the SDA). The Sex Discrimination Commissioner attempted conciliation of the matter but this was unsuccessful.

Ms Dibble died before the Commission moved on from a conciliation to a hearing, however her executrix decided to pursue the complaint.

Consideration of the case

Sir Ronald Wilson, the Human Rights Commissioner, decided that the complaint could not continue after Ms Dibble's death. He said that, while a hearing into such a complaint could serve 'a useful public purpose', actions under the SDA are similar to personal actions. The common law rule with respect to personal actions is that they terminate on the death of the person suing.

A single Judge of the Federal Court affirmed Sir Ronald's view, but the Full Court found that complaints under anti-discrimination law are *not* similar to personal actions.

One of the common criticisms of Australia's anti-discrimination laws is precisely that they are based on individual complaints. The problem with such a system is that the onus is put on individuals, regardless of their resources, to make a complaint when faced with discriminatory behaviour. Furthermore, a system which relies on individuals to initiate complaints may mean there is an insufficient focus on the responsibility of society (as opposed to those specific individuals subject to discriminatory behaviour) to ensure that discriminatory behaviour is prevented. According to this argument the common law analogy which should be developed is the state-enforced criminal law rather than the privately initiated civil law.

The Full Court said that the Act's objectives — which include the 'recognition and acceptance within the community of the principle of the equality of men and women' (s.3(d)) — must be

taken into account when interpreting the Act, so as to promote the hearing of test cases. The Court concluded that, despite the fact no *personal* remedy could be sought, the case did not cease to have significance.

Wilcox J also pointed out that Ms Dibble's valuable evidence would be lost if the Commission refused to hear the case. Even if the Commission subsequently instituted a more general enquiry it would not have this evidence before it — and the evidence of other witnesses and parties would have to be given again.

The approach of the Full Court is useful in articulating background principles of anti-discrimination law — especially given other Commonwealth anti-discrimination legislation (for example, race and disability) is silent on whether a complaint can continue after the death of a complainant. Furthermore, the outcome of the case after HREOC's hearings will have important consequences for women with a biological childbearing capacity who are currently barred from drug trials by drug companies and ethics committees.

Kirsty Magarey

Kirsty Magarey is a research fellow at the Law Faculty, UNSW.

ACT

SURROGACY AGREEMENTS

Recently a baby was born in Canberra under a surrogacy agreement. The baby was the result of IVF — the gametes being those of a couple ('the genetic parents'). The birth mother and her husband did not contribute any gametes.

Soon afterwards the Chief Minister presented a Bill to the ACT Legislative Assembly that would provide that the Supreme Court may make an order (a 'parentage order') allowing genetic parents to obtain legal parentage of a child who has been born to another woman as the result of a non-commercial surrogacy agreement. The Bill has been referred to the ACT Community Law Reform Commission for consideration.

According to the Bill, a 'parentage order' can be made by the court if:

- it is satisfied that the making of the parentage order is in the best interests and welfare of the child;
- at least six weeks and no more than six months have elapsed since the birth (giving a 'cooling off' period);

the child's home is with the genetic parents;

the birth parents are in agreement freely, and with full understanding of what is involved;

- the genetic parents are domiciled in the ACT when both the application and the order is made;
- both the genetic and birth couple have received assessment and counselling from an independent service (unless the court is satisfied that it is not otherwise contrary to the welfare and interests of the child).

Once an order has been made, it is proposed that the Registrar will enter the details of a parentage order in the Parentage Register, and then re-register the birth of the child.

Currently, the law says the woman who gives birth to a child and her husband are the legal parents of that child, and that the commissioning parents have no legal claim on the child, despite the fact that they are the genetic parents. The *Substitute Parent Agreements Act 1994* prohibits commercial surrogacy agreements. It also prevents facilitation of pregnancy for the purpose of commercial surrogacy. However, it does not prohibit non-commercial agreements or the facilitation of pregnancy where there is a non-commercial agreement.

As a result, doctors at the IVF Clinic in John James Hospital have developed a surrogacy program which involves facilitating the pregnancy of the birth mother through IVF where the genetic material has been totally donated by another couple (the genetic parents).

For further information contact Meg Wallace, Legal Policy Division, ACT Attorney-General's Department, GPO Box 158, Canberra, ACT 2601. tel (06) 207 0536, fax (06) 207 0538. MW

NSW

REGULATING WATER

The Sydney Water Corporation (SWC) was created in 1995 out of the old Water Board and made subject to an elaborate regulatory framework to ensure it achieved set economic, social and environmental objectives. (See 'Sydney Water Inc' in (1995) 20 *Alt.LJ* 67).

In particular, an industry-specific Licence Regulator was created to oversee the Corporation, especially to ensure it complied with the terms of its

operating licence (granted for five years).

Recent events in NSW, following the release of the first audit report by the Licence Regulator, will provide a test of the framework created. Already various cracks have appeared, including alleged undermining of the process by SWC itself by publishing misleading advertisements about the conclusions reached by the Regulator.

One significant aspect of the audit report on SWC was the way it classified consumer complaints: simply put, it claimed only to have received 180 complaints, according to its definition of what constituted a complaint, compared to 'several thousand customer complaints', according to the Regulator, which observed:

In terms of customer service and some other responsibilities the audit revealed a tendency by Sydney Water to apply narrow and strained definitions which prejudice the interests of citizens.

Complaints have been made to the ACCC, the NSW Ombudsman and the NSW Department of Fair Trading about a number of issues, and the NSW Nature Conservation Council has called for more public involvement in the annual licence review, especially of SWC's environmental performance.

The public profile of the Licence Regulator itself is also in need of some action as a public meeting called in September to discuss its report attracted one single solitary citizen.

Advertisements in the Sydney press in October have now called for public submissions on the 1996 audit by 22 November 1996. Meaningful accountability has a long hard road ahead of it. PW

Queensland

GOVERNMENT STOUSHES

The Borbidge Coalition Government is involved in a number of significant legal stoushes at present. In particular, the Government is at loggerheads with the Criminal Justice Commission (CJC). The politics can be hard to follow at times but the controversy appears to centre on cuts to the CJC budget and the forthcoming release of the Report of the Carruthers Inquiry into matters related to the Mundingburra by-election. It has been suggested that the Government is eager to discredit the CJC before the release of the Carruthers Report. CJC

Chair, Frank Clair, is resisting strong Government calls for an immediate Public Inquiry into his recent allegations on high-level police involvement in drug trafficking. The Parliamentary Criminal Justice Committee is supporting Clair in this regard.

The Carruthers Inquiry may make findings likely to embarrass both sides of politics in Queensland. There is the possibility of adverse findings against:

- the Police Minister and former Premier, Russell Cooper, in relation to the Memorandum of Understanding signed by Police Union president, Cooper and then Opposition leader Borbidge; and
- Queensland Labor Party Secretary, Mike Kaiser, in relation to the Party's arrangements with the Queensland Sporting Shooters Association.

A range of concerns have been expressed in relation to the Government's proposed public service legislation which would see a wide range of public servants placed on employment contracts. The Government has also been strongly criticised in relation to moves to reduce access to workers compensation entitlements and common law negligence actions for work related injuries. The Litigation Reform Commission has been merged with the Law Reform Commission following the State budget. ● JG

South Australia

CASTRATION, CURFEWS AND CAPITAL PUNISHMENT

The State Parliament will be presented with a number of Private Members' Bills in its Spring session including Bills to reintroduce the death penalty for certain crimes, to allow for the chemical castration of repeat sex offenders and to establish a curfew for children. Bills to reform prostitution laws are also on the agenda. Media speculation is that many (if not all) of the Bills will lapse — there is a State election due by the end of next year and it is considered that the Government is concerned to avoid controversy. Nevertheless the Bills will no doubt invite much public discussion.

What is unlikely to receive the same level of debate is the recently released Planning Strategy for country South Australia. The Strategy is required to be produced under the *Development Act* and provides the broad objectives for

the development of that part of the State which it covers. The document includes many points which relate to the rights of people in rural communities. While much of the Strategy is concerned with narrow economic matters, the Strategy also documents the implications of the changing demographic profile of rural South Australia — in particular a rapidly ageing population as older people retire to the country and the young drift to Adelaide. The Strategy states:

The main issues facing families in rural areas suffering population decline are isolation, unemployment, low incomes and ageing. These, with increasing numbers of single parent pensioners, place demands on community services. These not only include those provided by the State Government, but support services from local government and the non-government sector. Such services are particularly important in helping in times of personal stress such as family breakdown, or health, education and welfare problems. [South Australia, Planning Strategy: Country South Australia, August 1996, p.27]

In the context of a State (and Federal) Government driven by the ideology of small government this point must provide some discomfort for our lawmakers. It is only one step away from asserting the right of country people to expect a certain level of state support in coping with their situation. Such radical thinking might spread to the cities!

Perhaps debating the three C's — chemical castration, curfews and capital punishment — is a lot easier than tackling the issues raised in the Strategy Plan. ● BS

Victoria

CRIMINAL SENTENCES

In the 'Government by the People' style that the Kennett Government does so well, the Attorney-General Jan Wade recently commissioned a survey in the Murdoch paper, the *Herald-Sun*, to garner the public's opinions about criminal sentencing. Defending the Government's decision, Ms Wade argued that the legal system has failed the community and that radical changes were necessary. However, a study released by the University of Melbourne may give the Government encouragement. The study indicated that Victorian judges have been imposing longer sentences in sexual offences cases — with rape sentences rising by almost 70% over three

years. Although Victoria's imprisonment rate is still relatively low, the increased gaol sentences have contributed to a 10% rise in Victoria's prison population. However, it is interesting to note that the indefinite sentences introduced by the Kennett Government in 1993 have been used in only two instances — each involving a sexual offences case.

It was in this climate that a 14-year-old boy became the youngest person to be convicted of murder in Victoria, as well as the youngest Victorian to be sent to prison. Sentenced by Justice Philip Cummins to 13 years imprisonment with an 8 year minimum, the boy was convicted of the murder of a taxi driver, and the armed robbery of another. Comments by Justice Cummins during the trial raised questions about the responsibility of the now renamed Department of Human Services for the actions of those in its care (the boy had been a ward of the state since aged 6) and the adequacy of government services in this area. The evidence of a parade of young witnesses in the trial brought to light what many in the welfare sector have known for a long time — that there are severe problems in the provision of child protection services, problems which are exacerbated by the lack of funding from the Victorian Government.

LACK OF CARE

Raising similar questions, the Government is facing litigation regarding its provision of care for the disadvantaged. So far the Kew Cottages and St Nicholas Parents Association have been successful in their attempts to keep litigation on foot which claims that the Government has failed to provide a proper standard of care to the residents of Kew Cottages and to observe other obligations under the *Intellectually Disabled Persons Services Act*. Following a Writ lodged last year, the Supreme Court rejected the State Government's application to have the action dismissed. Appealing to the Court of Appeal this year, the Government argued that the Courts do not have jurisdiction to query Government spending. The Court of Appeal dismissed the appeal, awarding costs against the Government.

POLICE COMPLAINTS

Eager to repair its tarnished reputation, the Victoria Police have initiated wide ranging changes to their system for investigating complaints against police,

including a completely revamped Ethical Standards Department. The new program, entitled Project Guardian will involve ethics training, including honesty programs, and will encourage police to transfer to the ethics department as a step to further their careers. However, the Victorian Council for Civil Liberties has called for a separate and independent body to investigate police, suggesting that a judicial inquiry into the police force was inevitable — an inquiry which would have many interested onlookers!

UNFREE SPEECH

On a different note, Victoria has sought leave to bring an action in the High Court which will challenge the implied rights to freedom of speech found in the Constitution in the cases of *Theophanous* and *Stephens*. Victoria is arguing that these cases should be reopened and overturned as they are based on bad constitutional law. The case concerns the right to freedom of political expression, and was originally brought in the Victorian Courts by Laurie Levy, the well known animal rights activist. Opinions are divided as to the direction that the High Court will take, considering the changes on the bench since *Theophanous* and *Stephens* were handed down. The case will be an important indication of whether the High Court will proceed any further down the implied rights path which it paved under Sir Anthony Mason. Attention will be focused in particular on the decisions of Justice Kirby and Justice Gummow, the new additions to the bench, as it is considered unlikely that those involved in the previous decisions, such as Chief Justice Brennan, will alter their original opinions. ● EC

Western Australia

SEXUALITY DISCRIMINATION

The Western Australian Government recently rejected a Bill submitted by Opposition spokeswoman Yvonne Henderson to outlaw discrimination against those who identify or who are identified as lesbian, gay, bisexual or transgendered.

In 1984 the WA Commissioner for Equal Opportunity released an extensive report encouraging the State Government to extend human rights protections to those who face discrimination on the basis of their sexuality.

Outlining the at times horrific discrimination faced by lesbians and gay men, the report concluded that to fail to do so would be both unjustified and inexcusable. Then Attorney-General, Cheryl Edwardes rejected the Report's findings and refused to amend the States equal opportunity laws. This time around, although not denying that discrimination does exist, Attorney-General Peter Foss rejected the Opposition's proposal, arguing that he did not want to be the Attorney-General remembered for encouraging 'the homosexual lifestyle'.

While the absurdity of Mr Foss' reasoning is all too evident, perhaps the best response to statements like the above, is offered by Chief Justice Nicholson of the Family Court who, speaking at a conference on Law and Sexuality recently held at Murdoch University School of Law, noted the following:

To the degree that sexuality is a fluid human characteristic, it strikes me as absurd to imagine that the achievement of limited legal protections would induce someone to re-orient their sexuality. It seems to me that politicians take themselves far too seriously if they really believe that any legislation they pass will have any effect one way or another.

Western Australia and Tasmania remain the only two States without human rights protections for lesbians and gay men. Copies of the Chief Justice's paper, as well as the other papers presented at the conference, are available on *ELaw — Murdoch University Electronic Journal of Law*, which can be accessed via the internet at URL — <HTTP://www.murdoch.edu.au/elaw> ● CK

The States/Territories roundup was compiled by Elena Campbell, Jeff Giddings, Chris Kendall, Brian Simpson, Peter Wilmshurst and Meg Wallace.

LESBIAN FAMILIES

Parental responsibility of co-mothers

JENNI MILLBANK discusses how a recent case used equitable principles to resolve a dispute following the breakdown of a lesbian family.

W v G (1996) 20 Fam LR 49 is a landmark decision of the NSW Supreme Court which held a lesbian co-mother liable to pay child support for the children raised within a lesbian relationship. It is a remarkable decision in that it finds a legal relationship of parenthood, in the sense of parental responsibility to support, regardless of biology or statute. However, it is not an unequivocally positive decision for lesbian families. This note mentions some of the negative elements of the case. These reservations about the case are in part due to the somewhat shaky factual foundations of the decision, but largely concern the imposition of financial liability on lesbian (or gay) co-parents who nevertheless have very few legal rights as parents or partners.

Facts

W v G concerned two women who separated after an eight-year lesbian relationship into which two children were born. The plaintiff, Wendy (not, as they say, her real name) was the biological mother of both children, born after she had self-inseminated sperm donated by a known donor. Wendy approached the court asking *inter alia* for 'equitable compensation' from Grace (Wendy's ex-partner) by means of a lump sum towards the cost of maintaining the two children to the age of 18. The claim was successful, and Wendy was granted \$150,000 from Grace's estate to be held on trust and used for the children.

The case was argued and decided on equitable principles. The *Artificial Conception Act 1984* (NSW) provides that donors of sperm, even known donors, are *not* defined as fathers. Thus the court held that the donor was not liable under federal child support legislation. Nor was Grace liable under statute because the legislation only contemplates the liability of biological and adoptive parents.¹ Grace's unsuccessful defence rested largely on the idea that the sperm donor should have been regarded as the other legal parent. As I have noted elsewhere, this is a somewhat ironic argument coming from a lesbian, especially considering that the sperm donor had agreed to have no connection to the children and was not even called at trial.²

Promissory estoppel

In the absence of statutory recognition, Wendy's counsel sought a novel use of the promissory estoppel principle from

Waltons v Maher.³ Wendy argued that by virtue of Grace's statements in support of Wendy having children, Grace's (contested) participation in the insemination process and her silence as to any contrary view, Grace had 'created or encouraged . . . a belief or assumption, or could otherwise be said to have promised' that she would 'accept the role of parent to each of the children, and would in so doing accept responsibility for the material and general welfare of both children' (at 56). In reliance on that implied promise, Wendy had two children, which was to her detriment in the sense that she would now be left to support them to adulthood alone. Hodgson J accepted this argument and applied *Waltons v Maher* to estop Grace from resiling from the implied promise.

The use of equitable principles in this case appears just and reasoned. The court was faced with a situation where one partner was being left with the financial burden of two children and very few assets following an eight-year relationship, while the other partner had substantial assets and no legal liability to provide support. Law, specifically statute law, had failed to provide a remedy and equity stepped in, as equity does, in an attempt to do justice between the parties.

However, the extent to which the facts supported the use of promissory estoppel is a major issue. First, there was no explicit promise to parent. Thus, the court looked to the words and conduct of the parties to find an implied promise. When did this implied promise arise? Was it when Grace agreed to the insemination? Was it when she participated in the insemination? (The extent of this participation was hotly contested and left undecided with respect to the second child). Was it when she had an ongoing live-in relationship with Wendy, knowing that Wendy was going to, and subsequently did, have children? Was it when she took on a parenting role with the children? (And *did* she in fact do this?) Was it a combination of all of these things? From a close reading of the case, the answer is unclear, and it is this lack of clarity which may have laid the groundwork for appeal.

Detrimental reliance

Detrimental reliance on the promise by the plaintiff and knowledge of that reliance by the defendant are key elements in promissory estoppel. Of particular importance in this case is the fact that promissory estoppel requires that the reliance *follow* the promise. For Wendy to establish detrimental reliance, in that she had two children, the promise must have preceded the reliance. The promise, therefore, had to have arisen prior to each insemination, not after. However, the court used evidence such as greeting cards, words spoken to third parties, and wills — all of which came into being *after* the births — to imply a promise from Grace that she would parent. To fall within the bounds of promissory estoppel this evidence must have been used to prove retrospective intent, because promises following the births do not fulfil the necessary element of detrimental reliance.

Scope of the promise

A further serious issue sidestepped in the case is the scope of the promise. The court quantified the promise using a three-step process. First, an expert report on the cost of raising children to adulthood relative to parental income (the Lee

Scale) was applied. Second, Grace's income was calculated by assuming an 8% return on her inheritance (she was unemployed at the time of trial). Third, the costs between Wendy and Grace were apportioned by applying the formula under the *Child Support (Assessment) Act*. Thus, the court held that Grace was to bear approximately two-thirds of the cost of child raising. However, when the promise was made (which had to be prior to insemination under promissory estoppel's constraints), and indeed for most of the relationship in which the children were raised, Grace was either engaged in low-paying employment or was on unemployment benefits. Thus, when Wendy relied on Grace's financial support in having the children, Wendy was surely relying on the support of a *low income earner* — not on the support of a woman who many years later would inherit \$500,000 (and have her contribution apportioned by a statute which did not apply to her). It is clearly a fiction to say that Grace represented, or that Wendy relied on, a promise to support the children at the top end of the Lee Scale until adulthood.

Final orders and costs have not yet been determined, so it is not known whether an appeal will proceed. If it does, the two issues discussed above, the timing of the point of promise and the scope of the promise, may well be weak spots, which could allow the Court of Appeal to overturn the case on purely technical grounds and ignore the policy import of the decision.

Recognition of lesbian families?

Despite the fact that the decision in *W v G* does go some way towards recognising lesbian families, it does so in what is effectively a legal and social vacuum. The decision applied a case about building supermarkets to raising children without acknowledging the wider legal context in which the parties were and are operating. Grace was required by equity to stand by her promise to be a parent, to the tune of \$150,000, without being recognised as a parent in any other area of law. If Grace had died or been injured, the children would have had no right to compensation or to her estate if there was no will (although they could have applied under the *Family Provision Act 1982* (NSW), as it is broader than all other States, except the revised ACT version). If Wendy had died or been injured, Grace would have had no right of guardianship.⁴ Although Grace could have approached the Family Court of Australia seeking custody or access to the children,⁵ the extent to which the court would recognise her claim is questionable. Non-biological parents are generally referred to as a 'stranger' and biological parenthood has been regarded as a 'significant factor' by the court in assessing which proposal advanced the welfare of the child.⁶ Moreover, in child custody cases involving lesbian mothers and their male ex-partners, the court has continued to issue judgments which are at best disrespectful and at worst pathologising of (biological) lesbian mothers, as recently as last year.⁷ Thus, the technical right in equity of a lesbian co-mother to approach the court may indeed do very little in fact to provide equality between lesbian and heterosexual families.

Conclusion

When the broader context of the failure of the law to recognise lesbian partnerships and parenthood is acknowledged, it is hard to see the *W v G* case as an unequivocal improvement in the legal position of lesbian families. Effectively, we have the right to sue each other and thereby save the state money on child support, but not much else. Of course, this

is not the fault of the court in *W v G*. Like most litigation, issues are privatised and individualised and the Court could only do justice with the specific issues put to it. The case does, however, serve to highlight how iniquitous this area will be until legislation begins to fill in some of the gaps.

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References

1. See *Child Support (Assessment) Act 1989* (Cth) ss.3, 5, 29.
2. See 'An Implied Promise to Parent: Lesbian Families, Litigation and W v G', (1996) 10 *Australian Journal of Family Law* 112.
3. *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Promissory estoppel as a 'sword', a way of actively enforcing what would otherwise not be a legal obligation, stems from this case.
4. See *Lesbian and Gay Legal Rights Service, The Bride Wore Pink*, 2nd edn, Gay and Lesbian Rights Lobby, Sydney, 1994.
5. The *Family Law Act 1975* (Cth) s.65C(c) provides that 'any other person concerned with the care, welfare or development of the child' can apply for a parenting order (which encompasses residence or contact, formerly known as custody and access). The Act also states that a parenting order may be made in favour of a person who is not a parent: s.64C. This is a vast improvement on many other jurisdictions where lesbian co-parents do not even have standing to approach the court, see, for example, the American cases: *Curiale v Reagan*, 222 Cal App 3d 1597 (3d Dist 1990); *Nancy S v Michele G* 228 Cal App 3d 831 (1st Dist 1991); *Alison D v Virginia M*, 572 NE 2d 27 (Ct App 1991).
6. See, for example, *Drew v Drew; Lovett (interveners)* (1993) 16 Fam LR 536, limited by *Hodak and Hodak and Newman* (1993) 17 Fam LR 1.
7. See, for example, the demeaning eight step test applied to a lesbian mother in *L and L* (1983) FLC 91-353, including questions such as, 'Whether a homosexual parent would show the same love and responsibility as a heterosexual parent'. A recent case involving a gay father adopted this approach: *Doyle* (1992) 15 Fam LR 274. The Family Court has taken such steps as banning mothers from living with a female lover: the most recent of which was *G and G* (1988) FLC 91-939 (interim order, lasting one year). In *A and J* (1995) 19 Fam LR 260, the trial judge expressed the view that 'it was inappropriate for children to observe overt displays of affection between persons in a committed and continuing homosexual relationship'. The court granted the custody to the husband despite the evenly balanced claims of the parents, on the grounds that it was of overriding importance that the child have a 'balancing' male influence to counter the effects of the mother's lesbian relationship. This was upheld on appeal by the Full Family Court.

MATERNITY RIGHTS

The baby or the job?

CAROLINE ALCORSO discusses the experience of Working Women's Centres.

Working Women's Centres are community-based, government-funded information resource centres for working and unemployed women.

Although there is considerable interstate variation, all centres provide information, advice and support on employment issues, including:

- unfair dismissal
- discrimination
- pay and employment conditions
- maternity rights and entitlements
- health and safety
- workplace bargaining and
- vocational support.

The NSW Working Women's Centre, in Parramatta, NSW, is one of the four new centres across Australia. In late 1994, coalitions of women's organisations, trade unions and (in

Queensland) the State Government received funding from the Federal Department of Industrial Relations to establish industrial relations information services for women in NSW, Tasmania, Northern Territory and Queensland. These centres now form a network with the Adelaide WWC, which has a long and quite different history, emerging out of the labour movement in the mid 1970s.

The centres represent a new type of community service. In part they can be seen as a response to the void in the private sector workforce caused by the declining presence of trade unions and other bodies that represent workers' interests. In this respect, they can be seen as part of a new species of community-based industrial service, similar to, for example, JobWatch in Victoria. WWCs are also a response to the distinct needs of *women* workers in male-dominated and sexist workplaces and labour markets, and grew out of women's protests at the decentralisation of industrial relations and the adverse impact this would have on women workers.

Maternity rights — the experience of NSW

In the first 18 months of our full operation, queries and complaints on maternity entitlements and rights have averaged around 10% of all client calls — some 150 from January 1995-August 1996. Even when we add in those sex discrimination and employment termination cases where maternity issues are involved, this is well behind the number pertaining to the less gender-specific issues such as unfair dismissal, remuneration, employment conditions and workers' compensation.

Typically, women inquiring about maternity issues seek information and support on being denied their leave entitlements or on being refused their old (or another suitable) job on return to work. In some cases, once armed with information, callers are able to negotiate an acceptable outcome with their employers, with or without our direct assistance.

However, there seems to be a distinct syndrome whereby employers try to retain the temporary replacement worker, and downgrade or harass the return-to-work mother. Often the replacement worker has been taken on for a lower wage; perhaps also the employer perceives a new mother as potentially unreliable.

Being dismissed following pregnancy also remains depressingly common, ironically, in two recent cases even amongst women employed as private nannies! One wonders about the social chaos that would result if, on falling pregnant again, mothers were suddenly regarded as unable to care for their existing children.

The scale of these issues amongst the many problems facing our clientele may not, on first glance, seem dramatic. Comparing frequencies is, however, fraught with problems, as women are far more likely to seek information and pursue action over a traumatic event like being sexually harassed than they are over denial of their maternity leave.

Limited rights

Maternity rights themselves, while important, provide relatively little protection. When one examines the typical complaint to the WWC from pregnant women and new mothers, one is struck by the thinness of the maternity rights enjoyed by Australian women. The best most women can expect is leave without pay, and for the 30% of women who are employed on a casual basis, and a further proportion who have not been with that particular employer for 12 months,

not even unpaid leave is available. This very thinness militates against a large number of complaints, and against consciousness about rights.

For this reason, the WWC often proposes to women that they seek conditions above the minimum, especially where their particular minimum is nothing. We have also looked with interest at some of our recent cases which do test the limits of the law, especially with regard to casual workers. We have found that the most vulnerable women occupy precisely those employment types that in turn are likely to deny them access to maternity leave and other rights.

The problems of a 'regular casual'

In one such case, a Vietnam born immigrant woman who worked as a process worker in a large multinational food company had been retained as a full-time 'regular casual' for nearly four years. During this time she had not taken any leave, as she earned a low wage and had pressing financial needs.

Immigrant women appeared more likely to be retained as casuals at this factory; for example, Anh had a Vietnamese friend who had worked there six years as a 'casual'.

Although it had been explained to her that she was not entitled to maternity leave, she had been reassured that she could just call the company when she was ready to return to work and go back to her old job. However, a few weeks after the baby was born, Anh received notice of her termination benefit from the superannuation company.

Alarmed, Anh called her supervisor and said that she wanted to return to work. Her supervisor procrastinated, and eventually said there was no job for her. When Anh, very upset, pressed people at the company, explaining that she needed the money desperately, she was banned from the worksite for being disruptive.

An out of court settlement of some three months pay was reached after Anh made application to the Australian Industrial Relations Commission for unfair dismissal. However, an anti-discrimination claim also made by her at the time was rejected by the NSW Anti-Discrimination Board on the basis that workplace conflict, as much as discrimination, could have been the cause of her problems, and that the company had not shown discrimination in the past — for example, permanent women workers had not been dismissed after they had had babies. (The 'conflict' referred to was a sharp exchange between Anh and her supervisor in the late stage of pregnancy when she sought a different production line job where she could sit down instead of standing.)

What this case highlights is that the lack of entitlements for casual workers (and approximately half of all casual workers are estimated to be 'regular casuals') ensures that the already precarious position of these workers is made more precarious and unsafe, both while they are at work and following childbirth. What justification can there be for their exclusion from this most appropriate entitlement when in NSW casual workers *are* entitled to long service leave?

The experience of the WWCs confirms that significant numbers of women continue to have difficulty in obtaining their maternity entitlements, and are especially vulnerable to dismissal when they are pregnant, or have had a child. It also shows that an increasing number of women (that is, long-term casuals) fall through a very patchy legislative net, and have few rights or legal protection at all. While enforcing awareness of and compliance with existing laws is clearly

important, extending and strengthening the employment rights of women workers in the area of maternity must be a priority for the labour movement and all governments.

See below for contact information, including Free Call numbers, for all the Centres. Contact the Centre in your State to find out more about, or to assist with, its work.

Caroline Alcorso is Director of the New South Wales Working Women's Centre.

WWC CONTACT DETAILS

NSW
tel (02) 9689 2233
free call 1800 062 166

QUEENSLAND
tel (07) 3224 6115
free call 1800 621 458

ADELAIDE
tel (08) 8267 4000
free call 1800 652 697

TASMANIA
tel (002) 34 7007
free call 1800 644 589

NORTHERN TERRITORY
tel (08) 8981 0655
free call 1800 817 056

Failing to deliver

CAMILLA PALMER examines the impact of European law on maternity rights in Britain.

Good maternity rights, high quality childcare and a flexible working environment which enables women to combine work with family responsibilities are the key to women's equal participation in the labour market. The UK has failed on all scores. The prediction that by the next century 20% of women will choose to remain childless, in order to pursue a career, is a damning indictment. Despite the increasing number of women entering and staying in the labour market, there is still a glass ceiling, which few women break through, and full-time women employees receive only 72% of men's gross weekly earnings.

Maternity leave and pay

Prior to 1994 women who had worked for their employer for less than two years were not entitled to maternity leave. The evidence shows that many were simply dismissed. The European 'Pregnant Workers Directive' forced a reluctant UK Government to introduce 14 weeks maternity leave for all women, whether permanent or temporary employees, irrespective of the number of hours they work or how long they have worked for the employer.¹ In addition, women who have worked for their employer for two years are entitled to 'extended maternity absence' — that is, they can return to work up to 29 weeks after the birth of a baby.²

The reality is that many women cannot afford to take the longer period. Statutory maternity pay (SMP), which is payable to employees earning more than \$122 a week, is payable for 18 weeks @ 90% of pay for the first six weeks and a flat rate of \$109 a week for the following 12 weeks. (This is paid by the employer, but 90% is refunded by the Government.) Thus, women who are only entitled to 14 weeks leave must return to work and will lose four weeks SMP. This is just one of the anomalies in the system. Another is the different treatment of women during their 14-week maternity leave period and the extended maternity absence.

During maternity leave women are entitled to the benefit of the terms and conditions of their contract *except* for

'remuneration'. Remuneration is the woman's basic pay. All other benefits, such as mortgage subsidy, insurance, employer pension contributions, and holiday leave continue to be received or accrue during the 14 weeks.

What happens at the end of the 14 weeks, during the extended 'maternity absence' period? The Employment Appeal Tribunal (EAT) clearly does not know. Two EAT decisions say that the contract continues, but are not clear about whether the *terms and conditions* of the contract continue.³ The third decision suggests that the contract comes to an end — unless and until the woman exercises her right to return to work.⁴

Dismissal and discrimination

It is now *automatically unfair* to dismiss a woman for any reason connected with her pregnancy, childbirth or maternity leave. The employer has no defence.⁵ This protection was introduced in 1994 at the same time as Carole Webb was arguing before the European Court of Justice (ECJ) that it was *discrimination* to dismiss her because she was pregnant.⁶

It took eight years for Carole Webb to win her case. All the British courts were against her. The ECJ, to which the case was referred by the House of Lords, held that it was unlawful to treat a woman less favourably because she was pregnant. It was not necessary to compare her to a man in a similar situation (the sick man comparator). Nor was it possible to argue that the discrimination was *not* because the woman was pregnant but because of the *consequences* of her pregnancy — that is, she was not available to work.

Webb established that any less favourable treatment of a woman because she is pregnant, has had a baby or has taken maternity leave is unlawful discrimination. This would include a failure to recruit, promote or train a woman, denial of any benefit or dismissal. A discrimination claim should always be brought (as well as an unfair dismissal claim) because, unlike unfair dismissal, compensation can be awarded for injury to feelings and there is no limit to the amount of compensation.

Other maternity rights

All employees are entitled to *paid* time off for ante-natal care, which includes relaxation classes. In addition, pregnant women, new and breastfeeding mothers are entitled to protection from health and safety risks. Employers must carry out an assessment of the risks and where there is a risk, the employer must either alter the working conditions to remove the risk, give the woman available suitable alternative work, or if there is no such work, suspend her on full pay.

A 'right' to return to work part time or as a job share?

Many women want to return to work part-time. Refusal to allow a woman to work part-time may be indirect discrimination. Indirect discrimination is where there is a 'requirement' or 'condition' (for example, to work full-time), which a considerably smaller proportion of women than men can comply with (90% of part-timers are women), which the employer cannot justify and which is to the woman's disadvantage because she cannot comply with it. Women with children find it harder to work full-time and it is not enough to say they *could* do so by employing a childminder.

The main issue is whether the requirement to work full-time is necessary. Employers often argue it is administratively difficult to have part-timers, or they are inconvenient

or the job is one which can only be done by a full-timer. Courts, and particularly the ECJ, are increasingly looking for proof to support such bald assertions.⁷ Successful claims can lead to substantial damages — \$70,000 in two cases.

Conclusion

European law has led to improved maternity rights in the UK and protection against discrimination (particularly in relation to part-timers).

There is still a long way to go. Maternity leave is too short and the pay too little. Despite evidence that greater maternity rights benefits both employees and employers (because of the reduced turnover of staff), this is unlikely to persuade a government committed to a free market economy.

Enforcing employment rights is difficult; there is no legal aid and the law is complex. As one senior judge said of the maternity provisions, 'they are of inordinate complexity exceeding the worst excesses of a taxing statute' which 'is especially regrettable bearing in mind that they regulate the everyday right of ordinary employers and employees'. He then said that 'even with the skilled assistance of experienced advocates he had no confidence that he correctly understood them'. What hope for us lesser mortals?

Camilla Palmer is a solicitor in London and an expert in discrimination and employment law.

References

1. Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
2. *Employment Protection (Consolidation) Act (EPCA) 1978*, ss.39-44, as amended by the *Trade Union Reform and Employment Rights Act Act 1993*. This was also the position before 1994.
3. *Institute of the Motor Industry v Harvey* 1992 ICR 470 and *Hilton International Hotels (UK) Ltd v Kaissi* 1994 ICR 578 EAT.
4. *Crouch v Kidsons Impex* [1996] IRLR 79.
5. *EPCA* 1978, s.60, as amended.
6. *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482 ECJ and *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] IRLR 645 HL. At the time Carole Webb was dismissed protection from dismissal referred to in ref.5 above did not exist.
7. These principles apply to other requirements to work particular hours, such as anti-social hours, excessively long hours, unplanned overtime.

POLICING

'Clearly this is not a breath freshener!'

CHRIS RICHARDS examines the safety of police use of capsicum spray.

When ex-FBI Special Agent Thomas Ward awaited sentence after pleading guilty to receiving a \$57,000 illegal 'gift' from a leading United States capsicum spray manufacturer, the safety of capsicum spray was also standing trial. Ward got two months imprisonment in May 1996. The verdict on the safety of the spray for the hundreds of Victorians who will be sprayed with it, has yet to be delivered.

Ward's late 1980s research on capsicum spray found it to be safe and effective. His research contains the only comprehensive research on human subjects exposed to capsicum

spray, and includes the results of spray testing on nearly 900 FBI Academy trainees and police officers.

Ward's acceptance of large monetary gifts from a company which has profited from his findings means that his research conclusions cannot be relied on. At best, they have the taint of bias; at worst, they are fabricated to ensure that his benefactor's product appears in the best light.

However, Ward was only exposed in February 1996. The FBI endorsement of capsicum spray, based on Ward's research before he was discredited, has been widely attributed as critical to the spread of the spray to the armories of law enforcement agencies around the world — including, it seems, the Victoria Police.

On 18 April this year, Sunshine police became the first Australian police officers to carry capsicum spray as an operational weapon. Since then, the spray has also been distributed to Broadmeadows, Dandenong, Springvale, Knox, Geelong, Morwell and Preston police stations.

Assistant Commissioner Ray Schuey says that the addition of capsicum spray as a police weapon is part of the implementation of the recommendations of Project Beacon. Under the umbrella of this project, five independent reviews formulated 219 recommendations. One of the reviews was conducted in mid-1994 by FBI Special Agent Jim Pledger who recommended that capsicum spray be introduced.

And, while Ward may not have been in Australia in person, it seems he was here in spirit. A Ward study was one of only three documents that the Victoria Police sent to North Melbourne Legal Service in answer to its freedom of information request for the information that the police held about capsicum spray in February 1994. Which leaves us to ask — was Ward telling the truth? Is capsicum spray safe?

Its official name is oleoresin capsicum spray. Oleoresin capsicum is a natural oil of red cayenne pepper. In Victoria, it will be sprayed into the faces of violent police suspects who are assessed as likely to injure themselves or others. It will cause an acute burning sensation and inflammation that results in immediate pain and a closing of the eyes. The mucous membranes around the eyes, lips and nose will become inflamed. If the droplets are inhaled, they will inflame the respiratory tract causing choking and gasping for breath. It will also incapacitate co-ordination. While Victoria Police say that the pain and inflammation will last up to 45 minutes, other reports say the effects could last up to two hours.

Two days before capsicum spray became available to Sunshine police, the San Francisco District Attorney's office banned the use of pepper (capsicum) spray by its investigators. The DA's chief investigator was quoted in the *San Francisco Chronicle* as saying 'It's obvious there are some problems with it. There have been numerous deaths across the nation associated with its use.'

Capsicum spray was legalised for use by California law enforcement agencies in October 1992. The Americans call it pepper spray. To date, Californian police officers and sheriffs' deputies have used the spray nearly 23,000 times.



The American Civil Liberties Union (ACLU) says that, in California alone, 37 deaths in police custody have been associated with pepper spray since 1993. In its 1995 report, *Pepper Spray: More Fatalities More Questions*, the ACLU reported that one in 600 people died after being pepper sprayed.

The report examines the circumstances surrounding the deaths of 26 people who died in police custody in the 15 months preceding 1 June 1995. Typically, the deceased were under the influence of drugs or had a mental condition, and were irrational or combative at the time they came into contact with the police. Most were middle aged and overweight. Many had pre-existing respiratory and cardiac conditions. All died shortly after being pepper sprayed. None of the deaths were officially attributed to pepper spray in autopsies.

A May 1996 edition of the *San Francisco Weekly* prints extracts of the reaction by Dr Carol Henry, Director of the Office of Environmental Health Hazard Assessment (OE-HHA), to the ACLU report. 'We are concerned that in each incident, untoward reaction to [pepper spray] may be the contributing cause of death, or [have] exacerbated underlying conditions such as pre-existing disease or drug use to cause cardiac arrest or respiratory failure', Dr Henry wrote to Californian Attorney-General Lungren.

By contrast, a report commissioned by the International Association of Chiefs of Police (IACP) studied 22 in-custody deaths where pepper spray had been used, and found causes of death were due primarily to drugs or positional asphyxia (many of the suspects were hog-tied). In no case was pepper spray found to be a cause. The IACP report supports the use of pepper spray as a safe and effective police tool. Assistant Commissioner Schuey says that Victoria Police accept the findings of this report.

The San Francisco Police Department also agrees with the IACP report. On 8 May 1996, a departmental task force that had been working on the pepper spray issue for almost a year found no connection with in-custody deaths in San Francisco and recommended that officers should continue to use pepper spray when they feel it is necessary.

But Advanced Technologies President, Stephen Beazer, doesn't agree. Beazer's organisation is one of the major manufacturers of capsicum spray devices in the United States. 'Does pepper spray have a role in some of these deaths? I will say yes. It is going to have an effect. These are weapons,' he told the *Los Angeles Times* last year. 'Clearly, this is not a breath freshener or an underarm deodorant.'

A possible conclusion that capsicum spray can exacerbate pre-existing heart or respiratory conditions to a fatal level is evident in 16 of the 26 deceased examined in the ACLU report. The health risks could be particularly serious for people in this category. An estimated 10% of the Australian population suffer from asthma. It is not hard to imagine the distress that would be caused to an asthmatic by inflammation to the respiratory tract after inhaling the spray. Assistant Commissioner Schuey says that this concern is exaggerated. He points out that he's never come in contact with someone who has had an asthma attack either before, during or after an arrest. In addition, Flinders Medical Centre respiratory physician, Dr Jeffrey Bowden, who reported to the Victoria Police about the health effects of capsicum spray, is quoted in *Police Life* as saying that the risk of capsicum triggering an asthma attack is small. (His reference is to capsicum, not capsicum spray. His report is not available to the public or media.)

It is impractical for the police to ask whether a person has these pre-existing conditions before using the spray. And there is no other way for police to assess whether a person has a special condition that could make the spray dangerous. Assistant Commissioner Schuey describes a thorough training regime and a detailed after-care procedure designed to limit the use of the spray and pick-up any health problems it causes at the first available opportunity after the spray is used. However, critics question why the spray needs to be used in the first place.

The recommendations to introduce the spray were spawned by Project Beacon, the sole purpose of which was to investigate operational safety of police members. The spray extends the weapon options available to police members. Like the extendable baton, it is to be used in conjunction with other weapons. Assistant Commissioner Schuey says that it is not an alternative to firearm use. There are no set guidelines that describe when the use of the spray is advisable. It depends on the level of threat of violence assessed by the police member.

Western Suburbs Legal Service lawyers, Jude McCulloch and Marcus Clayton, say that the Victorian public has been duped about the use of the spray. They say that the spray was sold to the public as an alternative to the police shooting those they believe are armed and threatening. During the extensive Coroner's inquest into seven fatal shootings of Victorian citizens by the police which was conducted over several years earlier this decade, the police said that all of the deceased had a gun or a knife that made the police fear for their safety. It was this fear, the police said, that provoked them to shoot. McCulloch and Clayton point out that a police officer is unlikely to allow a person holding a gun or a knife to get within the 3 metre range in which the spray becomes effective. Schuey acknowledges that if a suspect is holding a gun within the 3 metre range of the spray, then the threat levels make use of the spray (as opposed to a gun) unlikely. In the seven shootings examined during the inquest, guns would almost certainly still have been used even if police carried capsicum spray.

Damien Lawson, a spokesperson and founding member of Copwatch, thinks that the spray is more likely to be used to make it easier for police to get the hand-cuffs on and a person into the divvy van without confrontation. Lawson adds that the spray is tantamount to a punishment. It causes intense pain and psychological trauma. He says that police shouldn't be punishing people: that's the job of the courts.

The fact that the spray is a repeatedly present factor in Californian deaths in custody should be enough to set off warning bells that further research about the safety and effectiveness of the spray is needed. Victoria Police ignore these alarm bells at their own risk. In California, a district attorney, lawyers, civil liberties organisations, a major environmental health body — even a manufacturer of capsicum spray — have connected the spray with the capacity to kill. It appears to be law enforcement bodies who are the main advocates resisting a connection between public danger and capsicum spray usage. Turning its back on the issue has meant that the San Francisco Police Department now faces a barrage of highly publicised wrongful death and injury claims, which, if successful, will cost the Department millions in public money and bad publicity. Victoria Police need to act quickly to avoid the same fate.

Chris Richards works in law and media, presently in Sydney.

Public and Private: Feminist Legal Debates

Edited by Margaret Thornton; Oxford University Press, Melbourne, 1995; 318 pp; \$29.95.

Public and Private: Feminist Legal Debates is a collection of essays by participants in the 1992 Law and Feminism series of the Research School of Social Sciences at the Australian National University. When introducing the reader to this text, editor Margaret Thornton tags the collection as an exploration by Australian feminist legal scholars of the ambiguities for women arising from the analytical separation between the public and private spheres. The thematic division of what is a very disparate collection of essays occurred when the project to publish a collection of essays was initiated and a recurring theme of the public/private dichotomy emerged among the participants' research proposals. Given this origin it is perhaps not surprising that the essays do not predominantly 'debate' the notions of public and private as suggested by the title. Feminist legal writings have often adopted the public/private dichotomy as a starting point for discussion and in some ways this book demonstrates this, continuing, reflecting and reinforcing that tradition, rather than challenging or debating it.

This is not to say, however, that *Public and Private* does not introduce a number of interesting additions to the debate surrounding the public/private dichotomy. Thornton states that the book is structured to highlight the contradictory and shifting strands of public and private. The book does achieve a crystallisation of the many ways the public/private dichotomy debate is invoked. This is exemplified in Ngaire Naffine's article, 'Sexing the Subject (of Law)', which explores the nature of legal subjectivity in the public and private spheres. Naffine draws the conclusion that claims of female inclusive subjectivity in either sphere are false; the law fails to recognise women in their particularity, especially in the private sphere, and it fails to recognise women's rights to participate in the public sphere. Similarly Regina Graycar's article, 'The Gender of Judgments: An Introduction' is a challenge to the notion of 'public' decision making (judging) divorced from the private sphere.

A number of the other articles focus on a specific area of law, examining the practical impact on women of the contradictory and shifting strands of public and private. A recurrent theme throughout a number of pieces is the increasing (re)privatisation of aspects of public life under the auspices of responsiveness to the family, the bridging of the public and private spheres, individual freedom, flexibility and gender neutrality. A number of the writers question assumptions surrounding the benefit of shifts between the public and private spheres and alert us to the ease with which feminist analysis can be manipulated to suit contemporary discourses.

Rosemary J. Owens' article, 'The Peripheral Worker: Women and the Legal Regulation of Outwork', explores the construction of work in the public and private spheres, and more particularly the way 'atypical' work relationships such as outwork are treated. Owens concludes that the construction of work remains heavily gendered and that (re)privatisation of paid work perpetuates this. Laura Bennett's article, 'Women and Enterprise Bargaining: The Legal and Institutional Framework', examines, within the economic and industrial context, the differing legal and institutional frameworks of federal and State industrial relations systems and draws out the possible implications for women of the shift from centralised wage-fixation to enterprise bargaining.

Marcia Neave's article, 'Private Ordering in Family Law — Will Women Benefit?' examines the impact on women of the privatisation of dispute resolution of family law disputes, including the promotion of co-habitation and separation agreements. Hilary Astor's article, 'The Weight of Silence: Talking about Violence in Family Mediation', takes the shift to mediation of family disputes, and questions the assumption that women within the context of mediation will be able to make public the violence that has occurred against them.

The slippery and at times uneasy division of public and private spheres is

also a common theme. This is particularly so for Gail Mason's article, '(Out) Laws: Acts of Proscription in the Sexual Order' and Jenny Morgan's article, 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners'. Both writers address the slippage of matter of a sexual nature into the private sphere, through the invocation of morality. Hilary Charlesworth's article, 'Worlds Apart: Public/Private Distinctions in International Law', also draws out different uses of the public/private dichotomy, in this case regarding the jurisdiction and the exercise (or not) of international law.

Two articles provide a more direct challenge to the way feminists have analysed the public/private dichotomy. After exploring the history of the public/private divide in her introduction to the book, Thornton in the article, 'Embodying the Citizen', proceeds to question the basis on which public structures have been challenged, suggesting that a search for a more meaningful interpretation of citizenship in the public sphere is necessary. Archana Parashar's article, 'Reconceptualisations of Civil Society: Third World and Ethnic Women', is the contribution I found the most challenging. Parashar questions the way feminists have sought to reconceptualise the public, the private and civil society and argues for a more inclusive reconceptualisation, to ensure the inclusion of women from Third World societies and ethnic minority women.

Although the collection sits somewhat uneasily together due to the differing focus of the writers, I think its loose and diverse nature does make *Public and Private* an interesting and resonating read. The majority of the articles in the collection illuminate and extend the multifarious feminist analyses of the public/private divide in varying contexts; although in other parts there is a distinct challenge to the scope and focus of the analysis itself.

JACINDA DE WITTS

Jacinda de Witts is a law graduate working at the Australian Industrial Relations Commission.

Rogue Trader

by Nick Leeson; Little Brown 1996; 256 pp; \$19.95 softcover.

While there is no doubt a self-serving quality to this account of the fall of Barings Bank by Nick Leeson, the young man partly responsible for its fall and currently serving a prison sentence in Singapore, one must sympathise with many of his observations about the management of Barings. Even the rather lame report on the fall of Barings produced by the UK bank regulator, the Bank of England, referred to the serious failure of controls and managerial confusion within Barings leading to its collapse in February 1995 as a result of accumulated trading losses of £827 million.

Leeson was the manager of Barings Futures (Singapore). He managed to conceal these trading losses incurred as a result of his management of futures and arbitrage dealing on the Singapore International Monetary Exchange (or SIMEX) and the Osaka Securities Exchange by a combination of lies and forgery while at the same time keeping auditors, supervisors and the distant global treasury operations of Barings at bay by recording enormous false profits.

While there was every good reason to question the performance of the Singapore office as the largest profit centre for the Barings group with enormous daily financing requirements, Leeson's explanation is that nobody in Barings really wanted to know. Senior management at Barings were obsessed with the enormous bonuses they stood to gain as a result of Leeson's apparently profitable trading and this overcame their sense of prudence. The possibility that their hard drinking, jube chewing, football obsessed, youthful colleague could be fiddling the figures by a few hundred million was unthinkable.

Part of the reason Leeson was able to conceal trading losses resulting from the trading errors of his colleagues and adverse market movements was the unique position he occupied in the Singapore futures operation. Leeson was the manager controlling both the trading undertaken by Barings Futures (Singapore) on any one day in the various dealing pits of SIMEX (for example, the Nikkei pit where trading took place on futures contracts based on trading activity on the Nikkei stock index) as well as the settlement of those deals. Usually trading and settlement are strictly seg-

regated to ensure mistakes made during the often frenetically paced trading day are accounted for, supervised and retrieved before accumulated losses become too large. Significant losses or errors (for example, buying instead of selling futures contracts for a client) would of course usually indicate negligence and require dismissal of relevant staff to preserve the bank's reputation as well as reduce risk to client funds but Leeson was anxious to preserve both his staff and his new position as recently arrived manager.

As controller of the settlement function Leeson was able to direct the creation of the ironically entitled '88888' error account (a lucky number in Chinese folklore) where losses and errors could be parked. However, as the futures contracts parked in 88888 were transparent to SIMEX (which had online computer access to Baring's trading positions) they also attracted margin calls from SIMEX. Margin calls are a form of risk management employed by SIMEX whereby SIMEX calls for funds from traders to cover any daily losses (also apparent because of the transparency of computer-based settlement systems) as well as estimated losses for the following day's trading. In this way an independent regulatory body can reduce risk for parties using SIMEX to ensure that counterparties to futures trading can honour their contractual liability.

Leeson had no funds to cover these margin calls and so at first used a combination of floating client funds and his own bonus payment to fund margin calls. When his loss position in 88888 grew too large to fund in this way he traded options (contracts whereby the buyer has the right but not the obligation to buy futures contracts during a certain period at a certain price) and used any profits he could gain from selling them at accounting time to reduce the loss position in 88888. This also exposed Barings to any adverse movement in the options market as Leeson failed to hedge his position (that is, counter adverse market movement by buying or selling in the underlying futures markets). Further funding came from Baring's central treasury operation in London which dealt directly with Leeson and which could not verify his calls for extra funding dressed up as legitimate client funding needs. The ob-

ject was to reduce the 88888 account balance to nil thereby avoiding management scrutiny.

Leeson attempted to trade his way out of his loss position which increased from £23 million in 1993 to £116 million in 1994 to £208 million at the end of 1994 with a rapid acceleration in exposure in the first two months of 1995 to £827 million at 27 February 1995 when Barings was closed down by the regulatory authorities. As much of his trading was done in Japanese yen and shares his trading positions were significantly affected by the plunge in the Japanese stock markets following the Kobe earthquake as well as the market perception that Barings was carrying large overvalued positions. Leeson attempted to move the market by high volume trading but merely increased Barings' exposure.

When auditors or regulators turned up Leeson bluffed and used primitive forged documents cut and pasted to draw in fictitious third party transactions to explain away irregularities. Barings management and auditors, although troubled, bought the bluff and failed to verify Leeson's statements adequately.

In the end (February 1995) Leeson fled Singapore, was eventually arrested and extradited to Singapore on forgery charges where he is now serving his prison sentence. While the prudential regulatory requirements of SIMEX enabled most of Barings counterparties to suffer minimal loss as a result of Barings' collapse, Baring investors lost their £90 million investment in the bank. When they attempted to have their case brought before the UK courts to seek compensation as part of a civil fraud claim the Serious Fraud Office (SFO) used its statutory veto power to prevent the claim from proceeding arguing that issues of fraud were more properly dealt with by the Singapore courts. This was despite the fact that much of the fraudulent conduct by Leeson related to margin funding from London and the supply of false accounts to London. Given the possibility of UK jurisdiction and the SFO's gutting of the investor litigation, Leeson's lawyer was moved to respond to the SFO decision not to extradite Leeson to the UK by a media release stating: 'It makes no sense, unless there is some non-legal explanation and they are coming under political pressure to resist extradition here'.

Rogue Trader is a quick and sometimes embarrassingly frank read. Leeson portrays himself as the working class boy made good surrounded by aristocratic and greedy incompetents. There are no real excuses for his conduct—his physical and mental deterioration from the stress of living a lie for over three years are described in detail. Those who want more technical detail should consult the report of the Bank of England and more recent assessments. Hopefully such post mortems will have a pervasive influence on organisational culture and corporate governance in the financial markets. One succinct assessment by the UK tabloid the *Daily Telegraph* is a worthy conclusion:

The report reflects badly on the Bank of England, badly on Mr Leeson, but worst

of all on the senior management of Barings. It defies the comprehension of an outsider that a single individual could have wreaked such havoc for almost three years without detection. Mr Leeson is neither victim nor hero, merely the latest in a long history of young men entrusted with responsibilities for which they proved unfit. But it is those who sat on the board of Barings who emerge from the story as almost sublime incompetents, blithely counting their own booty on the promenade deck, oblivious of the current cascading into their ship below the waterline . . . if Mr Leeson goes to prison while the former board of Barings continues going to Glyndebourne, this sorry saga will leave the bitterest of tastes.

CHRIS DELЛИT

Chris Dellit is a Sydney solicitor.

Indigenous People and the Law in Australia

by Chris Cunneen and Terry Libesman; Butterworths Legal Studies Series, 1995; \$32.00 softcover.

In teaching the law relating to indigenous Australians, I'm constantly confronted by the endlessly varied ways in which racism and a lack of understanding of history and Aboriginal and Torres Strait Islander people limit my students' ability to understand the operation of the law. I was looking forward to the publication of Chris Cunneen and Terry Libesman's *Indigenous People and the Law in Australia* for two reasons: first, because it might be expected that these authors would have the nous to address their subject matter in its cultural and colonial context, and second, because I had been led by the publisher to believe that the book would be suitable for use by law students.

I was disappointed on the second count. The book is suitable for use with early year university students — although in law schools like my own it is highly unlikely to displace the 'essential' Anglo-Saxon tribal material. However, it is not generally suitable (nor is it intended) for use in more detailed teaching of the law relating to indigenous Australians, although some chapters, for example those on removal of Aboriginal children and public order offences, are suitable for that purpose. This means that, notwithstanding the excellent *Majah: Indigenous People and the Law* (Bird, Martin and Nielsen (eds), Federation Press, 1996), there is still no reliable, up to date, comprehensive (*Majah* is a collection of essays), culturally sensitive, historically in-

formed university level teaching book on indigenous legal issues in Australia.

Having said that, it should be acknowledged that the project undertaken by Cunneen and Libesman (writing a comprehensive secondary legal studies text) was probably more important than production of a university teaching book. As my students' ignorance consistently demonstrates, if 'reconciliation' is to be brought about by educating other Australians about indigenous people, that education will need to start before the university level. No such education would be complete without a study of the impact of law on Aborigines and Torres Strait Islanders over time.

In this context, the book strikes a good balance between information and analysis. It has a refreshingly critical edge. Unlike the dozens of writers who have spilled ink over the *Murray Islands* case, the authors do not give the impression that a vast gulf of cultural fascination (or fear, longing or piety) separates them from their subject matter: they write out of an apparent familiarity with indigenous people and indigenous issues. The extracts and discussion questions canvass issues of practical importance for Aboriginal and Torres Strait Islander people: child removal, the nature of 'crime', adults and kids in custody, relationship with the police, use of public space and public 'order', alcohol, violence against women, child custody, housing, work and unemploy-

ment, consumer remedies, racism in the media and racial discrimination and vilification, as well as land rights, native title, sovereignty, self determination and the prospects for a 'treaty'. Good use is made of material from disciplines other than law, the work of bodies like the Royal Commission into Aboriginal Deaths in Custody and well-structured interviews with indigenous people.

Racism is discussed not only where it has been egregious (for example, within the colonial police forces or their successor organisations), but also where it is insidious (for example, in the ethnocentric definition of offences or the social Darwinism of the native title debate). However, although an early chapter attempts to explain the origins of racist ideas justifying Australia's colonisation, what constitutes racism is nowhere clearly defined. I would have preferred much clearer definition, if only to avoid the problems which can arise from bad teaching. Many of my students seem to think that racism is confined to 'boong-bashing'; since this is true of some university teachers I expect it is also true of secondary teachers. Every year students raise half-baked theories about Aboriginal weirdness — the mysteries and brutalities of 'customary law',¹ the 'fire water' theories about grog, the idea that culture slips on and off like a Lifestyle condom.² They bring to classes on indigenous people and the law their dreams and anxieties about who *they themselves* are: what do these 'ancient people' mean for 'our young country',³ what is the personal moral import of 'all that'⁴ past violence and dispossession? Answering these questions requires the teacher to refocus the lens on our own culture, in particular on the durability and mutability of racial stereotypes. This is not an easy task, but it would be made easier by a teaching book which employed a comprehensive definition of racism in its critique of the law.

The four history chapters of the book canvas topics neglected or glossed over by lawyers (who usually don't know the details): the military and 'child stealing' heritage of the police; the calculated recruitment of 'native' police as a killing machine in Queensland; the use of summary procedures for trial of Aboriginal people on serious offences; the relationship between graziers, the police and the NSW Protection Board; the absolute power of Queensland reserve superin-

tendents; and the opportunistic responses of States to the 'assimilation' policy. Chapter 4, a case study on removal of Aboriginal children in NSW, explores the sinister rationale behind removals by reference to parliamentary debates which make clear that 'the whole object of the [protection] board was to put things in train on lines that would eventually lead to the camps being depleted of their population, and finally the closing of the reserves and the camps altogether' (p.49). The best thing about this chapter is that it doesn't stop with this damning but impersonal observation about white people's motives — it also explores the human side of the experience from the Aboriginal point of view. We are told how Aboriginal people resisted child removal, which necessitated the NSW Act's amendment, of the mopping-up exercise being conducted by the Link-Up organisation, and of the emotional and psychological impact of removal on the parents, the children and their children.

One of the drawbacks of a book which aims to give comprehensive coverage is that no topic can be given complete coverage. Chapter 16, 'Aboriginal people and political power', is a useful introduction to organisations like the Aboriginal Legal Service and ATSIC and their critics, but I felt that separation of this material from earlier historical chapters limited the reader's sense of Aboriginal agency in bringing about political change over time. This is a minor criticism, however, and it's one which the authors have tried to avoid by including material about FCAATSI and the Freedom Rides in other chapters. The work of the Aboriginal and Torres Strait Islander Social Justice Commissioner, who had written (at least) his first report before the book's publication, seems to have been largely overlooked, although it could have been used in any of four chapters.

There are some mistakes and the occasional lapse into romanticism. For example, after a discussion of Yanyuwa traditional land ownership in chapter 9, it is said that, unlike 'European [sic] laws', 'Aboriginal law is part of a more encompassing understanding of how the cosmos works and how individuals and communities fit into this system' (p.105). That's true. But it's followed by the naive statement: 'Traditionally appropriate behaviour is not decided by people but rather it is part of what is, how the universe works. Sometimes such law is described as natural law.' Of course this is the *ideology* of Aboriginal tradi-

tion, but the reality of that tradition (like any other) is that *people* make it. The teacher of indigenous legal issues here confronts a dilemma. Faced with the information that Aboriginal tradition is invented, students often react out of a negative stereotype: 'if they invent tradition, why should we give it any weight?' In this context it's far more important that they see the parallels between our own law (and religion) and Aboriginal tradition⁵ than that they succumb to a less hateful but equally inaccurate stereotype — that of the sublime primitive.⁶ I'm also not sure that the non-Aboriginal reader really gains much sense of Aboriginal land traditions by reading descriptions of them. I've tried to overcome this problem by using a role play in which students assume identities within a particular kinship and land ownership system, identifying their relationships to one another and to land. The role play does seem to communicate what land ownership is about, but it has its own dangers: in particular, it risks giving the impression that Aboriginal people who do not use the same land ownership system are somehow 'less traditional'.

The discussion of the *Native Title Act* in chapter 11 glosses over the content and effect of the 'past acts' regime. It also falls for the line that 'The *Native Title Act* is not intended to affect the *Racial Discrimination Act* in any way. The Act is intended to be a special measure.' This is disappointing. Australia has been able to fool a UN Committee⁷ into believing that the *Native Title Act* is a special measure (a type of 'affirmative action' for the sole purpose of advancing a disadvantaged racial group), but the Act contains provisions which *discriminate against* native title holders as well as other provisions which bring their treatment into line with that of other landowners. The idea that it was a 'special measure' was 'an abstract beat-up'⁸ designed to ensure Aboriginal support for the Native Title Bill in Parliament.

JENNIFER CLARKE

Jennifer Clarke teaches law at the Australian National University.

References

3. For a discussion of how Aboriginality gives meaning to Australian nationalism, see Andrew Lattas, 'Primitivism, nationalism and individualism in Australian popular culture' in Bain Attwood and John Arnold, *Power, Knowledge and Aborigines*, La Trobe University Press, 1992.
4. In my experience, while it is now reasonably common for urban Australians to acknowledge the inter-racial violence of Australian history, it is rare for them to link this violence to particular people or places. Perhaps part of the difficulty is the failure of urban Australians to come to terms with the landscape — an inability to distinguish one part of 'the Outback' from another. Australian maps are peppered with 'Massacre Creeks' and 'Waterloo Lanes'. Yet in the public debate which followed the Port Arthur massacre, not only was it rarely acknowledged that larger numbers of Aboriginal people had been killed during Australia's colonisation, but the location of these massacres seemed to be of no consequence. (By contrast, the location of the Broad Arrow cafe was of crucial importance.) The lack of specificity in my students' sense of frontier violence makes it all the more likely that they will treat that violence as a one-sided issue of personal morality: it burns them, but they have no idea whether it burns any Aboriginal survivors; they don't know where to begin looking for those survivors or even the places in which the violence occurred.
5. For an interesting discussion of the law's different treatment of religions and traditions, see Neil Andrews, 'Another Dissent in Paradise? The Hindmarsh Island Bridge Royal Commission', forthcoming, *Canberra Law Review*.
6. A similar comment might be made about the statement (p.146) that in the Northern Territory 'there are few competing claims amongst Aboriginal clans'. Even in the NT there have been notorious exceptions. Since the National Native Title Tribunal is now faced with many more, the problem of competing claims is not something that can be romanticised away.
7. See Committee on the Elimination of Racial Discrimination (CERD), Report to the 49th session of the General Assembly, reprinted in (1996) 1(1) *Australian Indigenous Law Reporter* 162 and CERD 45th meeting Examination of the 9th periodic report from Australia, UN/CERD/C/SR.1058 (translated from the French).
8. Brennan, Frank, *One Land, One Nation: The Politics of Mabo*, UQP, 1995, p.69.



BITS

One For The Money

by Janet Evanovich; Penguin 1994; 290 pp; \$12.95.

Two for the Dough

Janet Evanovich; Penguin 1996; 301 pp; \$19.95.

In the vulgar world of crime fiction, bounty hunter Stephanie Plum is as loud and brassy as the lime green and hot pink packaging of these books. A retrenched lingerie seller for a down-market store Plum comes to bounty hunting not by choice but by sheer necessity; she needs to pay the rent. She quickly decides, however, that toting a gun, mace spray and handcuffs is more enjoyable than slapping pancake makeup onto shoppers in a department store. Unfortunately her doting suburban family can not understand why she would choose a life of adventure and danger over a life of mediocrity in the malls of New Jersey. Plum's relationship with her family is as integral to these stories as her relationship with Joe Morelli, vice cop and would-be lothario. In *One For the Money* Morelli, who is wanted for murder, has skipped out on his bail and it is Plum's job to bring him in. In *Two for the Dough* both Plum and Morelli are seeking out Kenny Manusco who has skipped town after shooting his best friend.

In Plum, Evanovich has created a character who is at turns smart talking, naive, extravagant and generous. A character who will spend her last cash on a pair of 'to die for' shoes, and describes a particular outfit as being better than mace on a blind date. A character who develops an involuntary twitch in her eye every time she re-enters the parental home, and considers a hamster a suitable substitute for an ex-husband and potential kids. Plum is witty and likeable and her encounters with Morelli are littered with double entendres and irony. Evanovich's description of the burbs is frightening. Any place where the entertainment of choice is attending viewings at funeral homes is clearly to be avoided and its seamy underbelly of drugs, gun running and murder is almost refreshing. Despite Plum's liking for shoes and

sarcasm she is no powder puff and the novels contain enough blood, guts and plot twists to keep the reader's attention throughout. As Plum herself might say this is not Dostoevsky but what the hey. Grab a daiquiri or a cold beer sit down and enjoy. ● AM

Famous Mugs: Arresting Photos and Felonious Facts for Hundreds of Stars Behind Bars

Cader Books distributed in Australia by Penguin 1996; 138 pp; \$12.95.

More vacuous than *Who Weekly*, *Famous Mugs* is a series of brief descriptions of police charges against mainly US 'stars'. The book is divided into chapters according to themes such as Acting Up, Kiddie Crime and Family Affairs.

A number of the descriptions are accompanied by actual mug shots. None of these are captioned and many appear on a different page from the relevant story which is very confusing if the offender is not as famous as the publishers would like to think.

The cover has hopeless Hugh on the cover and indeed most of the stories in *Famous Mugs* need little retelling: Johnny trashing a hotel room, Sean thumping a journo etc.

Scariest of all is the invitation at the beginning of the book to download a tasty mug: 'Grab your own electronic mug shot, and other special treats, at our new web site.' I can hardly bear to think what their idea of a special treat is. Palpitate. Palpitate.

As bad as it sounds. At least *Who* only costs \$2.80. What were the good people at Penguin thinking? ● FW

The Point of Murder

by Margaret Yorke; Warner Futura 1996; 217 pp; \$13.95.

The Point of Murder was first published in 1978 and it certainly shows! The characters are rigidly grounded in the

social attitudes of the 60s and 70s. Female stereotypes and sexist attitudes dominate the storyline and destroy any legitimate character development.

The accidental rape and murder of a young woman is used as a platform for commentary on female sexuality and morality. The plot is predictable; drama and suspense are replaced by voyeurism and female ridicule.

I found the tone of the book irritating, the storyline too simplistic, and the social commentary alienating. RS

Advocacy in Court, A Beginner's Guide

by Keith Evans; Blackstone Press Ltd, London, 1995; 2nd edn; 206 pp; \$30 softcover.

Advocacy in Court, A Beginner's Guide is a 'how-to' manual for baby barristers. Keith Evans is a Middle Templar of the London bar as well as holding admission as an attorney of the State of California. He has a relaxed, confiding style as he constructs a path through the trivia and minutiae of the advocate's craft for every new barrister/solicitor advocate.

It is true that becoming a professional advocate is very much a process of trial and error (all puns intended). In the long process of acquiring skills in the courtroom every practitioner commences as an amateur. The speed with which those skills can be acquired depends on the types of matters in which a new advocate becomes involved. This in turn depends on the kind of work available to the tutor and drawn from the floor on which the barrister reads. Evans has attempted to cover areas which should be a basic part of each pupil's tutelage but which he recognises as often overlooked. The book also serves as an insider's review for the emerging solicitor/advocate who may not have the guidance of a year as pupil or reader to provide training in the nuances of style and conduct in the courtroom.

The book commits several basic errors of the 'where I write he read she as well' type in the course of attempting to be gender neutral and failing dismally. It is also full of instruction on the quirkier side of proper British courtroom etiquette which thankfully does not apply in Australia. Nevertheless, its basic insights are valuable and pleasantly accessible. SP

BITS was compiled by Annemarie McDonough, Susan Phillips, Rita Shakel and Frith Way.



MENTIONS

PUBLICATIONS

'You and Family Law'

This new publication produced by Victoria Legal Aid in conjunction with Legal Aid Western Australia, contains up to date explanations of the recent amendments to the *Family Law Act*.

Available free of charge by contacting Victoria Legal Aid on tel (03) 9607 0223.

'Police Powers And Your Rights'

The third edition of this useful publication, addresses topics such as: police questioning, fingerprinting, body samples, searches and much more.

Available free of charge by contacting Victoria Legal Aid on tel (03) 9607 0125

'Achieving Mother Friendly Workplaces'

The ACTU has published this guide to assist women in establishing mother friendly workplaces. It emphasises the importance of providing suitable facilities for childcare activities, such as breastfeeding.

Available free of charge from ACTU, ACTU House 393 Swanston Street, Melbourne, VIC 3000, or tel (03) 9663 5266, fax (03) 9663 4051

'Future Childcare Provision in Australia'

The Child Care Task Force, established by the Economic Planning Advisory Commission, has published its first In-

terim Report, which is the first national analysis of childcare. It addresses the growing trend of women remaining in the workforce and working longer hours, which in turn causes an increased demand on childcare services. However, some concern was raised by the report's recommendation of a radical change from childcare subsidies to a family voucher system.

Copies of the report can be obtained from CCTF, PO Box E4, Queen Victoria Terrace, Parkes, ACT 2600.

PENDING LEGISLATION

The Workplace Relations and other Legislation Amendment Bill 1996

The National Women's Justice Coalition has made written and oral submissions concerning this Bill to the Senate Economics References Committee.

The Coalition's submission focused on the desirability for the Bill to provide for paid maternity leave, this being currently absent from the regime of minimum industrial conditions for women. The Chair of the Committee, Senator Jacinta Collins, responded favourably, saying she shared their concern about paid maternity leave and Australia's responsibility to meet its international obligations.

Copies of the report can be obtained from NWJC, GPO Box 3148, Canberra, 2601 or by e-mail nwjc@ozemail.com.au

CONFERENCE

Native forests and public policy

Date: 6-8 December 1996

Sponsored by the Environmental Law and Policy Centre, Murdoch University Law School

This conference is aimed at improving the dialogue between government, industry and conservation interests in Western Australia. Speakers to include prominent federal and State politicians, industry leaders, academics, practitioners and environmentalists.

**Contact: Moira Dawe
tel 09 360 6050 email:
mdawe@central.murdoch.edu.au**

NATIONAL WOMEN'S JUSTICE COALITION HOME PAGE

The home page of the National Women's Justice Coalition will help you to follow the Superclinics abortion case. The home page provides links to newspaper articles about the case through Butterworths Legal Express, an outline of CES v Superclinics, the NSW Court of Appeal decision under appeal, and an article on the case by Reg Graycar and Jenny Morgan. For further information go to the following net address:

<http://www.ozemail.com.au/~nwjc/>

SPORT AND THE LAW — NEW COLUMN IN ALT.LJ

Future issues of the Alternative Law Journal will contain a semi-regular 'sport and the law column'. The sport/law nexus is increasing due to the marked growth in commercial sponsorship and television coverage and the general high profile nature of many sports. One need only think of the increasing number of drug allegations against sporting greats, or of the ongoing dispute over Rugby League in Australia, to realise it is a topic of increasing concern, and one which we think is likely to resonate with our readership.

The journal calls for contributions on the subject. Writers might choose to explore how law uses sport as a site of cultural production and regulation. Items may also address how gender, sexuality, class and ethnicity are constructed in the legal treatment of sport issues, or how sport embodies a consent to physical harm in the context of criminal law and torts.

However, these are merely some suggestions and should not be viewed as exhaustive. We encourage all contributions in order that the sport/law

issue be both openended and wide ranging.

Contributions should not exceed 900 words (and could be much shorter) and should be sent to Andrew Sharpe at the Law School, Macquarie University, Sydney, NSW, 2109. tel (02) 9850 7092, fax 02 9850 7686.

e-mail

Andrewsharpe@mq.edu.au

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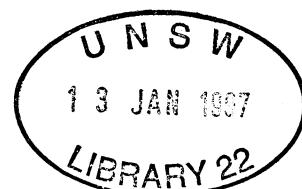
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OPINION

A vision of law in the future

As we all move closer to the end of the millennium, questions of 'the future' merge into everyday reality. We are often too busy to think about these questions — let alone plan for them. Yes — the future will happen. What ideals and dreams do we have for how we want it to be? Where do we want to go tomorrow? What is our vision?

Yet, as someone once said, 'vision without action is hallucination'. What is our strategy to achieve these ideals in tomorrow's realities? Can or should we do anything about it?

In this issue, we aim to re-open and re-examine some of those questions of the future. We began by asking what will the law be like in the year 2525? Why will it be like this? Is the psychedelic whorl of the Age of Aquarius a possibility or a fantasy? 'In the year 2525, if man is still alive, if woman has survived ...'

In considering the system of law in the future, we looked at the broader context. What will the world and its environment be? What will be the results of increasing globalisation and differentiation? What will technology allow us to do? What will be the outcomes of current pressures for a society based on economics and business values? What will be the values and beliefs, cultures and ethics? What human factors may limit or extend these trends?

Then we brainstormed some ideas as to what the law might be like in the future. What will the law be? How will the law be defined? Who will — and who will be able to — define it? Who will be the law's consumers and customers? Who will deliver legal services? How will the economics and funding work? Who will have access to the law and how will it be allocated?

We went wild... Could we have two law systems — one for the haves and another for the have-nots? Will there be a powerful top down, rational, money-driven legal system for some and an underground, rebellious chaos for others? Could there be multiple layers and variations? What will be the role and structure of lawyers? What limits are there to futuristic fantasies of lawyers giving virtual advice or running cyber-suits for mere techno-millions of uni-cyber-dollars?

We continued... What will happen to the printed word of the law? What are the implications of technology? Can we see and learn from alternative communication media such as music and art? How does multimedia affect our interpretation and understanding?

What are the legal issues involved? How will our cultural systems deal with the internationalisation of information, globalisation of economics and mediation of values? What are the implications of the law's tendency to follow?

What is our vision of the law in the future?

Our contributors' visions of the future are bleak. Justice Michael Kirby warns that an unrestrained ascendancy of economics, competition and technology could snuff out

idealism and noble values of the legal profession — he calls for a revisiting of values and ethics. Kim Rubenstein's vision is more egalitarian and idealist — or is it tongue-in-cheek?

Peter Huxtable sees a reframing of legal aid services with the push for privatisation — co-operation being driven out by increasing competition for the poverty law budget. In examining new trends in family law, Renata Alexander sees women disadvantaged by the increased use of mediation. Richard Hil laments the attitude towards young people, their families and crime — where is their future? Ian Freckleton warns of a future with policing as para-militarisation.

Melissa de Zwart examines the reaction of an archaic law applied to new technology — where is the vision of new laws to deal with digital technologies? In the environment, David Heilpern sees the lone lawyer battling bulldozers in the forests.

In this issue, we also sought to move out of our comfort zones of the printed word — what can alternative media say to us? An artist, Julian Wong, sees darkness, corruption and a concentration of the ownership of information. A musician, Irene Vela, speaks of poisoned words and betrayal by our national institutions.

Why, in the year 1996, are these the themes and visions of the future — perhaps even the realities? As Kirby points out, 'change is inevitable'. Yet are these bleak visions inevitable? Maybe, maybe not. But without action, they could be. How can we ensure change is for the better?

It seems that long term, alternative visions of the law are missing. And if ideals and dreams are there and an optimistic vision exists, it seems there are few long term strategic plans for ensuring this is the future. Where are the long term goals and aims? Where are the new laws for new concepts and technologies? Where are the alternative frameworks with positive and beneficial goals? And how will these alternative visions be achieved? Who is responsible for implementing them? How will our dreams and ideals be achieved? Vision without action ...?

In this opinion, we are concerned that these questions of the future of the law have not been fully considered. We are concerned that without a vision, without long term strategic planning and without an action plan, the future may be bleak.

In the short term, these questions can be ignored — it is easier to put down your head and do some real work.

But this opinion is also a call for action. What do you want the future to be? Where do you want to be tomorrow? What can you do today?

Sophia Panagiotidis
Judith Bennett
Juliana Ryan

Billable hours in a noble calling?

The Hon. Justice Michael Kirby, AC CMG

Ethics and the Australian legal profession.



Let me invite a re-examination of what it means to be a member of a profession and a legal practitioner in our society today. Let me challenge the Australian legal profession to re-evaluate its conduct with a view to enhancing the level of service provided to a community which has ever-increasing expectations of the profession but a diminishing estimation of the likelihood that such expectations will be fulfilled.

Clearly, there is a tension between the traditional features of the practice of the law in a learned profession, enjoying important privileges (on the one hand) and the dictates of modern business practices which impose on lawyers of today obligations to address cost factors and so-called 'bottom line' considerations (on the other). Within the Australian legal profession a fear has been expressed that the undue emphasis on economic factors has led, in recent times, to a lessening of sensitivity to, and adherence to, the old ethic and culture of professional service. How real is this fear?

The basic questions which I pose are these: Is this expressed anxiety nothing more than a nostalgic hankering for a return to 'good old days' of legal practice, which were not always so good for the consumer after all? Was the professionalism of the past merely a self-deceiving disguise to preserve a hold on power in society? Or is the expressed anxiety a last desperate effort to keep alive the flame of professionalism in the face of so much evidence that the law is moving in the direction of becoming just another business? In short, is the idealism and selflessness of professionalism finally dying out in the law such that we will attend the funeral before the century is out?

Problems

Three recent comments on these questions are relevant.

The first is a book by Professor Anthony Kronman, Dean of the Yale Law School, titled *The Lost Lawyer: Failing Ideals of the Legal Profession*.¹ This book has been called the most influential work on the legal profession written in recent decades in the United States. If you have read it, you will understand why. It takes attorneys, advocates, law teachers and judges to task. It contrasts the suggested idealism, self-discipline, public spirit, economy and wisdom of the lawyers of Kronman's early years with the scene he observes today as head of one of his nation's finest law schools. Kronman begins his book with these arresting words:

This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul. The crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up. Disguised by the material well-being of lawyers, is a spiritual crisis that strikes at the heart of their professional pride. [p.1]

Kronman considers that, in the hands of today's lawyers, the stewardship of the institutions of law in the United States has been extremely poor. They will not pass on a profession of quality and integrity

The Hon. Justice Michael Kirby is a Justice of the High Court of Australia. This article is an adaptation of an address delivered to the Saint James Ethics Centre's Forum on Ethical Issues, Sydney, 23 July 1996.

such as they received from earlier generations. This is how he sums it up:

Attorneys practise law in a different way than did their forebears. The best graduates gravitate to huge and impersonal law firms where they are put in a corner and time charging is the rule. Original ideals of wise and dispassionate advice to clients are increasingly enfeebled by a mercantile attitude which effectively lets the client dictate the course of disputes, without the effective cautionary words which lawyers previously gave. The role of the lawyer in times gone by involved compassion for the client's entire predicament, tempered by detachment and also a measure of concern for the public good. Kronman predicts that the growing ascendancy of the economic view of law and a decline of its self-image as a helping profession, will continue the decline of idealism and professionalism unless this is arrested.

Advocates too, according to Kronman, are changing their ways. The old days of complete honesty with the courts and candour and honour in dealing with each other has given way to a more ruthless effort to win cases because larger profits hang on them, essential to the lawyer's 'business'. The client becomes a mere 'punter'. The lawyer becomes caught up in the client's speculation. Whereas, in the past, the advocate would conceive of his or her role as being, akin to the judge, the maintenance of a measure of dispassion, the shift to a business definition of the law embroils the lawyer entirely in the client's cause. It erodes the detachment essential to professionalism.

Kronman is equally critical of law schools for fostering the teaching of law (and negating the teaching of legal ethics) in ways that pander to the demands which the market view of legal practice place upon the law schools.

But Kronman's most scathing comments are reserved for the judges, especially appellate judges. He says that in the United States, under the pressure of their case-loads, judges have become mere editors of opinion drafts presented to them by their clerks. According to Kronman, very few judges in the United States still draft their own opinions. The consequence is discursive opinion writing, needless dissents and footnote battles as the clerks struggle for their place in the law books, with fuzzy reasoning which reflects a lack of traditional judicial wisdom and 'horse-sense'.²

A reading of Kronman's book would leave any lawyer dispirited. In fact, it is a profoundly discouraging book, not least because its author does not offer very much by way of solution or many causes for optimism. The question which an Australian lawyer asks on putting it down is whether there is evidence in Australia (with its somewhat different legal traditions) which makes Kronman's analysis inapplicable to our own circumstances or whether it is, at least, a warning of what may be in store.

To answer this last question it is necessary to consider a much publicised essay by my colleague, Sir Daryl Dawson, 'The Legal Services Market'.³ Justice Dawson acknowledges that the very changes which give rise to many of Kronman's concerns can already be detected in the Australian legal scene. Written soon after the publication of the Sackville Report⁴ and the Justice Statement of the Federal Attorney-General's Department,⁵ Justice Dawson's essay rejects a nostalgic hankering for the past that will not return. To talk of a 'national market for legal services' is to conceive of the legal profession in economic terms in a way that would have

offended the purists of past generations. But Justice Dawson accepts that the change of language results from a fundamental change in the way in which the profession is now being practised in Australia. It is now increasingly conceived of as a 'commercial activity', albeit one of a special kind. Such changes of approach will doubtless improve the accessibility, efficiency and costs of some legal services and even the rewards to some legal practitioners.

Anomalously, surveys of members of the Australian legal profession have revealed the existence of very high levels of dissatisfaction with professional life.⁶ Justice Dawson lists a number of reasons why this should be so. Many of the reasons are connected with the growing concentration of legal practice in large firms. There is the increasingly narrowing effect of specialisation. There is diminished loyalty of partners to each other and to employed solicitors. There is a loss of objectivity consequent upon the employment of marketing managers to attract profitable clientele — something unheard of in years past. The priorities have changed in some places to the making of money rather than the provision of disinterested, yet sympathetic, legal advice. Unprofitable work is rebuffed by some as a waste of time. Longer and longer hours must be worked at the cost of the quality of the lawyer's life. The social environment of the legal workplace has deteriorated. The satisfaction which attended much legal practice in the past has been replaced by a 'strictly commercial and entrepreneurial approach to the practice of the law'.⁷

Justice Dawson, like Kronman, does not offer much by way of solution to these trends. He was not even convinced that the one idea which Kronman advanced, viz working in a right-sized country town, would work in Australia. He observes that 'the attractions of a country life, apart from the practice of the law, are not for every lawyer'.

The third commentary relevant to these remarks is in an address by the Chief Justice of the United States, William Rehnquist, at the Commencement Ceremony of the Catholic University of America Law School on 25 May 1996. Chief Justice Rehnquist reminisced about his own first graduation 54 years earlier and about his early faltering efforts to establish a legal practice in Phoenix, Arizona. He acknowledged that lawyering today was probably of a higher quality than in those days. Law firms are 'certainly more efficient' today. To some extent this is simply the result of new technology and new approaches to office management. He also acknowledged that young lawyers today generally make more money than they did in his day, even allowing for inflation. But then he asked the Kronman question:

If all this is true, why are there so many dissatisfied young lawyers?

Like Justice Dawson, Chief Justice Rehnquist resists the yearning for the 'good old days'. He discounts the inevitable criticisms from 'old timers' like himself. This is how he expresses his conclusion:

...The practice of law is today a business where once it was a profession...Market capitalism has come to dominate the legal profession in a way that it did not a generation ago. Law firms, whether in 1956 or 1996 have always had to turn a profit if they were to stay in business. But today the profit motive seems to be writ large in a way that it was not in the past... Perhaps nowhere in the profession is this tendency more developed than in the emphasis on billable hours. It appears that now clients are insisting on some changes in this form of billing, and perhaps it will not be as dominant in the future as it has been in the past...Hourly billing rewards inefficiency: the work of lawyer A, who spends 100 hours preparing a motion for summary

judgment, costs the client 100 times the billing rate; the work of lawyer B whom it takes 200 hours to do the same work costs the client twice as much for the same service.

The system of billable hours can reward the slow-witted lawyer. It can penalise the experienced, wise and efficient. Chief Justice Rehnquist is not one generally adverse to the market economy and individual autonomy. Yet he describes the eroding consequences of converting the legal profession into a business:

in economic terms, large firms simply cannot justify taking on small matters; so they end up with only large clients... [and] large cases... [with] an enormous amount of time devoted to relatively uninteresting work ... [in cases] very few of [which] actually go to completed trial.

There is also a loss of loyalty not only *within* firms but as *between* clients and legal firms. Chief Justice Rehnquist concludes:

[I]f the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't a great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other.

I have now said enough about the problem. I have said it through the voices of other distinguished observers of the legal profession: two of them in the United States and one of them in Australia. What are the lessons that we should draw as we consider the direction of the Australian legal profession, struggling for its role in the new century just four years away?

Lessons

First, as Justice Dawson warns, we should avoid tiresome nostalgia for the past. It will always be the privilege of old timers, particularly in a hierarchical, traditionalist and historically conscious occupation such as the law, to look to the past with more affection than, say, the typical aeronautical engineer or a computer games salesman. But lawyers too, and their institutions, must move with fast changing times. Technology stimulates rapid change. Other change factors are also at work: a better educated community; a much expanded legal profession; a less monochrome society with changing values. Every institution, from the Crown down, is under the microscope of critical social scrutiny. In the case of the law, such scrutiny not only reveals the many wrongs in the substantive law which, in 'the good old days', too many lawyers accepted without complaint;⁸ it also reveals the inadequacy of the system as currently organised to deliver justice to the ordinary citizen and the unsatisfactory features of the ethnic and class make-up of the legal profession itself.⁹

Second, we should avoid exaggeration of the extent to which the ideals of the legal profession, at least in Australia, have changed. Large firms, relative to the size of the profession, existed 30 years ago. What has changed has not been a mere matter of size but the national and even international operations of some legal firms. These changes are themselves responses to globalisation and the development of a national economy which requires a national response from the legal profession. I agree with Justice Dawson that *Street v Queensland Bar Association* (1989) 168 CLR 461¹⁰ probably hastened the belated advent of a national legal profession in Australia. Yet this was both inevitable and desirable at the present stage of Australia's development. If the practice of law were cocooned in small old-time personalised firms, lawyers would be criticised for failing to respond to national

needs and international opportunities. We should not stereotype the responses of legal firms or individual practitioners in terms of size and change of practice. If the supervising courts and professional tribunals hold fast to the high standards of individual service demanded in the past, some of the worst abuses which have occurred in the United States may be avoided here.

Yet even in the United States the big firm is not entirely a novelty. In the May 1895 edition of *American Lawyer* a writer was complaining:

[T]he typical law office...is located in a maelstrom of business life...In its appointments and methods of work it resembles a great business concern...The most successful and eminent at the Bar are the trained advisors of businessmen...[The Bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honour...[F]or the past thirty years it has been increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking. [pp.84-5]

I remind you that this was written 100 years ago. It tends to confirm that in the law we constantly revisit the controversies of the past. In 1904, in an address to the New York State Bar Association, a lawyer observed:

The law business is not what it used to be. The expression 'law business' itself marks a certain change. This business side of the profession has assumed paramount importance and the profits of the business are our most practical concern.¹¹

If all this sounds familiar, it should make us pause before we accept, at face value, all the criticisms directed at current conditions, at least in Australia.

Third, we should accept that no institution, however glorious, is impervious to change. This is least of all so in a profession which repeatedly boasts of its adaptability and which rests upon the foundation of the common law, which is truly one of history's success stories in its capacity to adapt (sometimes quite rapidly) with changing times. Many sole practitioners continue to make a living in the law in Australia, especially in suburban and country districts — although apparently at levels generally lower than in the past. Organised legal aid, the growth of the institution of Public Defenders, combined with the decision of the High Court in *Dietrich v The Queen* (1992) 177 CLR 292,¹² have all stimulated, to some extent, a flow of public funds to individual solicitors, small firms and junior members of the Bar. True, this flow is apparently endangered in the present time of budget cuts. The concentration on legal aid in criminal cases is sometimes criticised when important civil litigation, eg in family law cases, is neglected. However, legal aid is a partial antidote in the Australian legal profession, to combat the worst excesses of work concentration noted in the United States. This should make us careful before we assume that we are on exactly the same track.

Fourth, lawyers should not be adverse to acknowledging that many changes, which alter the character and activities of the legal profession, often forced upon it reluctantly, have been for the better. Clinging to old ways, just because they are old, is not rational. Sometimes we have to unlearn bad old habits which have outlived whatever usefulness they may have had — such as the two counsel or the two-thirds fee rule amongst barristers; or the total ban on advertising; or the prohibition on the use of paralegals or of joint practices with other professionals. Sometimes lawyers have had to respond to the call for external scrutiny of the way in which they

handle complaints from the public and from clients. One does not have to wholly embrace Richard Ackland's view that lawyers are members of a *Broederbond*,¹³ or criticism that the Bar is simply a cartel, to accept that external perceptions are often quite useful and even legitimate. Lord Justice Staughton in England recently remarked that some of the profession's ethical rules appeared to have been simply protectionist and not at all concerned with the public interest or the proper administration of justice.¹⁴ We can now see that at least some of the ethical truisms of the past were less concerned with ensuring right behaviour to clients than with gathering and retaining clients from the ambitions of competitors or stamping a high degree of conformity on professional behaviour and services.¹⁵ Mr David Bennett, QC, President of the Australian and New South Wales Bar Associations, has accepted that 'some beneficial reforms to the provision of legal services have taken place in recent years'.¹⁶ If this seems to be an uncharacteristically muted, grudging, even reluctant concession for a leading advocate, it is fair to observe that it is one that would probably not have been offered by some of Mr Bennett's predecessors.

If changes, resisted at the time, are now seen to have been 'beneficial reforms', members of the legal profession must keep their minds open to the possibility that other changes, urged today, will in due course come to be seen as useful to the ultimate objective of practising lawyers, which is to ensure that as many people as possible secure accurate legal advice and competent legal representation.¹⁷

Fifth, it should be acknowledged, both within the legal profession and by its critics, that there remain many, possibly a majority, who are as committed to the ideals of service and dispassionate advice as existed in times gone by. One United States response to Kronman's book was written by Mary Anne Glendon called *A Nation Under Lawyers — How the Crisis in the Legal Profession is Transforming American Society*.¹⁸ Glendon admits that, with more than 800,000 lawyers, the United States has become the most intensely lawyered society the world has ever known. She concedes that a variety of beliefs and ideals are vying for dominance within the law. But she points to the heroes of the United States judicial and legal scenes in recent decades, notably Archibald Cox and Judge John Sirica and the unanimous opinion of the Supreme Court which ultimately demonstrated that even the President of the United States, with the power of life and death over millions, was subject to the law in a society ruled by law.¹⁹

We have our heroes and role models in Australia: fine leaders of the legal profession who daily accept the call to *pro bono* work, just as their predecessors did in earlier times; women lawyers who blaze a trail for equal opportunity in the law; Aboriginal lawyers, now exemplified by Judge Robert Belllear in New South Wales, who will help to change two centuries of attitudes to indigenous people; gay lawyers who courageously break down ancient stereotypes and refuse to accept prejudice from society, least of all from their colleagues; Councils for Civil Liberties and numerous professional associations connected with the law and law reform such as the International Commission of Jurists, the International Bar Association, Amnesty and a myriad of other groups. Who says lawyers have wholly lost their idealism? Some may have. But many have not.

Sixth, this said, some of the issues of professionalism which have been identified in the United States and Australia are certainly ripe for attention. Many of them derive from the

growth of very large firms with their assignment of unrewarding work to the best and brightest graduates. Such firms are themselves obliged to address the growing evidence of lawyer dissatisfaction with their life and work. Unless a culture of loyalty and self-respect can be restored, the mercantile values of ruthless self-interest will permeate legal practice in Australia just as they have done in the United States. In the past, such loyalty had to be earned by reciprocal fidelity, honesty and dispassion. At the launch of her book *Legal Profiles*, containing client assessments of big firms in Australia, Andrea Warnecke reportedly said that the qualities of good lawyers today include how much fast food they eat, the lack of a good tan and the non-existence of erotic dreams.²⁰ Such deprivations are not good for lawyers or anyone else. Australian lawyers have received a warning.

Seventh, the revival of the public debate about what legal professional ethics should be makes it timely to urge an intensified interest in the teaching of legal ethics in law schools. I do not mean just a rudimentary training in the requirements of the local professional statute, rules of etiquette and, where applicable, book-keeping and trust account requirements, offered in a few lectures thrown in at the end of the law course. It is a matter of infusing all law teaching with a consideration of the ethical quandaries which can be presented to lawyers in the course of their professional lives. Only in this way will law schools provide students with guidance on professional responsibility and on the ethical issues they will face as they enter the profession.²¹ One commentator has remarked, rightly in my view:

[Law teachers] cannot avoid teaching ethics. By the very act of teaching, law teachers embody lawyering and the conduct of legal professionals. We create images of law and lawyering when we teach doctrine through cases and hypotheticals.²²

Professor Ross Cranston in his new book *Legal Ethics and Professional Responsibility* accepts that the technical rules can be left to the practice course. However, he asserts:

...all law teachers have a responsibility to give attention to the ethical under-pinnings of legal practice. We have a responsibility to sensitise students to the ethical problems they will face as practitioners to provide them with some assistance in the task of resolving these problems, and to expose them to wider issues such as the unmet need for legal services. [p.30]

Eighth, the courts and bodies supervising professional conduct, also have a duty to uphold high standards of honest, faithful, diligent, competent and dispassionate legal advice and representation. In Australia, the courts become involved in cases of professional discipline in only the most serious cases. The establishment of the Legal Services Commissioner's office in New South Wales has seen an apparently significant increase in the number of complaints against lawyers in that State, according to a report published by the Commissioners's office in 1994-95. While the Commissioner's first report was criticised for its statistics and approach, that there has been an increase in complaints seems indisputable. It appears to bear out the conclusion that many clients and citizens feel more comfortable with the notion of complaining to a body which does not have representational and lobbying functions for the legal profession. It may be hoped that professional bodies and courts will have the imagination to devise remedies suitable to the wrongs when proved. Dealing with defalcation, criminal offences and trust fund abuses may be simple. But over-charging may require new responses that involve a purgative obligation of honorary legal service to the poor or disadvantaged.²³ Rudeness

and non-communication may warrant a session of mediation with the complainant as the New South Wales Attorney-General has proposed. But how is incompetence, ignorance of the law and simple failure to attend to a case to be redressed for the protection of the clients who come after?

Ninth, we should be encouraging the gathering and analysis of data on ethical defaults so that we can derive from them lessons about the teaching of law and ethics, the provision of new professional regulations and the provision of example and instruction from the leaders of the legal profession. This is one good result flowing from the establishment of the office of the Legal Services Commissioner in New South Wales. Statistics are now being gathered, according to the formulae in the Commissioner's Act. They are published beyond the legal profession to the community at large. The first step in law reform, indeed of any rational discussion on policy, is to establish the facts.

The deeper malaise

In my view, there is a deeper malaise in legal practice today which may underlie the problem discussed by Professor Kronman, Justice Dawson and Chief Justice Rehnquist. It is difficult to speak of it. In a secular society we feel rather uncomfortable in doing so, lest such words should be misinterpreted as inappropriate, hypocritical or self-righteous.

I refer to the void which is left in many lives by the absence of any spiritual construct and by the increasingly general rejection of any spiritual dimension to life. I mean a life in the law which involves no reflection on the amazing fact of existence and its brevity and about justice and its demands — a life in the law which is content with an annual trip to the Law Service at the beginning of Law Term or which even misses that, as the declining congregations witness a rising generation with 'better things to do' on the first day of Term. Such a life may be devoid of clear signposts. This is the malaise which was mentioned by Justice Zelling on the occasion of his retirement from the Supreme Court of South Australia:

Even someone of the ability of Lord Radcliffe would have difficulty in reminding us today, as he did thirty-five years ago, of the words of St. Augustine of Hippo that life measured only in human terms is an inescapable disaster. The lack of that shared belief makes the articulation of the community conscience by the judiciary so much harder today.²⁴

Until now, a spiritual dimension in societies such as Australia's afforded a framework of common beliefs important to sustaining and reinforcing ethical principles.²⁵ The Judeo-Christian-Islamic belief in the sacredness of each individual human life, bearing a divine spark, provided an ultimate foundation for self-control and for respect for others. That foundation is certainly one of the *stimuli* to the global movement for universal human rights which continues after the spiritual sources have been rejected or abandoned in many societies.²⁶

At a time when so many fundamentals are questioned, doubted, even rejected, it is hardly surprising that the ethics of the legal profession should also be doubted by some of its members and attacked by its critics. It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection, particularly to minorities, those who are hated, even demonised, and reviled. Without some kind of spiritual or

ethical foundation for our society we can do little other than to reach back into the collective memory of our religious past or to rely on consensus declarations as to contemporary human values.

Conclusions

The challenge before the Australian legal profession as it approaches a new century is to resolve the basic paradoxes which it faces. To adapt to changing social values and revolutionary technology. To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation for ordinary citizens. To preserve and, where necessary, to defend the best of the old rules requiring honesty, fidelity, loyalty, diligence, competence and dispassion in the service of clients — above mere self-interest and, specifically, above commercial self-advantage. Yet to move with the changing direction of legal services in a global and national market. To adapt to the growth and changing composition of our society and of its legal profession: beyond the monochrome club of Anglo Celtic males. And to mould itself to the fast changing content and complexity of substantive and procedural law. It is quite a tall order. Is the Australian legal profession up to it?

The hope must be that some of the old-fashioned notions of service will survive even these changing times. In the void left by the undoubted decline of belief in fundamentals, we must hope that a new foothold for idealism and selflessness will be found. Despite the beliefs of some of its critics, the Australian legal profession's guiding principles will not, I believe, be found in economics alone. Still less will it be found in a dogma of free market competition or the arid language of the *Trade Practices Act*.²⁷ Economics alone cannot explain the will to do justice, to be dutiful to courts and honest and faithful to clients. Modern economic theory, now put into widespread practice, has not done such a good job in terms of social engineering. The large pool of long-term unemployed, the rise in crime, in drug use and increased stress within personal relationships all suggest the failure of unbridled economic rationalism as an alternative foundation principle for society. Indeed, in place of the old mateship of Australian society we see the steady growth of an underclass with grave dangers for social stability and traditional egalitarianism.

The great debate for lawyers in the coming century will not be whether a separate profession of advocates will survive. It will not be whether competition and consumer pressure will improve the delivery of some legal services. Still less will it be whether some lawyers will wear wigs. These are not the vital questions. What is vital is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service. We must certainly all hope that the basic ideal of the legal profession, as one of service beyond pure economic self-interest, will survive. But whether it survives or not is up to the lawyers of today. They should do what they can, while moving with the times, to revive and reinforce the best of the old professional ideals, to teach them rigorously and insistently to new recruits and to enforce those ideals strictly where there is default. But will they heed this call or dismiss it with a yawn and return to billable hours?

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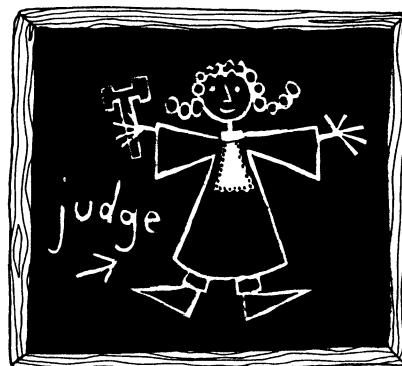
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LEGAL STUDIES

These suggestions for discussion are based on the following article 'In the Year 2096' by Kim Rubenstein.

1. Kim Rubenstein states 'The Constitution of 1901 failed women'. Do you agree? Give your reasons.
2. What individual rights are actually dealt with in the Constitution?
3. Discuss Rubenstein's statement: 'The use of information technology has led to increased public participation in the running of government and greater accountability by Parliament to the public'.
4. Discuss the meaning of 'separation of powers'. Rubenstein says 'Separation of powers was never absolute in the 1901 Constitution'. What do you think she means by this?

5. Does the Australian Constitution reflect 'the values and principles of the community'? Discuss.



6. Why do we have a Constitution? Will we still need a Constitution in the 21st century?

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IN THE YEAR 2096

Kim Rubenstein

Visions of Australia's Constitution in the 21st century



Wouldn't it be fantastic to have a crystal ball to divine the future of the constitutional system in Australia? It would save those reviewing the current Constitution wasting their time on irrelevant matters and would focus their attention on those issues vital for the 21st century. Despite the fact that this cannot be done, this article predicts some changes to the Australian Constitution in the hope that the vision becomes reality.

Our Constitution is a fundamental, foundational statement about our community. By establishing a political framework it affects all aspects of our lives, even when this is because it prevents the government from exerting power over a particular issue. In this sense, national constitutions will continue to be important in the 21st century. But their significance will differ from that of 19th and 20th century constitutions because of the changing role of national governments in the international arena. We have to be mindful of the process of internationalisation which is having an impact on our domestic system.¹ External affairs and the integration of the world's political framework will be even more significant in the 21st century, and may in fact represent a new world order. That changed order is not the focus of this vision but it acts as a backdrop to the advent of a more gender conscious Constitution for the 21st century.

The following is an extract from a 21st century article which looks back on the 20th century.

A history of the evolution of Australia's Constitution dated December 2096

Gender and constitutions

The Constitution of 1901 failed women. This failure can be seen both in its formation and in its practice throughout the 20th century.² The 21st century Constitution represents changes that better reflect the nature of the society it governs. In discussing gender in a constitutional context, 20th century discussions often considered the introduction of equality rights into the Constitution, and the use of a constitution to restrict government from infringing women's rights. As the 1901 Constitution did not deal comprehensively with individual rights and the individual's relationship with the state, it made sense to question whether the omission influenced women's political inequality in practice. (There were some individual sections of the 1901 Constitution that related to individual rights: ss.41, 51(xxi), 80, 116 and 117.) There was a debate, however, within feminist circles about the success of Bills of Rights in effecting change for the disadvantaged within the community.³

Instead of changing the Constitution from the perspective of rights, reforms occurred by transforming long-standing constitutional ideas. The 21st century witnessed the development of new meanings for the

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terms: representative democracy, federalism, responsible government and separation of powers.

Representative democracy

The 1901 Constitution provided for a system of representative democracy by requiring people to choose their representatives (ss.7 and 24). There were references to elections and electors, and regular elections (ss.7, 8, 9, 24, 25, 28, 30 and 32). Moreover, the High Court during Chief Justice Mason's term also articulated an implied constitutional right of freedom of political speech, specifically linked and limited to representative democracy.⁴ This approach (which by 2050 had been reviewed many times by the changing High Court) recognised that different conceptual levels informed constitutional interpretation. At one level was the text of the Constitution itself, with certain rules such as that requiring the direct election of Members of Parliament. At another level was the principle of representative democracy underpinning the rule, and at yet another level were theories or assumptions behind the principle. Twentieth century political theorists had explained that the principle of representative democracy required linkage between the elected and the electorate, and an ongoing connection between the two. They also acknowledged that electoral systems changed over time.⁵

The principles and theories all related to broader principles. In the 21st century, current views of representative democracy have continued to evolve. For instance, we presently see that the connection between the elected and the electorate has become greater because of technological changes. The use of information technology has led to increased public participation in the running of government and greater accountability by Parliament to the public. Electronic mail and websites have created avenues for participation by all people with a computer or TV screen, and the establishment of new community centres means that everyone can access a computer or TV. Elections have become straightforward electronic procedures.

Not only have the electors experienced change, but so too have their representatives. For instance, changes in parliamentary working hours occurred due to the use of information technology. Federal representatives don't have to travel to Canberra as often because electronic systems allow better communication between Members of Parliament and higher quality debate over legislative proposals. Parliamentary committees also use inexpensive video conferencing facilities for their meetings and public hearings. On the rare occasion that a full meeting of Parliamentary representatives is required in Canberra, the introduction of the creche (in the year 2000) made Parliament more family and people friendly.

And of course changes have occurred beyond the technological front. The 20th century's predominantly male governance is an anomalous relic of the past. The 1996 Parliament championed itself as one of the most successful in relation to women, yet it was strikingly unsatisfactory compared to this 21st century. In the House of Representatives in 1996 there were only 23 women out of 148 (15%) and in the Senate there were also 23 women, but out of 76 (30%). The current reality of 50% women in both houses is a far cry from those early days — and the 50% figure of women is not just white, upper class women, as some women cautioned. The Parliament is now overtly conscious of its representative nature. There is a diversity of perspectives, for it became strikingly evident that class and race also affect people's experiences. The experience of the indigenous community was significant in

highlighting this. The whole system of representation has been revitalised in that the democratic process more accurately represents the entire community by ensuring the equal representation of women and by ensuring diversity in the representation of men's and women's interests.

These changes occurred due to the accumulated attempts to reform the system in the last decade of the 20th century. A range of initiatives were used such as: mandatory and voluntary quotas, changes to the political and legal culture in which the under-representation occurred, 'schooling' in parliamentary skills for women and other groups within the community without adequate representation, and significant changes to the electoral system. Each separately would not have resulted in change, but cumulatively they affected how people viewed representative democracy. By well into the 21st century the community ensured changes were made to the Constitutional document itself so that it better represented the expectations of the entire community. We can see this in the current text of the 21st century Constitution which specifically acknowledges the evolving nature of representation, and demands that Parliament regularly review its electoral legislation so it best represents the community. Other changes were made in the Senate, and some of the reasons for those changes are discussed below.

Federalism

Back in 1901, the framers created a federal system. The essence of Federation was the creation of a compact between the States (former colonies of the UK) and the new federal entity, and the balancing of power between the two.

There were various ways of viewing federalism at that time. Rose Scott, who was involved in the federation debates in the 1890s, was fiercely opposed to Federation and a centralised system. As Marilyn Lake highlighted, Scott presciently observed that the creation of a new 'faraway federal parliament' would render it increasingly difficult for the mothers of the nation to participate in national government.⁶ Justice Elizabeth Evatt had similarly noted that if women had been involved in drafting the Constitution they would have never agreed to s.125 mandating that the Federal Parliament be at least 100 miles from Sydney.⁷ Scott was also concerned about the nature of democracy, in that the further the government was from the people, the less accountable and responsive it would be.

But federalism was also a principle from which women and other groups in the late 20th century began to experiment with different forms of representation. At the time of Federation, those framing the Constitution were interested in protecting States' rights, and it was acceptable to incorporate into the democratic system the protection of the collective rights of the States. In the late 20th century other groups within the community were demanding that their interests be specifically represented. The indigenous community, multicultural communities, gay and lesbian communities, rural and urban communities and others succeeded in introducing an Upper House that was not just a States' house, but a people's house of a different quality to the House of Representatives. Instead of the Senate just representing States' rights in the 21st century, it broadened to include other group rights.

The existence of a federal system was also significant with the advent of the further internationalisation of world politics in the latter part of the 20th century. In fact, regional organisations became more significant in shaping community iden-

tity than the former State governments because of those organisations' entrenchment in the Constitution. This involved a refashioning of legislative responsibility, and regional organisations around the country were involved in that redrafting process. It meant that environmental issues, social security matters, competition and economic policy, technological issues and industrial relations principles were all reviewed in light of the different organisation's specific experiences with government and politics. And to the extent that these regional rules conflict with federal and international rules, the current body of elders (made up of nominees from different regions and Federal and international representatives) sits in Geneva and conducts hearings by satellite, making determinative decisions about the extent of those inconsistencies.

Responsible government

The principle of responsible government was unusual in the way that it fitted into the Australian constitutional system in 1901. It stemmed from the Westminster system and the constitutional monarchy under which Australians lived. In that system, the Queen and her representative acted on the advice of the Ministers. The principle also included the notion of parliamentary responsibility, that is, members of the executive are accountable directly to the people. (Section 64 of the Constitution required members of the executive to be Members of Parliament.) This principle included the collective responsibility of the government in promoting a unanimity of approach to policy issues, resulting in a distinctly partisan approach to the resolution of those issues.

The continued centrality of the political parties in the constitutional system meant that the parties could no longer ignore the vexed question of the place of women. Recognising that the political party dictated who was responsible to whom in Parliament, a review of the parties occurred when the old style Senate was able to orchestrate the numbers to support a review. This realisation, together with the effective gender representation of the smaller parties, led to new voices being heard. Promoting equal representation within the political parties was the basis for greater representation in the Parliament and in the Cabinet for policy development. Given Cabinet's centrality to the system of responsible government, women were placed within the Cabinet in equal numbers, including the Minister for the Status of Women.

The final modification to responsible government can be seen in the movement to the Republic. The transition was significantly influenced by women's equal participation. Conscious that the Queen was Head of State only by virtue of not having a brother, women were determined to introduce a system that would ensure equality of gender in the appointment process, both in who chose the Head of State and who was chosen. For instance, the Constitution mandated that the Head of State would alternate between gender. There was also a decision to set out the specific powers of the new Head of State, rather than relying on English conventions that had been interpreted by predominantly male judges.

Separation of powers

Separation of powers was never absolute in the 1901 Constitution. It was an interesting mixture of the United States and English Constitutions which resulted in a partial separation of powers. It had a strict separation of the judicial branch of power, but not of the legislature from the executive. The principle that was protected was the liberty of the individual. These liberties have been reinterpreted in the 21st century

with the recognition that power is not just held by governments, but by other bodies who wield great influence over individuals in the community. The value of separation of powers has extended beyond the narrow purview of government to broader issues of power balance in the society.

One of the High Court cases of the late 20th century, *Brandy v Human Rights and Equal Opportunity Commission* (HREOC) (1995) 127 ALR 1, highlighted the different power issues at play within society. In that case, the court held that the HREOC could not be a *determinative decision-making body*, and the procedure set up transforming HREOC decisions into orders of the Federal Court was a breach of the separation of powers principle in the Constitution. The HREOC framework was specifically designed for the subject matter of the jurisdiction, and to give people affected, access to a resolution of the issues. Women were often disadvantaged by the adversarial system (as they often were in negotiation-style environments) and the separation of powers principle therefore did not truly cater for the different power differentials within society. Great minds went to work on refiguring the checks that needed to be provided for in society, and large private corporations became subject to review by parliamentary committees, as did other groups within society. Parliament essentially better reflected the community and therefore had more authenticity in reviewing the different interests in the community.

This extract from 2096 may not even exist in printed form in the 21st century. Already, the computer is becoming the central mode of communication and in the 21st century the printed form may be as much a relic as the 1901 Constitution itself. However, in whatever form it appears, this article has highlighted a few changes to our present constitution to illustrate that different frameworks and principles may lead to diverse forms of representation and the control of power in the Australian community. It has touched briefly on the effect of globalisation in order to rethink the role of the Constitution. Australia's Constitution will continue to be recognised as reflecting the values and principles of the community and it will have a profound influence over the relationships between private corporations, state bodies and individuals in Australia. To the extent that gender and other interests are more visible in the future constitutional system, the better will it serve its purpose.

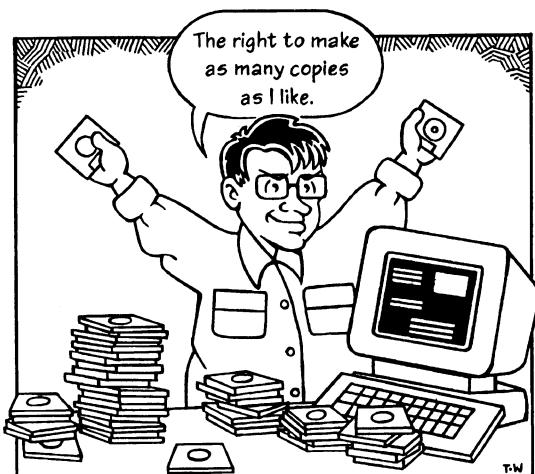
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COPYRIGHT IN cyberspace

Melissa de Zwart

Is copyright dancing on its own grave and singing 'hallelujah'?



Copyright on the Internet !

Ho hum, another article about how difficult it is to be a copyright lawyer in the age of the Internet. Hasn't everyone been saying for years that copyright is dead or at least that it is completely irrelevant to the regulation of the cyber environment manifested by the Internet? Most notably anyone who has been even remotely interested in the free speech campaigns that have been raging in the United States, which understandably regards itself as the 'Electronic Frontier', knows that in the new Wild West the old rules cannot, and therefore do not, apply. It has become trite for copyright lawyers to bemoan the impossibility of dealing with digital technologies in the light of traditional copyright concepts, yet there has been little action to redress this technological impairment. Are we letting the cyberians get away with too much? Should we just take our (digitally generated) bat and ball and go home?

Maybe it isn't necessary to give up hope just yet. A recent decision of the Federal Court of Australia, *Trumpet Software Pty Ltd v OzEmail Pty Ltd* (1996) 34 IPR 481, has sent a timely message to the cyber community that copyright is not dead. It is alive and well and flexing its muscles on the very frontier that pronounced its death, the Internet.

Trumpet Software Pty Ltd, an enterprising Tasmanian company, for some years produced and distributed as 'shareware' a computer software program called Trumpet Winsock. Trumpet Winsock is an extremely successful program, both in Australia and overseas, which enables the user to establish a connection to the Internet through an Internet Service Provider. The conditions upon which Trumpet Winsock were distributed provided that the user had a period of time, usually 30 days, to evaluate the program. After the expiration of that evaluation period the user was required to forward a registration fee to the owner. The registration fee is small, in the order of \$20 to \$30.

In 1995, OzEmail Pty Ltd, one of a number of Internet Service Providers which use programs such as Trumpet Winsock to interface between the user and the Internet protocol (TCP/IP), arranged for two diskettes to be distributed as a promotional give-away attached to the cover of the April issue of *Australian Personal Computer* magazine. The diskettes contained a version of the Trumpet Winsock software which had been downloaded from the University of Tasmania's FTP site, and which contained certain additions, alterations and deletions from the original Trumpet Winsock software. Approximately 60,000 copies of the magazine were distributed. A similar distribution took place in the August issue of *Australian PC World* magazine.

The promotion was undertaken to encourage users to connect to the Internet via OzEmail by providing five hours free access to the Internet. The distributions took place after OzEmail had been unable to negotiate successfully with Trumpet regarding the promotion.

The Trumpet Winsock software included in the promotional package had been modified in such a way that the user was connected immediately to the OzEmail network, a significant change from the original program which did not specify the use of any particular

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Internet Service Provider. The README.MSG file, which directed the user's attention to the fact that the package was shareware, had been entirely omitted. The copyright notice and the disclaimer of liability had been deleted and a number of other modifications had been made by OzEmail. The court found that the effect of these exclusions and modifications (whether they were deliberate or inadvertent) altered the usual set up of the software program, leaving the user without any clear indication that Trumpet Winsock was shareware or that the user would be required to register with Trumpet after the expiration of the 30-day evaluation period.

Mr Justice Heerey found that OzEmail had infringed the copyright of Trumpet in the Trumpet Winsock program by distributing the Trumpet software via the magazine promotions because in undertaking the promotions, it did, or authorised the doing of, an act comprised in the copyright of that program pursuant to s.36(1) of the *Copyright Act 1968* (Cth) without, or alternatively in breach of, any licence from Trumpet.¹ In addition, Heerey J held that OzEmail's conduct was in contravention of ss. 52 and 53 of the *Trade Practices Act 1974* (Cth) as conduct that would 'mislead or deceive readers of the magazines into believing OzEmail had the permission, licence or authority of Trumpet to publish the software' and that the readers or users of the diskettes would be likely to be misled or deceived into believing that 'users of the software did not need to obtain a licence from Trumpet in order to use the software' (at 502).

The decision in itself is unremarkable, relying as it does upon traditional copyright concepts. What is important about the decision is that it sends a clear message to the computing industry that producers of software distributed via the Internet can and will rely upon copyright to enforce their rights. In other words, the decision confirms, contrary to the bold pronouncements that copyright has no place on the Internet, that copyright does operate effectively in a digital environment.²

Information wants to be free!

We are beginning to hear more and more in Australia that 'information wants to be free' and that any form of regulation of the Internet, be that through the enforcement of intellectual property laws, defamation or censorship, will weaken the value of the new digital medium. However, this simplifies the issue of how the Internet may be used and further, demonstrates a misunderstanding of the role that copyright may effectively play in encouraging creation and dissemination of new material. It also requires the universal acceptance of an ethos that the Internet is a brave new world where all participants will be equally enthusiastic about creating and sharing their creations via the digital medium, with a new understanding of what rewards may be expected as part of such a process.

The argument that copyright is dead is voiced particularly strongly in the United States by advocates of the 'blue ribbon' free speech on the Internet campaign. Advocates of this campaign, such as John Perry Barlow (a foundation member of the Electronic Frontiers Foundation and a lyricist for the Grateful Dead), assert that the enforcement of intellectual property rights in a digital environment cannot be justified on the traditional ground that it encourages creation and dissemination in return for fair reward, because traditional requirements of creation, that is, reduction to material form, no longer occur. Rather, Barlow considers that enforcement of copyright on the Internet will be used as a tool to limit freedom of speech. He argues that copyright has no relevance

in an environment where expression is no longer reduced to material form and that any attempt to enforce copyright in such an environment will lead to a restriction upon the free flow of information. He stated in an influential article in *Wired* magazine that as 'it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression'.³

Of course, this argument goes to the very heart of copyright theory, which makes a clear distinction between ideas, which are not protected, and the form in which those ideas are expressed, which is protected, provided that it satisfies certain criteria of authorship and originality.

It is important not to become too distracted by the strong emotive arguments which are voiced primarily to ensure that the Internet does not become subject to stringent monitoring and content regulation when considering the copyright implications of the new technology. It is therefore essential to have an understanding of the context in which these arguments are raised. Copyright legislation in various countries has sought to balance the need to encourage the creation and dissemination of works for the public benefit, on the one hand, with the private rights of the author in the work, on the other hand, through a system of ensuring a reward for the author. That reward, copyright protection, is limited in duration to a specified period of time, after which the work falls into the public domain. It is also limited in Australia by provisions allowing 'fair dealing' and in the United States by concepts of 'fair use'. Thus copyright is perceived to balance public good with private interests.⁴ How this balance is achieved is a matter for the applicable legislation in the relevant jurisdiction.

In her comparative examination of the development of copyright laws, Gillian Davies noted that the United States has traditionally placed a higher emphasis on the role of copyright in fostering 'the growth of learning and culture for the public welfare. The grant of exclusive rights to authors for a limited time is seen to be a means to that end'.⁵ In other words, the United States strongly favours the public interest over the natural rights of creators. This may illuminate the particularly strong arguments being advanced in the United States advocating the abolition, or at least the non-recognition, of copyright protection in respect of digital material.

The free speech campaign is specifically directed against the measures outlined in the *National Information Infrastructure White Paper* and other regulatory mechanisms such as the *Communications Decency Act 1996*, which seek to make provision for copyright protection of material transmitted by digital means and to impose strict controls over the type of information which is accessible over services such as the World Wide Web. In addition, there have been attempts (both successful and unsuccessful) to make network providers, such as CompuServe and Prodigy, responsible for the material which is made available via their service (and it appears inevitable that litigation on this issue will continue).

Clearly content control is a contentious issue when you are contemplating stringent regulation of a medium that has arisen in a largely unregulated and unplanned manner. Different users have over time developed their own philosophy regarding the purpose of the Internet and how it should be used. This philosophy will vary according to the nature of their primary usage — social, recreational, educational or commercial.

Internet regulation

The Internet as we know it today, is a development of Arpanet, a computer network created at the University of California in the late 1960s for the US Department of Defense, funded by the US Advanced Projects Research Agency. Its purpose was to ensure the stability of military communications in the event of loss of sections of the network, particularly in the event of nuclear attack. In 1983 the National Science Foundation took over the management of the system's 'backbone', that is, the system's hardware, and made access available to universities, research and development companies and government agencies, thereby creating an educational and research network. Access was granted to commercial users in the early 1990s. Thus the Internet was born and it has been growing out of control ever since.

Along with increased access to the Internet has come a demand for increased regulation as consumers begin to view the Internet as any other service provider. The difficulty with this perception is that no longer does any one organisation have the control or the responsibility for the supervision of the network.

The issue of regulating the content of Web sites has arisen recently in Australia over the availability of decisions of the Family Court on the Australasian Legal Information Institute (AustLII), an on-line service operated by the University of New South Wales and the University of Technology, Sydney for the purpose of providing free access to Australian legal materials to anyone who has access to the Internet. In May of this year, the *Sunday Telegraph* newspaper ran an article stating that 'intimate Family Court secrets of hundreds of Australians' were available 'at the touch of a button' on the Internet. Indeed, selected judgments of the Family Court were made available via the AustLII service, but this is a far cry from the sensationalist claim of the *Sunday Telegraph* which implied that juicy details of the family lives of ordinary Australians were being broadcast in glorious technicolour as an alternative to *Melrose Place*. The sensation led to the temporary suspension of the service pending further consideration of the issues raised in the article by the Attorney-General's Department. The service has now been resumed, carrying a clear statement that the cases are published primarily for use 'by persons engaged in professions and by students' and are published with the authority of the Family Court (as was always the case).

Censorship

The concern that copyright may be used as a form of censorship is understandable when that concern is considered in the historical context of the development of copyright laws. In England, the earliest form of copyright regulation, the system of Crown patents and licences to stationers, served the dual purpose of censorship and enforcement of the monopoly of the Stationers' Company. It was not until the Statute of Anne in 1709 that copyright was expressly recognised as a means of encouraging learning (and even this is questionable in terms of truly representing the motivations of the legislators). However, there has been a divergence of laws dealing with content regulation (defamation, obscenity etc.) and copyright since that time, a divergence which is clearly desirable in terms of fostering creation and dissemination of ideas. It would therefore be preferable to keep the debate regarding regulation of content and the debate regarding applicability of intellectual property to the Internet strictly separated to ensure that each issue is given full and appropriate consid-

eration. The need for creators to get reward for their endeavours is of clear importance in the increasingly commercial domain of the Internet.

Shareware or freeware?

The decision in *Trumpet* is also important because it provides judicial pronouncements on concepts such as shareware and freeware. The use of this jargon is not new; it has been in familiar use across the computing community for several years. However, there has been little consensus regarding the meaning and legal effect of such terms, with the end result being that users interpret the terms to suit their preferred intention (or user philosophy). Understandably, they have been terms which lawyers treat with some trepidation.

One of the key issues in the case concerned what legal rights and obligations attached to 'shareware'. Heerey J described shareware as:

a form of software marketing which gives the user an opportunity to evaluate the product; in other words, try before you buy. The owner of the software makes it available to users without charge for the purposes of evaluation. If users wish to acquire the software they must forward a registration fee to the owner. [at 485]

He conceded that the success of the shareware concept depended on the honesty of users in forwarding the registration fee, while noting that recent technological developments enable the inclusion of a 'timelock' which renders the program unusable after a given period of time unless registration is effected. Heerey J went on to state explicitly that 'shareware is to be distinguished from freeware, which means software supplied with no charge and no expectation of remuneration' (at 485).

The attitudes and statements of those involved in the case, which were discussed in the judgment, reveal the dissent and perhaps the misunderstanding among the computer community regarding what concepts such as shareware entail and the legal obligations that attach to certain products. Whether this is a genuine confusion or a wilful ignorance is a question which shall be left to one side. In his judgment, Heerey J noted the evidence given by members of the computer industry regarding whether shareware did, or did not, involve particular restrictions or obligations, but found that no legal 'custom' had been established. The evidence before the court provides a telling illustration of how concepts can be manipulated or interpreted to give weight to a particular point of view.

In his affidavit to the court, the OzEmail project manager stated that upon his consideration of the Trumpet Winsock licence provisions contained in the program he 'remained of the view that OzEmail was entitled to distribute Trumpet Winsock 2.0 in the manner intended' (at 487). Similarly, in correspondence with the solicitors acting for Trumpet, the solicitors acting for OzEmail stated that there was no need for OzEmail to have sought permission from Trumpet to distribute the software via the magazine promotions:

The rationale behind shareware is that distribution of the software concerned is maximised by permitting third parties to distribute the software. If the proprietor of software wishes to control the distribution of it, then the software would not be released as shareware. [at 492]

Heerey J rejected this high-handed assertion which attempts to impose many of the misconceptions of the computer industry onto copyright law. He refused to accept the argument that because a program has been distributed as

shareware there came into effect a licence which could not be revoked at all and found that the licence could be and had been revoked by Trumpet, who was free to do so at any time. The distribution by OzEmail had been conducted not for the purposes of evaluation of the Trumpet Winsock product, either by OzEmail or other users, but with the intention of encouraging use of OzEmail's own products.

OzEmail was not alone in seeking to prove that shareware should be considered part of the public domain. Anecdotal evidence suggests that confusion abounds regarding how the licence comes into effect and who should be responsible for its registration, if anyone. In the article discussed above, John Perry Barlow argued that copyright rewards should not even be necessary any more to encourage creation. He proposes an alternative system, more akin to patronage, whereby through giving away a product (such as a software program) you can increase the popularity and hence the value of the product and develop repeat business and the ability to sell ancillary services (although he acknowledges that this argument has some problems with respect to shareware).

A creator of a program may choose to make his or her program freely available by posting it on the Internet or may decide, as Trumpet did, to allow people to use it by way of payment of a small licence fee, after having been given an opportunity to evaluate the product. This should be a marketing decision of the producer, made in the full knowledge of the protection mechanisms available and with the full knowledge that it relies on the honesty of users, who will not always oblige. If this mechanism is reduced by users (or the courts) to a free right of unlimited free access it is likely to result in less information being made available rather than more.

It is noteworthy in the light of this discussion regarding the interpretation and effect of copyright principles in this environment that Trumpet was reluctant to authorise distribution of Trumpet Winsock 2.0 (the then current version of the program) which did not contain a timelock. According to the judgment of Heerey J, the managing director of Trumpet:

was concerned that the mode of distribution proposed by OzEmail could lead to many people using the software without paying Trumpet the registration fee. However, he believed Trumpet would be substantially protected against that misuse if the distributed version of the software was timelocked. [at 487]

Trumpet accordingly decided to consent to the distribution of the timelocked version by OzEmail, although this permission was withdrawn in the light of concerns by Trumpet about OzEmail's conduct during the negotiations.

What can be deduced from this concern was that Trumpet felt it was unwise to rely upon its rights in copyright alone, that copyright is somewhat of a blunt instrument in dealing with the issue of appropriation of software.

Trumpet's reluctance to rely solely on its legal rights can be understood again in the context of the debates that are raging in the US regarding regulation of the Internet. To quote Barlow again:

Software piracy laws are so practically unenforceable and breaking them has become so socially acceptable that only a thin minority appears compelled, either by fear or conscience, to obey them.

He advocates a new community in which piracy and 'freebooting' are the norm and eventually in which no legal structure will apply. One cannot help but feel that this view of 'social acceptability', expressed often enough and loudly

enough by the cyberians, may become a self-fulfilling prophecy if it is allowed to go unchallenged.

Copyright in traditional works

The problems that can arise where a culture is allowed to develop which considers that certain classes of works are not a proper subject of copyright protection and hence are freely available for use by anyone without the permission of the creator or payment of any remuneration to the creator, are clearly demonstrated by the widespread disregard for the rights of indigenous creators. A good example of this is found in another decision of the Federal Court, *Milpurrurru and others v Indofurn Pty Ltd and others* (1994) 30 IPR 209. In this case, the proprietors of the works of a number of Aboriginal artists were strongly criticised by the court for their failure to observe copyright. The infringement action was brought on behalf of eight Aboriginal artists in respect of reproduction of their artwork in carpets manufactured in Vietnam and imported into Australia. There was evidence that the designs were copied from publications of the Australian National Gallery and the Australian Information Service, including a catalogue and a calendar in which the artists' work appeared.

In what Mr Justice von Doussa described as 'an extraordinary tactical stance' the respondents refused to admit that the artists owned copyright in the relevant artworks until late in the second week of the trial (at 224). No justification for this stance was given, although it is typical of arguments raised in any case dealing with traditional artworks. Von Doussa J noted:

Pirating of Aboriginal designs and paintings for commercial use without the consent of the artist or the traditional owners was common for a long time. The recognition of the sacred and religious significance of these paintings, and the restrictions which Aboriginal law and culture imposes on their reproduction is only now being understood by the white community. [at 216]

It is interesting to note that Barlow highlights the deficiencies of the copyright system in dealing with traditional forms of music, artwork and medicine, with its insistence on concepts of authorship which lead to denial of intellectual property rights protection to these products. He believes a similar treatment will be imposed on digital creations, stating that:

soon most information will be generated collaboratively by the cyber-tribal hunter-gatherers of cyberspace. Our arrogant legal dismissal of the rights of 'primitives' will return to haunt us.

Alternatively, we could recognise that both are the proper subject matter for copyright protection.

As the decisions in *Trumpet* and *Milpurrurru* demonstrate in very different contexts, there is still a lack of perception in the community that copyright is an important property right that owners can and will enforce. The courts in both cases found the infringers had shown a lack of respect for the rights of the copyright owners and what they were trying to achieve by regulating access to their works. Whilst this comes as no revelation to people working in the copyright sphere, the lack of general public awareness of copyright issues has been of concern to creators for some time. As Trumpet's concern with developing a timelock demonstrates, creators are still concerned with protecting their intellectual endeavours and will employ any means available. However, often such devices act only as incentives to computer crackers to undermine the security devices. A more rigorous legal penalty is required.

In rejecting the need for the introduction of moral rights, the majority view in the 1988 'Report on Moral Rights' by

the Copyright Law Review Committee was that many of the problems perceived to arise from the lack of moral rights in Australia could be remedied by an increase in the understanding by both authors and the public of matters with which moral rights are concerned.⁶ A similar reasoning could be applied to issues affecting Internet copyright.

Where to from here?

So we may ask in the light of recent Australian and US experience what is the future of copyright in cyberspace? We must first have a clear understanding of what the Internet is and what we, as a society, want it to do for us.

Barlow has painted a very exciting picture of the Information Age as lived through the Internet:

all of the expressions once contained in books or film strips or newsletters will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions that one might behold in effect, as glowing pixels or transmitted sounds, but never touch or claim to 'own' in the old sense of the word.

Lance Rose, another contributor to *Wired*, paints a less glamorous view of the Internet and hence a more optimistic view of the role of copyright. He notes that piracy on a mass scale is not new, highlighting the availability at markets and street stalls of 'bootleg' music, videos, software, T-shirts and watches. He stresses that:

copyright succeeds at maintaining public markets for copyrighted products — markets where the owners can charge and receive a price for those products. It is irrelevant whether any given infringement goes unpunished — as long as it is kept outside the public marketplace.⁷

His view is that the rules of the marketplace should be allowed to operate and that copyright remains a valid and valuable right.

The Internet provides a very important, perhaps soon to be the most important, forum for the exchange of ideas. It is clear that a balance of philosophies is needed. Law cannot operate in a vacuum divorced from the developments taking place in the (virtually) real world. However, one should not be blinded by the wonder of the new technology and abandon all that has gone before. The Internet is a new medium for transmitting information but the content remains words, sounds, images. They just happen to be conveyed to us as noughts and ones. Copyright has adapted in the past; it will

again. Copyright cannot be blamed for the attempts of regulators to rein in the uses (and excesses) of the Internet.

Of course, the fact that the infringement in *Trumpet* was a wholesale appropriation makes the case a straightforward one. Much greater difficulties are going to arise where the copying is only part of a digital work, particularly where that part has been manipulated in some way. Digital technologies do pose a particular challenge to copyright law in terms of detection and proof of copying of parts of works but these can be dealt with as they arise in accordance with existing principles.

There is no excuse for complacency on the issue of copyright's relevance to the Internet. It is not only a narrow legalistic concern. We cannot have an informed debate about the future use and regulation of cyberspace if many of the participants have only a limited grasp of intellectual property law. The information superhighway will be of little use if there is no traffic on it because the absence of traffic police, or copyright protection, has meant the dangers of travelling the Net are too great for copyright creators. We must be wary of being too willing to view cyberspace as a new world requiring different rules, when the ones we already have seem to work reasonably well.

References

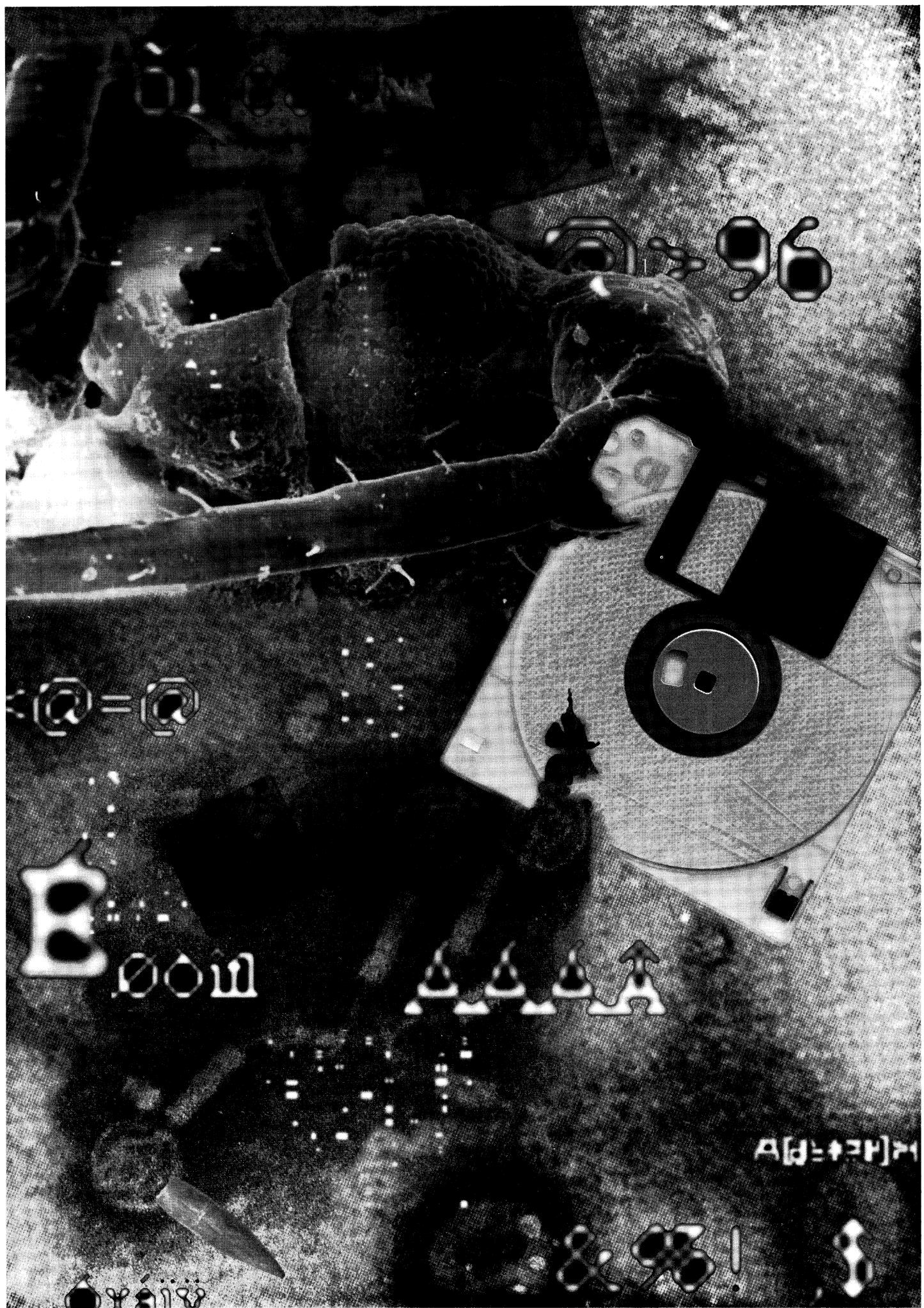
1. Subsection 36(1) of the *Copyright Act* provides that copyright in a literary work (such as the *Trumpet Winsock* software) is infringed by a person who, not being the owner of the copyright in that work, does or authorises the doing of, in Australia, an act comprised in the copyright of that work, without the licence of the owner of the relevant copyright. Such 'acts' are defined in s.31, in relation to literary works, as reproduction, publication, performance of the work in public, broadcast, causing the work to be transmitted to subscribers to a diffusion service, making an adaptation of the work or doing any of the above acts in relation to an adaptation of the original work (other than adaptation).
2. See for example, the articles published in *Wired* magazine (and via its online counterpart, *Hotwired*) by Pamela Samuelson and John Perry Barlow canvassing the validity of old law in a new environment.
3. Barlow, John Perry, 'The Economy of Ideas', *Wired* 2.03 (<http://www.hotwired.com/wired/2.03/features/economy.ideas.html>).
4. See Davies, Gillian, *Copyright and the Public Interest*, IIC Studies, Max Planck Institute, Munich
5. Davies, G., above, p.68.
6. Copyright Law Review Committee, 'Report on Moral Rights', January 1988, p.21.
7. Rose, Lance, 'The Emperor's Clothes Still Fit Just Fine or Copyright is Dead. Long Live Copyright', *Wired* 3.02 (<http://www.hotwired.com/wired/3.02/departments/rose.if.html>).

Virtual law and crime

artwork by Julian Wong

Julian Wong is a Melbourne-based digital artist currently studying electronic design and interactive media at RMIT. The following images and the work on the cover present a visual netscape based on internet references of virtual law and crime.

A micro-photo montage depicting the unhygienic intersection of data; where information becomes both viral and corruptible; virtual yet influential; where opposing theories, philosophies, social and political positions, extreme aspects of (sub) culture share a powerful communication outlet in an orgy of unbridled exhibitionism.





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PRODUCING ‘THE GOODS’

Peter Huxtable

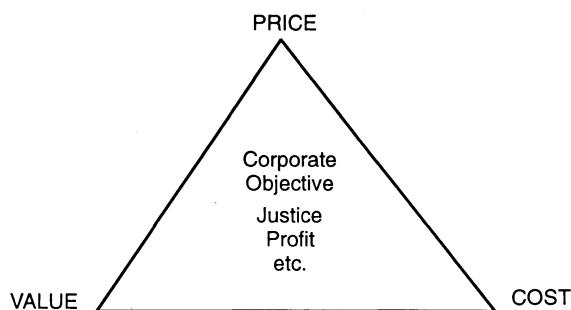
Competition and co-operation in poverty law services.

In these days of economic rationalism and professional management, publicly funded activities, like private enterprise, must produce the goods.

What are ‘the goods’?

In free enterprise, the goods are normally profit maximisation, although they may also be, for example, increased market share, quality leadership, positive public profile and even (due to any dichotomy between ownership and management) the aggrandisement of top managers. In the case of poverty law services, be they delivered through legal aid commissions (LACs), community legal centres (CLCs), Aboriginal legal services (ALSs) or private lawyers, the goods are access to improved justice in our society, especially for those most in need (the poor, the disabled, Aborigines, children etc.).

No matter what the primary corporate objective, long term survival and success depends on adding value that others in the industry don’t provide. This can be summarised in the following diagram:¹



In economic and marketing theory, the firm produces a product or service the customer wants, the product/service is distinct from that of competitors, production costs are pushed down, prices are set at levels the market will tolerate and extra value or benefit is provided to the customer, thus ensuring the firm’s product is bought rather than the competitor’s. All this leads to profit maximisation.

In the 1970s and 1980s, poverty law services were largely insulated from such hard-nosed business analysis — but no longer.

The welfare state is shrinking fast throughout the Western world, and the survival of institutionalised poverty law services depends primarily on understanding economic rationalist ideology and meeting it on its own terms. The motherhood statements of efficiency and effectiveness in Legal Aid Commission Acts are now life and death imperatives.

Poverty law service providers must now cut costs to the competitive bone, must provide services at a price the government is prepared to pay (unless substantial, supplementary funding comes from other, creative sources — remote, but not impossible) and must produce

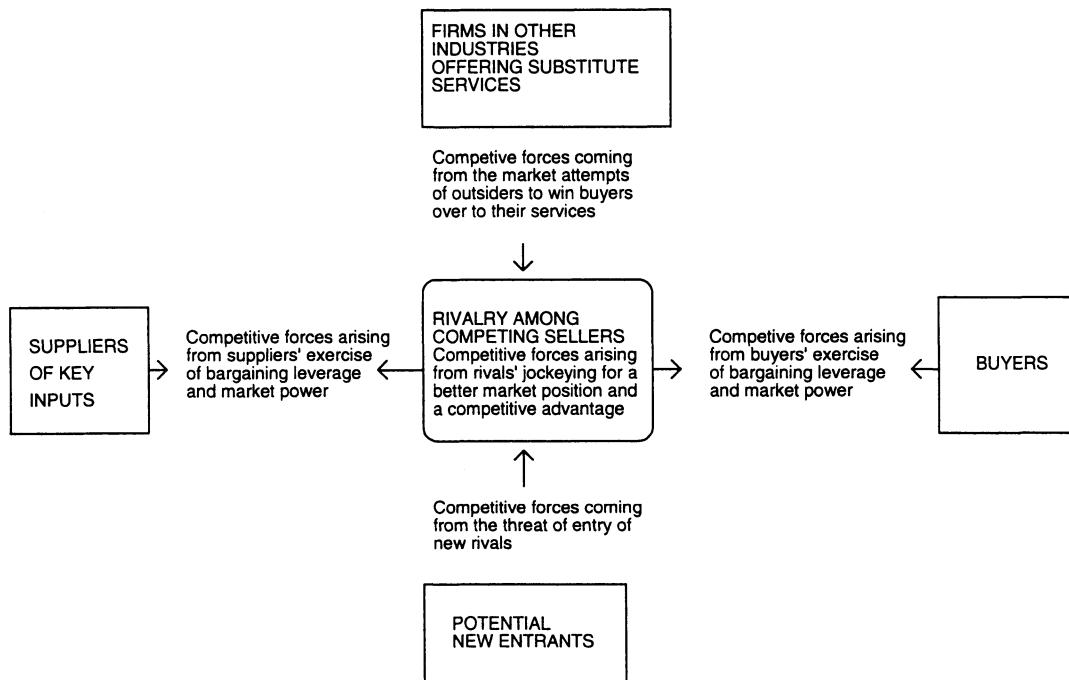
Peter Huxtable is a lawyer and mediator and currently manager of Legal Aid's regional offices in Western Australia. Views expressed in this article are his own.

client and community justice outcomes which can't be as effectively provided by others.

The five forces of competition

All legal service providers live in a dynamic, changing environment. According to Porter, 'Change is an unnatural act, especially in successful companies'.² However, change all organisations must, if they wish to survive and prosper in the current and future environment. Ignoring market opportunities and the actions of competitors will spell doom.

Critical factors can change fast, creating opportunities and threats. Management needs good knowledge of the organisation's weaknesses and strengths, sound strategic planning and positioning, and an organisational structure and culture which allows adaptability and flexibility. Porter has devised a five-forces model of competition:³



The underlying principle of Porter's model is that a business entity must be aware of its turbulent environment so that it can produce a competitive strategy in order to achieve market success. Strategic analysis is ongoing and aimed at achieving and maintaining competitive advantage, usually through offensive moves to secure market strength and defensive moves to maintain competitive strategy.

Lengthy, fertile analysis of the Australian legal services industry can flow from an examination of this model, but it is not intended to do that in this paper apart from noting a few driving forces of change:

recognition of the severe cost, time and justice limitations of the one lawyer to one client, adversarial model of litigation;

broad acceptance of alternative dispute resolution, including mediation, ombudsmen, and tribunals in which lawyers can't appear;

as many law students presently in Australian universities as there are practising lawyers, which will result in a huge shake-out of the industry, especially through price competition;

cross-party political support for a national competition policy in the legal services industry;

strong competition from sectors offering substitute services, such as accounting, conveyancing, government and financial organisations;

- cost cutting, such as through the heavy use of paralegals rather than lawyers (although this is probably tapering off now);
- greater expectations from clients, particularly corporate and government clients, in terms of price and quality of service;
- technological change, particularly in the form of computerisation, such as in practice management and the information superhighway of the Internet;
- the nationalisation and globalisation of the legal industry.

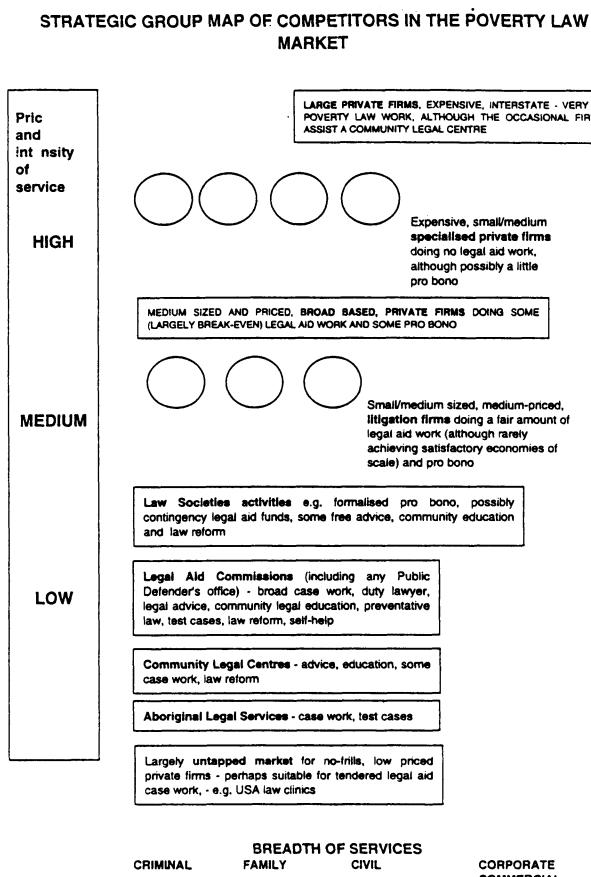
Dollar value of the market and rival groups

The Australian legal services industry was valued at a whopping \$5.105 billion a year in 1992-93.⁴ It is probably more like \$7 billion now. The poverty law services component of this (that is, funding of legal aid, CLCs and ALSSs) was a relatively paltry \$300m in 1994-95,⁵ that is, only some 4% or 5% of the total expenditure on legal services in Australia.

This \$300m was far from adequate in meeting the needs of justice and, moreover, State legal aid commissions are to have their total budget cut by some \$33m a year following the 1996-97 Federal Government budget.⁶ But the poverty law budget is still far from chicken feed for disadvantaged clients, salaried workers relying on it for their livelihood, and cash-strapped governments. Competition for the poverty law budget is strong.

In competition theory, one technique for examining the comparative positions of rival players is strategic group mapping. When firms, companies or organisations employ similar competitive strategies and occupy similar positions in the market, they are said to be in the same strategic group.⁷

PRODUCING 'THE GOODS'



The strategic group map is not to scale, and has deficiencies too many to explore here, but it does give a broad idea of where players lie in the provision of services in the poverty law market.

Competition by co-operation

Natural alliances tend to form, due to ideology and method of staff remuneration. These are seen more clearly through strategic group mapping.

On the one hand, it can be broadly argued that there are LACs, CLCs and ALSs banding together to provide mutual support and perspective. While still subject to a range of interesting competitive tensions among themselves, their services are to a large extent complementary and not duplicated. However, while recognising the unique philosophy and role of each of these main players, governmental desire for a co-ordinated, overall resource-allocation strategy, can be understood.

In apparent competition with the salaried block are the private law firms, of varying size and expertise, which are driven by more orthodox business objectives, particularly survival and profit.

But are the differences between salaried and private providers of poverty law services really so great? Both provide case work services for disadvantaged clients (although private firms have a more limited range of overall services), both are having to force costs down, both must come up with prices which are acceptable to an increasingly assertive client base (private, corporate or government), and both must provide quality services which effectively meet customer needs.

If any organisation does not achieve these objectives, the future competitive environment will see their demise, be it a

sole practitioner or a \$50 million legal aid commission. In the not too distant future, all can be expected to tender competitively for the work, to a greater or lesser degree, with obvious implications for client solicitor of choice, and raising issues of work quality and effectiveness. All players must also address increasing threats from government as to their independence.

Moreover, heavy competition in the open market, particularly on price, is not the only, nor necessarily the best, way to produce efficient organisations, quality services and lowest prices. Co-operation, collaboration and networking between players can be fundamental to achieving individual corporate objectives (including reasonable profit and incomes) and society's well-being (access to justice).

Coalitions of those with common interests, including workers, managers, customers, kindred organisations, and even traditional market-place rivals, can be built, and can result in outcomes which increase benefits to all stakeholders.

Competition by co-operation⁸ in the poverty law market is important because, while maintaining the vibrancy and benefits of competition, it:

- allows a more comprehensive tackling of increasingly complex justice issues, such as human rights transcending political borders, and
- allows legal services, which are more and more knowledge-based, information-intensive and computerised, to be broadly shared. This leads to lower costs, such as generic research for test cases.

Internal co-operation in business entities is epitomised in practices such as total quality management. The 'competing by co-operating' concept extends the idea further, so that co-operation can occur among those who would otherwise be fierce rivals but who share common goals and interests and who can gain from working together.

The mixed model of poverty law service delivery

From my study of Australian and overseas legal aid schemes,⁹ the ideal model of poverty law service delivery is the mixed model, that is, involving LACs (including a Public Defender's office), CLCs, ALSs and private lawyers, each with their own proven, cost-efficient and effective services and market niches, forming part of a comprehensive, integrated strategy. When working properly, the mixed model achieves all the benefits of competition by co-operation.

However, it has been advocated in powerful places that all Australian poverty law services should be put out 100% to competitive tender. If this occurred, it would obviously destroy the mixed model of service delivery, and would most likely result in pure bottom-line price competition. That risks the whole poverty law scheme collapsing by precariously putting all the eggs in one basket (either private or salaried lawyers), by losing enormous in-house expertise built up over decades, and by forfeiting the inherent tautness of healthy (hopefully co-operative) competition achievable under the present system, to a possibly monopolistic one in the long run.

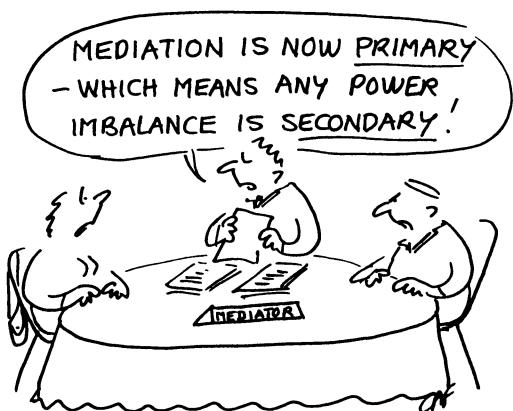
Moreover, a fully tendered out scheme would lose much of the added value of the mixed model of poverty law service delivery in terms of justice outcomes for the community as a whole.

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New mantras in FAMILY LAW

Renata Alexander

The impact of recent changes to the Family Law Act.



An article in the October issue of the *Alternative Law Journal* considered the recent changes to the *Family Law Act 1975* (Cth) and how they fail to address the social and economic disadvantages for women. This article examines recent changes from a different perspective, particularly with regard to mediation as a method of primary dispute resolution and new provisions about family violence and the relationship to children's matters. These changes serve to exacerbate rather than alleviate problems experienced by women in the family law system.

The *Family Law Act* came into effect on 5 January 1976. One of its main features was to establish the Family Court of Australia and that court recently celebrated 20 eventful years of operation. In the past two decades there have been numerous amendments to the principal Act, changes to the court's Rules, management and procedures, practice directions, High Court rulings and volumes of case law and commentary. The most significant legislative amendments have included widening the scope of the marriage power (1983), referral of State powers over ex-nuptial children (from 1986 to 1990), cross-vesting (1987), additional jurisdiction over such matters as bankruptcy and income tax (1988), introduction of the Child Support Scheme (1988) and provisions about alternative dispute resolution (1991).

The 1995 amendments

On 11 June 1996 substantial amendments pursuant to the *Family Law Reform Act 1995* (Cth) came into operation. These have radically altered the philosophical underpinnings and practical application of the *Family Law Act*, particularly in relation to children. The amendments are largely modelled on the *Children Act 1989* (UK)¹ and also reflect notions embodied in the United Nations Convention on the Rights of the Child which was ratified by Australia in December 1990 with effect from January 1991.

The 'old' concepts of guardianship, custody and access have been replaced with 'new' concepts of parental responsibility and parenting orders as to residence, contact and specific issues. New s.61B defines parental responsibility in terms of duties, powers, responsibilities and authority in relation to children and new s.64B defines 'parenting order'. Parents are encouraged to reach agreement about day-to-day and long term matters concerning their children rather than seeking a court order and s.63C introduces the new entity of a 'parenting plan' to incorporate such parental agreement. Parenting plans remain private informal agreements between parents unless registered with the court, in which case they become binding and enforceable. The Family Court has already produced 'parenting plan kits' for do-it-yourself parenting plans.

Parenting plans can be formulated with the assistance of counselling and mediation services. Such forms of alternative dispute resolution, together with conciliation and arbitration, have been elevated under

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the *Family Law Act* from the status of 'alternative' to the higher status of 'primary'.

Another feature of the *Family Law Reform Act* is the new Division 11 about family violence (ss. 68N-68T). This Division primarily deals with the relationship between contact orders and family violence orders and s.60D defines and expands old and new expressions in the Act, including 'abuse' and 'family violence'.

Other amendments under the Reform Act relate to child maintenance (ss.66A-66W), location and recovery of children (ss.67H-67Y), injunctions relating to children (ss.68A-68C) and presumptions of parentage and parentage testing (ss.69P-69ZD).

Any resemblance to the *Income Tax Assessment Act* in terms of the numbering of sections is purely coincidental!

This article examines a few of these recent changes and their impact in the area of family law and its application in practice as we head towards the 21st century.

Mediation

Mediation is sweeping the nation. From its humble introduction into the Family Court in 1991 through the *Courts (Mediation and Arbitration) Act* mediation services have climbed to prominence in the private sector and are receiving large budgetary allocations in the public sector of court-annexed and government-funded agencies. The latest amendments to the *Family Law Act* now ensure that mediation-like services are entrenched as permanent fixtures and accorded the status of 'primary' methods of dispute resolution.

The underlying rationale

In my view the change in name from 'alternative' to 'primary' is not merely cosmetic. Rather it reflects an underlying philosophy that promotes and legalises private ordering and informal justice and is premised on a conscious and calculated intention of maintaining power differences between men and women in family relationships.

Mediation and counselling both encourage the private ordering of family affairs. Personal norms, behaviour and relationships within the family context are respected and protected. Power bases remain immutable.

When challenged, those with greater power and resources will seek to maintain their superior positions, be it within the informal mediation context or through litigation and formal court processes. That is to be expected. Men usually occupy such positions of social and economic advantage. That is the norm within the home and within the workforce and community at large. Mediation is a much 'safer' forum within which to resist challenge. The process protects and replicates such power differences and the outcome usually entails minimal disruption to sources of power and control of resources.

Litigation and adjudication are much more 'risky' and pose a threat to those who seek to retain their power and control — be it over children, financial matters or the apportionment of property. Litigation adheres to clear rules and procedures, and court hearings afford a more objective evaluation of parties' relationships and resources. Court-imposed determinations are more likely to redress imbalances of power by providing far more equitable distributions and solutions than those reached privately. Courts, too, attract public scrutiny and accountability, whereas mediation and mediated outcomes remain private and untouchable.

Private ordering and agreements reached through mediation and counselling are therefore more attractive to those who want power imbalances to remain intact, that is, men, for it is men who dominate positions of power in all arms of government and regulation, who by definition comprise half of the divorce population and who have succeeded in ensuring that mediation and like methods are near-mandatory legislative requirements.

Rather than acknowledging such a sinister and raw rationale in favour of promoting mediation services, legislators and the legal fraternity rely on research and evaluations of mediation versus litigation to support the recent amendments. At best the available research is limited and inconclusive. At worst it is self-serving, methodologically questionable and therefore unreliable. Most of the research here and abroad as to the purported benefits of mediation is little short of propaganda published by exponents of mediation with preconceived notions and with vested interests in the maintenance and funding of mediation programs. Nonetheless some of the purported benefits need to be examined to enable meaningful debate.

Mediation saves time and money?

There is some limited evidence in the United States, that mediation is cheaper than litigation.² Mediated settlements can be reached more quickly and expeditiously than awaiting judicial determination. Other evidence, however, suggests the opposite. Failed mediation can be more expensive than litigation³ and may even prejudice one of the parties by prolonging a status quo in favour of one party in a children's matter or affecting the size or value of the asset pool in a property case. It may also mean a longer delay to reach a final hearing. Indeed, evidence in Canada suggests that mediation is actually more expensive than litigation, *irrespective* of whether an agreement was reached.⁴

Mediation is party-controlled?

Mediation is also praised as a party-controlled process with party-determined outcomes. This purported benefit too is transparent and flawed. Parties do not come to mediation with equal bargaining power, skills and resources. Women generally have less access to information and legal advice and are not fully aware of all the issues to be discussed. Full disclosure is not required. Through socialisation, women are generally less able to articulate their needs and advance their interests and are treated with lower credibility and attentiveness in negotiating situations. Outcomes reached through mediation are therefore likely to reflect and reinforce such differences.

There is also a power differential between parties on the one hand and the mediator on the other. Parties who have experienced mediation complain of being ignored, dismissed and pressured into agreements. Mediators are far from neutral. They are purveyors of certain beliefs and personal and professional biases and inevitably 'direct' parties into favoured outcomes. The mediator, not the parties, controls the process and what outcomes are reached. As such, mediation is simply legalised informal adjudication.

Problems with mediation

Objections to mediation at both theoretical and practical levels are many. To canvass them all is not the purpose of this article. However, the new amendments ignore the above objections and provide no safeguards against the disadvantages discussed. Redefining mediation as a 'primary' method of dispute resolution merely exacerbates problems as to power imbalance between parties, inequities regarding

access to resources and legal advice, mediator power, non-disclosure, family violence, economic pressures and the absence of court scrutiny. Some of these concerns were voiced in 1994 in both the Access to Justice Action Plan and the Law Reform Commission's Equality Before the Law Report but have been ignored by the legislators.

Promoting mediation may also have serious consequences on the availability of legal aid. Legal aid funding is being severely cut by the Federal Government in all States. Mediation is seen as a cheap alternative to litigation and legal aid bodies may require parties to attend mediation irrespective of the parties' relationship and problems involved rather than provide funds for traditional court procedures.⁵ This would effectively remove choice and make mediation mandatory for those who could not afford private lawyers. This would discriminate against those in lower socio-economic classes (primarily women) who would otherwise qualify financially for legal aid. Women form the vast majority of legal aid recipients in family law matters and with the push for mediation they would be denied the choice which they would otherwise enjoy if in better financial positions. Men in the main would still have the choice of whether to pursue mediation or to opt for litigation. Access to justice in the area of family law would continue to be gender-determined.

Child abuse and family violence

In 1991 the definition of 'abuse' in relation to a child was inserted into s.60 of the *Family Law Act*. The definition of 'abuse' in new s.60D(1) remains the same and reads as follows:

'abuse' in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

This definition focuses upon sexual and physical abuse of a child with the child as a direct or primary victim and this has limitations. However, a new definition in s.60D(1) of 'family violence' expands the concept of child abuse and abuse between family members. It reads as follows:

'family violence' means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

The definition of 'family member' is very broad and is contained in s.60D(2) and (3).

Although well overdue, given raised public awareness as to family violence and the existence of family violence legislation in all States, this new definition is a welcome insertion. It encompasses family violence which is direct or indirect violence towards a person or property, including threats, that causes harm, fear or apprehension. The prevalence and impact of violence in family life before and after the family unit breaks up has been further recognised in the expanded definition of factors in s.68F as to how a court is to determine what is in a child's best interests. Pursuant to s.68F(2) the court must consider:

- (f) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour;
- (h) any family violence involving the child or a member of the child's family

This is considerably wider than the former s.64(1) factors which focused on direct harm. The new factors include not only direct harm but also being *exposed* to family violence or being present where there is family violence. This clearly recognises the situation where children may be indirect or secondary victims, such as seeing or hearing their mother being abused, yelled at, threatened or hit or experiencing the aftermath in terms of their parents' language, behaviour and interaction.

On the face of it these new definitions and expanded considerations reflect a significant change in case law since 1994. Before then, family violence was largely ignored or dismissed as irrelevant if a child was not a direct victim. In the case of *Heidt and Heidt* (1976) FLC 90-077, the judge recognised the husband's violence to his wife but held that 'his affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband' (p.75,362). In the case of *Chandler and Chandler* (1981) FLC 91-008 the judge stated that:

whatever may or may not have been the relationship between the parties themselves, I am only concerned with the acts and conduct of the parties insofar as these directly affect the welfare of the children. There was no evidence of violence directly affecting the children, even if the wife's allegations were accepted as true. [p.76,107]

An abusive husband could nonetheless be considered an appropriate father and role-model.

Such judicial statements remained the prevalent view until 1994. In several reported cases since then, most significantly by the Full Court in *Jaeger* (1994) FLC 92-492 and by Chisholm J in *JG and BG* (1994) FLC 92-515, it has been held that family violence *can* be relevant to the welfare of children even if not directed at or even witnessed by children.

In my view the recent legislative amendments and the recent changes in judicial attitudes are appropriate trends as they recognise the prevalence of violence in the home, the relevance of past conduct of the parties in children's matters (notwithstanding the underlying 'no fault' philosophy of the principal Act) and how such family violence and conduct can affect the quality of parenting, the role-models offered for any children, the relationship between parents for purposes of contact and parenting responsibilities and the general well-being and development of children of all ages. In furtherance of this, new s.68J requires parties to inform the court if there is a family violence order that applies to a child or a member of the child's family and new s.68K requires the court to avoid making orders regarding children that are inconsistent with a family violence order or that expose a person to family violence.

Relationship between family violence orders and contact orders

Unfortunately the benefits of recent case law and statutory changes have been diluted by other provisions of the Reform Act which need to be examined. New Division II of Part VII on Children is headed 'Family Violence' but its stated pur-

pose in s.68N is to deal with the relationship between contact orders and family violence orders. Further, s.68Q(b) enunciates the laudable purpose of the Division that contact (formerly access) orders are not to expose people to family violence, but goes on in s.68Q(c) to say that a further purpose is:

- to respect the right of a child to have contact on a regular basis with both the child's parents where:
 - (i) contact is diminished by the making or variation of a family violence order; and
 - (ii) it is in the best interests of the child to have contact with both parents on a regular basis.

There is an inherent contradiction here. On the one hand, the court is not to make contact orders exposing people to family violence but on the other hand, the court must respect the right of a child to have contact with parents even if a family violence order exists. To further this 'right' of the child to have contact, s.68R provides that if a contact order is inconsistent with a family violence order, the contact order is to prevail and the family violence order is invalid to the extent of the inconsistency. (This complies with s.109 of the Constitution.)

This therefore enables a court to make a contact order that expressly overrides or diminishes the effect of a family violence order which was made for the protection usually of the care-giving parent and any children. The court would be informed of the existence of a family violence order, but would not necessarily be apprised of the need for or circumstances of obtaining such an order as courts of summary jurisdiction are not courts of record and family violence orders are primarily made on oral evidence.

In practice, therefore, if a mother with the day-to-day care of a child has a Victorian intervention order (or equivalent in other States) restraining her former husband or de facto husband from attending at or near her home (because of threats or assault or property damage in the past), the former partner may nevertheless obtain a contact order permitting him to attend the mother's premises for contact purposes. This naively suggests that the abusive husband can 'behave' himself at pick-up and drop-off times and the mother's order for protection is suspended during those periods even though such times are exactly the occasions when conflict and disagreement and tension arise. Handing over or returning a child for contact purposes is often conflictual, emotional, volatile and stressful for both parents and for children.

Because a contact order now prevails over an inconsistent family violence order, the effectiveness and reliability of the protective order is diminished for the woman and children and the unacceptability and criminality of the man's past behaviour is ignored. This suggests that a parent's right to see his or her child is akin to a proprietary interest which can be enforced whether or not the child has been a direct or indirect victim of family violence.

This 'right of contact' mirrors the provision in Article 9(3) of the United Nations Convention on the Rights of the Child which prescribes that:

State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

This philosophy, together with s.68Q discussed above, and recent allocation of federal money to establish 'contact centres' (formerly known as 'access centres') suggests a

reversion to the pre-1994 position where a court will again be loathe to suspend or discharge contact or even order no contact at all where there has been family violence in the child's home and family environment. Contact via a change-over service may become a soft option. The right of contact may reign supreme and override the right of the child and that of the child's care-giver to be safe and protected.

In this context it must, however, be acknowledged that s.68T does at last incorporate proposals that in the course of making or varying a family violence order, a State court may make, revive, vary, discharge or suspend a contact order.⁶ In practice, though, magistrates are unlikely to tamper with contact orders most probably made by the Family Court, a superior court, and are more likely to adjust or tailor the family violence order to co-exist with any existing contact order in order to avoid inconsistency. Again, the right of contact may receive greater priority than the right to protection and safety.

Conclusion

The amendments to the *Family Law Act* discussed here will have a serious impact on existing family law practice. The main changes relevant to this discussion are:

- Methods of alternative dispute resolution are now 'primary' methods to be utilised first, almost in a mandatory sense, before initiating traditional court processes. No safeguards are provided.
- Private ordering of family matters is encouraged through the use of counselling and mediation and the formulation of parenting plans and agreements.
- Family violence and child abuse now encompass physical, sexual and psychological harm to children and to members of a child's family involving the child as a primary or secondary victim.
- Contact orders are to prevail over family violence orders to the extent of any inconsistency.
- The right of contact between a child and parent is a priority over and above the right of a child or other member of the child's family to protection against family violence.
- Power imbalances between men and women and between parents and children continue unaddressed and unchallenged.

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3. Pearson & Thoennes, above, p.507.
4. Richardson, C.J., 'Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results', Dept. of Justice, Ontario, Canada, 1988.
5. This was trialed by Victoria Legal Aid in 1992-1993 for 12 months. Clients were refused legal aid (except in cases of family violence) unless they had first pursued mediation.
6. This idea was first advanced in 1992 by Victoria's then Labor Attorney-General to the Standing Committee of Attorneys-General. It was then adopted by the SCAG in July 1994, pre-empting legislative changes.

Crime *by default*

Richard Hil

Legislating for parental restitution in Queensland.

In the wake of the recent State and federal election campaigns, the forces of political conservatism appear to dominate almost every aspect of social policy discourse. The 'mandate' given to the Coalition by the electorate has been rapidly translated by governments into a formidable array of radical-conservative measures. The issues that were previously closeted in a seemingly 'progressive' liberal state have now risen to public prominence. The 'crackdown' on the alleged 'mismanagement' of funds by Aboriginal organisations, the cuts to ATSIC, higher education and employment training programs, the increased policing of social security fraud and the 'toughening up' of law-and-order are all symptomatic of a rapidly changing ideological climate.

Crime and moral order

In Queensland one of the most contentious areas of reform is taking place in relation to juvenile justice.¹ The Coalition, already bruised by its flirtation with the Police Union in the Memorandum of Understanding, is eagerly attempting to portray itself as the government of law-and-order. Coincidentally, as if on cue, there has emerged a number of moral panics over the supposed 'rising tide' of juvenile crime. For example, following a spate of robberies by teenagers in the outer suburbs of Townsville, as well as the bashing of a respected and widely known veteran of the second world war, the headline of a local newspaper called for 'Tougher Penalties for Juveniles' (*Townsville Bulletin*, 24 April 1996). In addition to reporting calls for longer sentences, and the public naming of offenders and their parents, the paper quoted the Attorney-General, Denver Beanland, as saying that '... the whole thrust of the *Juvenile Justice Act* will be to ensure that young offenders accept responsibility for their actions' and that 'the business of them shrugging their shoulders ... is going to cease'.

Among measures being proposed are longer sentences, family conferencing and increased parental restitution. In relation to the latter, it has been suggested that parents should be held directly accountable to victims for any damage or injury caused by their children. In cases of property damage, for example, parents may be required by the court to pay up to \$5000 in restitution.²

The repercussions of such measures for families, and especially for mothers who often end up holding households together, may, as suggested below, prove calamitous. The measures also legitimate the popular misconception that the origins of juvenile crime lie in particular family structures and relational dynamics. Single mothers or 'fatherless families' are represented in public discourse as the main harbingers of anti-social behaviours among their children.³ The supposed failure of parents (and especially of sole parents) to manage the behaviours of their children is seen by politicians and others as symptomatic of the demise of stable and 'traditional family life'.⁴ It is a failure of 'manners and morals' in which the causes of crime are seen

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to be connected to the erosion of 'traditional values' and individual responsibility.⁵ The task facing the State, therefore, is to engage institutional processes so as to ensure a return to a moral order based on the 'proper' roles and responsibilities of parents and their children.

Making them pay in Queensland

While the notion of parental restitution is hardly new, it has recently re-surfaced as a form of judicial penalty in a number of jurisdictions around Australia, including Queensland. Restitution exists both as an option for courts in respect of juvenile offenders and in the context of family conferencing. (Interestingly, it does not exist in relation to failure by the State in respect of those offenders who are under its care and protection. 'Exemptions' often apply in such cases.) Generally speaking, restitution is premised on the view that parents are culpable in the instigation, if not the commission, of their children's offending. It follows, therefore, that if juvenile offending occurs then parents should be held liable to pay restitution to the victim(s). In short, restitution may be defined as 'an order for payment for damage or loss resulting from the offence. A child or the child's parent or guardian may be ordered to repay the amount'.⁶

In Queensland, as elsewhere, legislative provision for parental restitution has existed for some time. Thus, s.2 of the *Children Services Act 1965* allowed for courts to:

... order such a child or a parent or guardian ... of a such a child [offender] or any two or more of such persons to pay compensation or make restitution in respect of the damage or loss occasioned by the offence to a charge of which such a child has pleaded guilty or of which he has been found guilty.

The *Children Services Act* thus provides for penalties to be imposed on parents or guardians where a failure to exercise 'proper' care, supervision and guardianship can be demonstrated by the court. More recently, the *Juvenile Justice Act 1992* includes similar provisions, although it is concerned explicitly with the 'wilful neglect' of parents in relation to the occurrence of juvenile crime. Like the previous legislation, the *Juvenile Justice Act* articulates a clear causal link between the alleged negligent actions of parents and guardians and the offending behaviour of their children:

... if it appears to the court that finds a child guilty of an offence relating to property or against the person of another, or evidence submitted or submissions made in the case against the child: (a) that wilful failure on the part of a parent of the child to exercise proper care of, or supervision over, the child was likely to have substantially contributed to the commission of the offence ... compensation [by the parent or guardian] should be paid to [the victim]. [s.197]

In enabling the court to widen its understanding of culpability in cases of juvenile crime to include the offender *and* her/his parents and guardians, the Act infers that such action occurs mainly because of the dereliction of parental responsibilities. However, there is no clear definition of what might constitute 'wilful neglect' on the part of parents or guardians in such instances, or how a 'substantial contribution' to the criminal act might be assessed. By allowing for such a broad framework of interpretation s.197 opens up the possibility for considerable variation in discretionary decision making by the court. Nonetheless, the Act proceeds to outline the conditions under which parental restitution should occur, namely that compensation (by the parent or guardian) should be paid to any person for:

1. loss caused to the person's property whether the loss was an element of the offence charged or happened in the course of the commission of the offence; or
2. injury suffered by the person, whether as the victim of the offence or otherwise, because of the commission of the offence ...

By enabling the court to grant orders of parental restitution in respect of harm caused by their children to victims, the Act links the criminal act *explicitly* to the ability and willingness of parents to exercise effective care and supervision. Section 197 further involves parents and guardians in the court process by allowing them to contest the imposition of restitution orders:

... of its own initiative or on application by the prosecution, [the court] may decide to call on the parent to show cause, as directed by the court, why the parent should not pay compensation.

This provision is a matter for the court's discretion. However, mindful of the fact that some parents and guardians may find it extremely difficult to meet restitution payments s.198 of the Act provides for consideration of financial circumstances:

In determining the amount to be paid by a parent by way of compensation, the court must have regard to the parent's capacity to pay the amount, which must include an assessment of the effect any order would have on the parent's capacity to provide for dependents.

In the event that parents are required by the court to pay compensation, the Act also outlines the conditions under which payment should be made. Section 198 states that the order must refer to:

- (a) the amount must be paid by a time specified in the order by instalments specified in the order; and
- (b) the amount must be paid in the first instance to the proper officer of the court.

The Act provides no clear indication of how the 'ability' to pay restitution is to be assessed and is equally unclear how penalties for default of payment are to be imposed. This allows for the possibility that parents and guardians may have to face criminal proceedings in the event of a failure to meet restitution requirements in the agreed time frame. Given that fine defaulters make up a significant proportion of the Australian prison population, such an outcome raises serious concerns over some of the unintended consequences of parental restitution.

Criminalising 'wilful default'

The proposal of the Queensland Government to place more emphasis on parental restitution as a means of crime management reflects a growing trend throughout Australia to penalise not only juvenile offenders but families as a whole. Recent legislation in New South Wales (*Children (Parental Responsibility) Act 1994*), Western Australia (*Young Offenders Act 1994*) and Tasmania (*Statute Law Revision (Penalties) Act 1994*, in association with the *Child Welfare Act 1960*) all include provisions allowing penalties to be imposed on parents where 'wilful' neglect or failure can be demonstrated to have contributed to the young person's offending. In the case of s.9 of the NSW legislation 'wilful default' on the part of parents is deemed to be an offence. Thus:

A person who by wilful default or by neglecting to exercise proper care and guardianship of the child, has contributed to the commission of the offence of which the child has been found guilty, is guilty of an offence.



This provision formally extends the boundaries of responsibility from the child to include his or her parents or guardians. Moreover, like the existing Queensland legislation, the *Children (Parental Responsibility) Act* (NSW) allows for the possibility of parents having to face further criminal proceedings should they breach the conditions of the court order. In short, the NSW legislation marks a significant shift in juvenile crime control insofar as the court may now *criminalise* parents for apparent dereliction of 'proper' care and supervision. Parents are thereby brought directly into formal criminal proceedings to face charges in their own right.

The emerging critique

While current reforms in Queensland are not intended explicitly to criminalise parents in the event of their children's offending, the proposed ceiling figure of \$5000 restitution raises a number of serious concerns. At a general level, critics point to the tendency of punitive and individualistic approaches, such as parental restitution, to abstract criminal action, and alleged parental culpability, from broader social, economic and political considerations.⁷ The result is an abstract articulation of justice that reduces criminal action to essentially moral and behavioural concerns. This form of reductionism ignores the complexities of criminal action and takes little or no account of the ways in which particular social groups are disproportionately policed and criminalised in the liberal state.⁸

The extension of punitive approaches in juvenile justice to include the parents and guardians of offenders rests on a number of crucial assumptions about crime causation. In particular, the notion of 'wilful failure' supports the idea that juvenile offending is the result of what are essentially the 'dysfunctional' features of family life. The inference is that 'low parental supervision' contributes directly to anti-social behaviours among children. According to the legislation, therefore, parents should be held liable for costs incurred through the actions of their children.

This assumption has attracted the most vehement criticism over recent months, particularly in relation to the NSW *Childrens (Parental Responsibility) Act*. The strength of opposition to this Act has emerged partly as a result of the explicit focus given to 'parental responsibility'. Foremost among the critics has been the New South Wales Council of Social Service (NCOSS). In a recent position paper the Council sets out a number of welfare and human rights concerns relating to the Act. NCOSS also asserts that the legislation runs counter to community-based initiatives out-

lined in a number of Green and White papers that preceded the ascent of the Act. Moreover, it is noted that:

... the likely impact [success?] of the legislation is severely curtailed by the exclusion from its ambit of wards of the state, a group which forms a large component of the number of homeless young people in the state.⁹

The Council is further mindful of the hardship that may be imposed on already hard-pressed families in the event of parents having to meet the demands of restitution orders. Thus:

... the impact on families already under stress is imaginable in practical (financial) terms but also likely to be considerable in terms of already fragile intra-family relationships.¹⁰

A similar view has been expressed by the Catholic Prison Ministry and the Church Network for Youth Justice. They argue that:

Most families where children are faced with court suffer from issues such as poverty, fractured relationships, domestic violence, unemployment, drug and alcohol abuse. Measures which shame and further alienate families who are the most in need of support and encouragement are to be deplored.¹¹

The Ministry also describes proposals by the President of the NSW Children's Court, Judge Fred Maguire, to fine those parents who fail to accompany their children to court, as 'anti-family, anti-community and pro-punishment. Solutions that are not grounded in a total social support approach are totally inadequate'.¹²

Criticism has also been expressed of the view that parents are indeed in a position to manage the behaviours of their children. Research shows that many of the breakdowns in relationships between children and their parents occur precisely because of disputes over household rules.¹³ This suggests that the simple association between 'low parental supervision' and juvenile crime implicit in the term 'wilful neglect' may in fact gloss over the intricate and often difficult processes of communication between family members. It also fails to recognise that parents may have made repeated efforts in the past to address their children's behaviours but without the necessary systems of social support have curbed their efforts. Moreover, it also assumes that it is indeed possible for parents to continually regulate their children's behaviours. As the Australian Association of Social Workers (AASW) points out:

The assumption that a parent can guarantee a child's behaviour at all times is simplistic, and is likely to affect disproportionate numbers of those on low incomes who are least able to pay fines. Convicting parents for not exercising proper care transforms failure as a parent into a crime, and punishes parents without offering help. The Act ignores the community's responsibility to create conditions conducive to effective parenting and focuses on the symptoms rather than the causes of the crime.¹⁴

The fact that parental restitution may in fact make the position of a family worse, and possibly reinforce the material conditions that contributed to offending in the first place, is an unintended consequence of such a measure. Indeed, the failure of the existing legislation to recognise the impact of poverty and disadvantage on growing numbers of families, and the results of this in terms of the ability of parents to provide effective care and supervision of their children, demonstrates an insensitivity to the realities of contemporary

family life. Furthermore, the penalisation of parents does little or nothing to improve the ways in which families themselves might address the problem of offending among their children. Indeed, the *de facto* criminalisation of parents constitutes yet another punitive attempt to formally control and regulate the actions of parents and young people. In addition, as Ian O'Connor points out in relation to Queensland's *Juvenile Justice Act*:¹⁵

The imposition of external solutions in fact destroys traditional modes of social control, and in consequence gives rise to many of the problems that result in children coming into contact with the child welfare and juvenile justice systems.

The ability of juvenile justice legislation to provide for positive and constructive responses to families in situations of difficulty requires an understanding of the social patterns of juvenile crime.¹⁶ This involves an appreciation of the ways in which structural and political forces shape processes of criminalisation as well as an awareness of the institutional means by which particular young people and their families are subject to differential patterns of policing.¹⁷

The fact that parental restitution is grounded in the individualistic principles of the justice model (with its emphasis on responsibility, accountability, proportionality, due process and so forth) means that such considerations are unlikely to receive attention in the sentencing process. To the contrary, the penalisation of parents for the actions of their children constitutes a punitive and retributive response on the part of the state to juvenile offending. It also supports the time-honoured view that the origins of juvenile crime are to be found in the homes of 'dysfunctional' or 'problem' families. Thus:

The principles of responsibility and restitution fit in neatly with recent populist assumptions about the general 'breakdown' in parental authority and the need for the restoration of greater discipline and control in the home.¹⁸

While such an essentialist understanding of juvenile crime may placate 'law-and-order' lobbyists, it does nothing to address the complex structural processes associated with offending. As noted by the NCOSS and the AASW, punitive measures such as parental restitution are likely to make the position of many families even worse and will further prevent parents and their children from engaging in empowering and self-directed approaches to crime management. By transforming crime into a moral issue (the failure to act 'responsibly') punitive approaches to justice merely disregard the role played by the state in generating the conditions that contributed to offending in the first place. Attention is thus drawn away from all the essential concerns of *social* justice and replaced by a narrow pre-occupation with individual moral failure. Put more bluntly, parental restitution (along with other punitive and retributive approaches) lays the *blame* for offending squarely on the shoulders of offenders and their children.

Conclusion

The Queensland Government's proposal to extend the legislative provision of parental restitution represents a shift to the more intense policing of young people and their parents. Specifically, the measures provide for increased penalties for parents where the court can demonstrate that 'wilful neglect' on the part of parents has contributed substantially to the offending of their children. In essence, the measures propose a highly individualistic and narrow view of crime causation: namely, that offending occurs primarily because of the failure of both the young person and his or her parents to act

'responsibly'. Crime is thus represented as a moral aberration, or a 'failure' on the part of parents to perform their 'proper' roles. Consequently, it only remains for the court to establish the degree of culpability on the part of parents and to punish them accordingly.

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Words are the Poison

words and music by

Irine Vela & Daniel Keene

a work from *The Little City*

Based on a story by Irine Vela & Daniel Keene
presented by Canto Coro & the
Melbourne Workers Theatre

December 1-15 Brunswick Town Hall

In the heart of the city of the future, a small community is united in its struggle against an increasingly fascist government. Drawing upon the experiences of past struggles (Chile, Greece, Spain, Australia), the community decides to govern itself, sealing itself off from the rest of the city. The government reacts by cutting off services and supplies.

The Little City is about what may come to pass. The Little City is about struggle, despair and hope that people can unite in a common purpose. The music in the play has been inspired by the works of Pablo Neruda, Mikis Theodorakis, Odysseus Elytis, Federico Garcia Lorca and Luis Advíns.

dedicated to my parents Anna & Hajrullah Vela
and to Melbourne's CANTO CORO

words and music by Irine Vela and Daniel Keene

Musical score page 1 featuring vocal parts for alto, tenor, piano, and piano, with lyrics: "words are the words on the lips / words are the poison and offer no". The score is in G major with a 4/4 time signature.

Musical score page 1 continuation featuring vocal parts for alto, tenor, piano, and piano, with lyrics: "of a trem - bi - ing speak - er the trea .. son that reason words are the treason that". The score is in G major with a 4/4 time signature.

Musical score page 2 featuring vocal parts for soprano, alto, tenor, piano, and piano, with lyrics: "wo - men and children / men commit ag - ainst men". The score is in G major with a 4/4 time signature.

Musical score page 2 continuation featuring vocal parts for soprano, alto, tenor, piano, and piano, with lyrics: "wo - rds that are wn - ten in stone or on / pro - mi - ses you ken with / words are the promises written in stone or on / promises broken words that will lat - er". The score is in G major with a 4/4 time signature.

Musical score page 3 featuring vocal parts for soprano, alto, tenor, piano, and piano, with lyrics: "words on the lips / of a trem - bi - ing". The score is in G major with a 4/4 time signature.

Musical score page 3 continuation featuring vocal parts for soprano, alto, tenor, piano, and piano, with lyrics: "words that grow / speaker words that grow / words that grow". The score is in G major with a 4/4 time signature.

Musical score page 4 featuring vocal parts for soprano, alto, tenor, piano, and piano, with lyrics: "the more they are / words that con". The score is in G major with a 4/4 time signature.

WORDS ARE THE POISON

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Words are the Poison is a song of betrayal by government and the system. Words can be meaningless unless backed up by action. Ultimately it is a song of betrayal by our institutions, by our governments, by the system and by indifference. Is this what we have to look forward to . . . or is there hope for the future?

Irine Vela is a Melbourne-based composer, musician and musical director.

Daniel Keene is a Melbourne-based lyricist.

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YOUTH AFFAIRS

Children in the Family Court The new law

In 1989 English child law underwent a dramatic overhaul, with the introduction of the *Children Act 1989* (UK). That legislation had two major goals: the harmonisation of public (for example, child protection) and private (for example, parenting disputes and adoption) child law and the reduction of state involvement in child welfare matters. While Australia's Commonwealth Government is constitutionally constrained from intruding into much of the public child law arena, the private law has recently been overhauled by amendments to Part VII of the *Family Law Act 1975* (Cth). This 'new law' is largely borrowed from the UK's *Children Act*, although there are some significant points of departure.

Much of the debate that led to the Act's amendment was outlined in a report by the Australian Family Law Council.¹ The main complaint about the existing guardianship/custody/access regime was that many non-custodial parents felt they were effectively excluded from the parenting enterprise. The Report, having concluded that 'cooperative parenting after separation is a desirable goal' (p.37), went on to say that:

- (l) Cooperative parenting will be enhanced by the use of terminology that discourages ideas of ownership of children;
- (m) In the end result, the division of post-separation parental roles into custody vs access reinforces the win/lose attitude and discourages ongoing parental responsibility. [p.37]

These concerns have been addressed predominantly through the introduction of:

- the notion of parental responsibility,² which is shared jointly by parents and which survives the parents' separation or divorce,
- residence and contact orders which replace those for custody and access (the concept of guardianship having been eliminated),
- specific issues orders, which can be sought to resolve parenting disputes not concerning residence or contact, and

parenting plans, which the parties can register with the court so that their agreement is enforceable.

The new law emphasises that both parents have a continuing responsibility

towards their child. If the parents cannot agree where the child shall live, then a residence order will be made. All a residence order does is to determine this one issue, with both parents continuing to have joint responsibility (and thus decision-making power) for the child. Likewise, a contact order can be made where this issue cannot be amicably resolved.

Rights of children to co-operative parenting

While these changes may be welcomed by some parents, do they really address the needs of children involved in Family Court proceedings? That the legislature had child welfare clearly in its sights when framing these provisions is made patent by the new s.60B:

the object of . . . Part [VII] is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The legislature has identified the principles underlying this object to be that:

- children have a right to know, and be cared for, by both parents,
- children have a right to regular contact with both parents and with other significant people,
- parents share their duties and responsibilities concerning the care, welfare and development of their children, and
- parents should agree on the future parenting of their children (s.60B(2) FLA).

The ideal of co-operative parenting outlined in the last two principles must surely be a crucial factor in the attainment of Part VII's broader stated object, namely the improvement of a child's developmental environment. In fact, where co-operative parenting is genuinely achieved, the rights expressed in the first two principles might be presumed to be reasonably safe.³ Just how far, though, do the other new provisions go in the promotion of this goal of post-separation co-operative parenting?

One of the major thrusts of the amendments has been to ensure, legally at least, continuing joint parental responsibility after separation. This directly addresses the claim that under the

old regime non-custodial parents had little legal basis for participating in the day-to-day care of their child. Giving both parents this responsibility will not, of course, guarantee co-operative parenting. It is, however, an important statement of principle. Children are entitled to expect that *their* right to joint parental support is recognised equally in this area as it is, say, in the child maintenance arena. What will be necessary to give full effect to this new concept is some judicial strength. It would be quite easy to reproduce the old system by giving to the residential parent (via a specific issues order) the day-to-day responsibility for the child. That is, bundles of rights and responsibilities akin to guardianship and custody could be divided between the parents in an effort to reduce future litigation. While this is technically possible, and possibly appropriate in some cases, by and large it would seem to be a retrograde approach, as the risk of the 'floodgates' opening would seem to be small. In the first place, even under the old system, a custody order was not a bar to future litigation over some specific point concerning parenting. Secondly, where the issue involved is relatively trivial the costs of litigation would normally act as a sufficient deterrent to most parents. Finally, as s.60B highlights, children have a *right* to be cared for by *both* parents, and only where the child's best interests dictate it, should the parents' opportunity to fulfill that obligation be fettered.

This explicit emphasis in the amendments on children's rights points us to the wider significance of the co-operative parenting goal. The wording of s.60B intentionally mimics various articles of the UN Convention on the Rights of the Child. The promotion of co-operative parenting thus not only addresses public demands for change, it is a strategy for meeting Australia's obligations under the Convention.

Assuming then that joint parental responsibility together with bare residence/contact orders becomes the judicial norm, how is this supposed to foster co-operative parenting? Will this regime reduce hostility and how will it cope with parental disagreements? These changes may foster co-operation simply by encouraging residential par-

ents to accept the role of the other parent and by empowering the non-residential parent to participate more fully in parenting. As was suggested above, it is unlikely that non-residential parents will use this as an opportunity to undermine the residential parent over trivial matters. Where, however, the issue at stake is more significant (say, for example, religion or schooling) then the mere introduction of joint parental responsibility will have little effect on the dispute resolution process.⁴ Such matters historically came under the umbrella of guardianship, and were thus usually joint decisions anyway. The only change under the new regime will be that any order needed to resolve the dispute will be called a specific issues order.

No-order rule

In amending the *Family Law Act*, the legislators specifically rejected a central tenet of the UK regime: the no-order rule. The *Children Act* prohibits a court from making an order under that Act unless it can be shown that the child will be better off if that order is made (s.1(5)). It is commonly said that this section was introduced to stop the widespread practice of making unnecessary consent parenting orders as part of the divorce package. The Family Law Council was not convinced of the value of this non-interventionist provision, seeing only (although not explaining) its 'inflexibility'.⁵ However, anecdotal evidence in the UK suggests that it is the no-order rule, rather than the change to residence/contact and joint parental responsibility, which is having the most significant impact on parenting disputes in that jurisdiction. Many English lawyers and judges apparently take very seriously the obligation to impress on parents their duty to try to resolve parenting disputes themselves. Furthermore, routine consent orders will not be made — if the parents have reached agreement then there is seen to be no need for a court order to that effect.

Parenting plans

It is hardly surprising, however, that a different approach was taken in Australia, given the traditionally interventionist bent of the *Family Law Act*, and thus the Family Court. Take, for example, parenting plans, which have no equivalent in the UK regime. Not only has the formalisation of parenting agreements been encouraged in Australia, an avenue has been provided for them to operate as (and thus be enforced as) court orders. How could the Family Court

consent (as it must) to the registration of a parenting plan, if faced with the no-order rule? While UK parents who have reached agreement are assured that a court order is uncalled for, in Australia judicial supervision is courted. One of the advantages of parenting plans is, of course, the visibility of the agreement's terms. A criticism of the English provisions has been that they promote any agreement, regardless of its content.⁶ Parenting plans, on the other hand, requiring as they do the court's consent before registration, are susceptible to judicial scrutiny, although the extent to which the court will avail itself of this opportunity remains to be seen.

So, will parenting plans promote co-operative parenting? While the process of registration may to some extent allay the fears of English critics, the whole notion of registered parenting plans seems to ignore the fundamentally mutable character of parenting. Parenting is not a static occupation. The complexity of the task stems, in part, from the continually changing conditions under which it is performed. While parenting plans may be a good starting point, what is to be gained by having them set in stone? While these plans can be revoked (and a new plan registered) they cannot be varied by the parties (s.63D FLA).

Registrable written agreements are, of course, something that the Family Court of Australia is very comfortable with, both in respect of children and property matters. Before the introduction of parenting plans there existed the (registerable) child agreement. Those agreements typically looked something like consent orders, detailing guardianship, custody and access rights. From a lawyer's perspective they were seen to provide some measure of protection for the (parent) client. Some effort will thus be required to make parenting plans live up to their name (that is, to be plans for the future parenting of children) rather than allowing them to simply reproduce the role of the child agreement. Lawyers are unlikely to be the ones making that effort, as it is not within the sphere of their expertise and yet it will be lawyers that many people turn to when finalising their separation. And even if useful parenting plans are devised (perhaps with the assistance of counsellors), what is to be gained by their registration? Will that increase or decrease future co-operative parenting? Moreover, a really good parenting plan will surely have many provisions that are simply not enforceable.

Consider for a moment the approach being adopted by English local authorities for children in foster homes. Under their new 'Looking After Children' scheme, authorities are trialing the use of detailed forms to monitor, and hopefully improve, the care of these children.⁷ These lengthy forms vary depending on the age of the child concerned and deal in detail with the issues most relevant to that particular age group. Most importantly, they are seen as a structured conversation between the carer and the authority, with every question designed to generate further discussion. Caring for a foster child no doubt highlights the tensions inherent in parenting, as there are usually two sets of carers and a local authority involved. However, we should also be thinking innovatively about the multitude of children struggling with what is now, after all, a common event — parental separation. Will (or should) parenting plans develop beyond the limits of their predecessor, the child agreement? Who should be assisting parents in drafting them and how should they be utilised as the child develops? What is to be gained by encouraging parents to involve the court in post-separation parenting? If resort to the court were to be reduced, as in the UK, how might we most effectively redirect resources to improve co-operative parenting? These are difficult questions, but they will need to be addressed if the recent changes are to live up to expectations.

Lisa Young

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References

1. *Patterns of Parenting After Separation*, AGPS, Canberra, 1992.
2. This term has been defined to mean 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': s.61B FLA.
3. Although there might conceivably be a situation where a grandparent, for example, sought contact in the face of joint parental opposition. Even with s.60B(2) it is likely that such an application would be unsuccessful.
4. There are, of course, other aspects of the amendments which might impact on this process, such as the role of what is now called 'primary dispute resolution': Part III, FLA.
5. Family Law Council, *Letter of Advice to the Attorney General on the Operation of the UK Children Act 1989*, 1994, pp.4-5.
6. See for example Bainham, Andrew, 'The Privatisation of the Public Interest in Children', (1990) 53 *MLR* 206, p.210.
7. Clare, Mike, 'The "Looking After Children" Project in WA and in the UK', *Australian Association of Social Workers Ltd Western Australian Branch Conference*, Perth, 24-26 September, 1996.

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

PUT YOUR PLACARDS AWAY (FOR NOW)

Girlie didn't have the sound recording device set up in time to record the thunderous sigh of relief emitted from numerous quarters when the Superclinics case settled out of court (see the DownUnderAllOver column in the October issue of *Alternative Law Journal*). The highly publicised tort action was looking to be a landmark in this country's human rights record, with parties lining up at the door of the High Court to get their *amicus curiae* (friends of the court) stamps. The Australian Catholic Health Care Association and the Australian Catholic Bishops were weighing in against the Abortion Providers Federation of Australasia and the Women's Electoral Lobby to argue over whether key State Supreme Court rulings which allow widespread availability of abortions should be overruled.

Before the news of the settlement broke, Girlie was busily packing the loud hailer for the trip to Canberra and thinking up snappy right-on slogans for her placards, pondering the irony of the situation — a case about 'wrongful birth' rather than the 'wrongful death of an unborn' was stirring the long-stilled pot of legally tolerated abortion. And the often uncomfortable meeting between the 'objectivity' of legal reasoning and the personal belief systems of the lawmakers was quite clearly on show. As Kirby J was compelled to excuse himself from the case (he was on the bench when the matter was heard by the NSW Court of Appeal), the Chief Justice had the deciding vote on whether the case should be opened up to argument from parties other than those to the proceedings. When he announced that he knew some of the bishops seeking leave to be heard (and with a name like Brennan and a son in the priesthood), we had more than a glimpse of underbelly poking out from beneath the CJ's cloak of impartiality.

But, hey, it's summer, and all cloaks and bets are off on Superclinics. Though it could be worth keeping an eye on the progress of MCCOC (Model Criminal Code Officers Committee of SCAG [Standing Committee of Attorney's General]). Their current discussion pa-

per on nationally uniform criminal laws for non-fatal offences against the person (Chapter 5 in their series, released in August 1996) contains a proposal for abortion (some might argue about its status as a 'non-fatal offence') that is modelled on the provisions currently in force in the Code States. If this were taken up, it would mean a somewhat less favourable situation (for those of pro-choice persuasion, that is) than the current state of play in NSW and Victoria under the common law. It might not be a placard and loud hailer job just yet — get those submissions in to MCCOC — but keep them somewhere handy.

SOMETHING WORTH SHOUTING ABOUT

Ms Jan Wade, Attorney-General for Victoria got up in Parliament recently and gave her second reading speech for the *Victims of Crime Assistance Bill 1996* — a bill that she asserted is 'far more responsive to the needs of victims'.

One major feature of the bill is a proposal to set up a Victims Assistance Agency to refer victims of crime to appropriate services and to co-ordinate resourcing of those services. OK, sounds pretty responsive to the needs of victims.

However, another feature of the Bill is the proposal to abolish the pain and suffering component of crimes compensation claims and to allow the Crimes Compensation Tribunal to direct how other awarded 'assistance' can be spent. Sounds very responsive to the needs of the Victorian Liberal Government's aggressively economically rationalist agenda. Victims will be allowed to recover pain and suffering type compensation direct from offenders, but only where a conviction has been recorded and the judge or magistrates decides it is appropriate. Think of it — you're lucky enough to be one of a tiny proportion of victims whose offender has been caught, prosecuted and convicted and you're given the go-ahead to go back to a civil court to fight over money. Thanks, Jan. Even if you take the alternative of assigning the State your right to sue the

offender, you'll get back only what's left after the legal costs are covered and the Tribunal has been paid back whatever it's already 'assisted' you with. Better hope you're raped by a millionaire.



Jan wants to replace pain and suffering payments with a voucher system for five counselling sessions, with more available if you want to make a further application — and feel up to exposing yourself to the stress-free environment of the Tribunal which, under the new legislation, will have counsel assisting it, presumably to argue against what it considers to be unreasonable payments of assistance. Sounds very responsive to the needs of lawyers struggling to make a living since legal aid cuts hit.

A coalition of individuals and organisations concerned about how these and other proposals contained in the Bill will affect victims of domestic violence, rape and incest has formed to oppose its passage through Parliament. For details call Maggie Troup or Donna Stuart on (03) 9642 0877.

BETTINA'S WORLD

For Sit Down Girlie readers who are denied access to the widely syndicated works of Ms Bettina Arndt, one-time 'sexologist' and vocal critic of feminism and its inhuman effects on the lives of ordinary men, this issue of the *Alternative Law Journal* offers a free introduction to 'Bettina's World' — a world that, on the surface bears a striking resemblance to the shared reality of many thinking, caring average Australians, but on closer examination (actually not that much closer, just a few paragraphs in), Bettina's World starts feeling a little (to use a technical term) 'weird'.

Take the recent three-part feature on the impact of family break-up that appeared on 12, 14 and 15 October in the *Age* in Melbourne and the *Sydney Morning Herald* — a classic example of how Bettina's World can insidiously lure unsuspecting readers into a confusing vortex of uncontextualised statistics, authorita-

tive quotes from 'important' individuals (around some of whom the vague whiff of misogyny clings suspiciously) and sometimes well-disguised emotive claptrap.

In Bettina's World of separation and divorce, 'the woman has all the power, the man almost none'. There is 'overwhelming evidence' that that power is 'exercised unreasonably' and that the Family Court has conspired to make legitimate 'tactics used to deny non-custodial parents contact with their children' and provide vindictive ex-wives with 'an armory of weapons' to ruin men's lives. Men are 'stunned' by revelations that their wives no longer love them and, like lambs to the slaughter, stumble blindly into the traps set for them at the Family Court. The court 'rarely show(s) sympathy' for these helpless creatures who are also 'forced to pay' child support 'under a formula seen by many as unduly harsh and unreasonable'. In Bettina's World sexual abuse of children exists only as 'maliciously used false accusations'; domestic violence is 'a powerful new weapon' in the battle to keep men out of their children's lives; and restraining orders 'are being dished out in Magistrates' Courts like lollies at a kiddies' Christmas party' to be utilised as a 'powerful component in the divorce arsenal'.

Some lucky couples in Bettina's World have escaped the evil clutches of the Family Court and have managed to behave in a respectful way towards each other following a marriage break-down. Bettina gets pretty excited by this and suggests that one woman who has been particularly nice to and supportive of her former husband (and his new wife) should be given a prize for 'civilised behaviour by an ex-wife'. Well yes, I suppose in Bettina's World it is unusual to come across a nurturing woman of strength and integrity, and in a realm where her sisters are responsible for wreaking havoc on the male half of the population, her rare status should be acknowledged.

Readers who have never been to Bettina's World but who may have had some contact with the Family Court or been personally involved in a family break-up may be feeling a little disoriented. Try adjusting the dial to enhance the shades of grey that have somehow been erased from the black and white picture Bettina's World is broadcast in.

Girlie has tried changing the channel or completely tuning out when Bettina's

World comes on, but sometimes, like the trashiest of soaps, it's dealing with issues close to one's heart (in this case the operation of family law in Australia) and it's hard to ignore. And like trashy soaps, Bettina's World reaches a large audience and has a devoted following. One that may find it more difficult to hear the words of people like the Chief Judge of the Family Court, Justice Nicholson. At a launch of a 10-year study into the impact of separation on men (reported in the *Herald Sun*, 7 November 1996) he denied institutional bias against men in the Family Court and spoke instead about 'males not coming to terms with divorce'. 'You've got, 10 years down the track, people still feeling considerable bitterness and largely blaming their former wives for the break-up of the marriage.'

It's a complicated business — and it's not improved by creating a major platform for the viewpoints of only a particular selection of participants. Nor does it help to draw the battle lines and define the warring sides on the basis of gender. Unfortunately Bettina's World can spill out into other realities and have just this effect. Girlie heard of one such occurrence at an editorial meeting at the *Sydney Morning Herald* when the prominence to be given to Bettina's family break-up features was being discussed. Should it get front page coverage or not? The meeting was divided: the women said 'no', the men 'yes'. Guess where the feature ended up. Just who is living in Bettina's World??

FAMILY LAW FIRST

Girlie is pleased to report that a case in the latest volume of the Family Law Reports (*In the marriage of W and L Doherty* 20 Fam LR 137) demonstrates that the Family Court is indeed taking domestic violence seriously. (Headline from Bettina's World: Man Gets Really Raw Deal on Property Settlement At The Hands Of Evil Family Court.) The Full Court upheld the trial judge's assessment of the equal contributions of the parties made in the course of their relationship, including the consideration that the violence and aggression of the husband towards his wife 'may well have increased [her] contributions as homemaker and parent as a result'. The trial judge referred to the husband's drinking habits and to the physical violence and aggression he exhibited towards his wife and children and found that although this behaviour related to a relatively short period of time towards the end of the marriage, it served to

increase the wife's contribution to maintaining the family unit, and diminish the husband's.

The court has acknowledged in a very real way that violence is not a valid way to resolve matrimonial conflict, it's a crime — and in future property settlement disputes, the ol' cliche may have some teeth (crime doesn't pay).

SOME WOMAN TO WOMAN ADVICE

The *National Law Journal* (26 August 1996) noted that a defendant received some unusual advice before her guilty plea in Ohio. Common Pleas Judge Shirley Strickland Saffold told Katie Nemeth that: 'Men are easy... You can go sit in the bus stop, put on a short skirt, cross your legs and pick up 25. Ten of them will give you their money... If you don't pick up the first ten, then all you got to do is open your legs a little bit and cross them at the bottom and then they'll stop.' Judge Saffold made the comments when fining the 19-year-old defendant \$200 for misusing a credit card. The Centre for Women Policy Studies and the National Organisation for Men have called the remarks sexist and insulting to men and women. Girlie is still trying to figure out what it all means!

Libby Wraight

Libby Wraight is a Feminist Lawyer

DownUnderAllOver

A regular column of developments around the country

Federal Developments

IR BILL GETS THROUGH THE SENATE

The centrepiece of the Coalition Government's industrial relations policy, the *Workplace Relations and Other Legislation Amendment Bill 1996*, has finally been passed by the Senate and sent back to the House of Representatives to be passed. The Bill was introduced into the Senate on 27 June 1996 and the third reading of the Bill was on 19 November 1996.

During the Senate consideration of the Bill, approximately 580 amendments were moved. Out of these, 175 amendments were agreed to in the Senate. Most of the amendments, 171 of them, were joint Government-Democrat amendments.

The Democrats said that their input into the amendments to the Bill 'take "scare" out and put "fair" in new laws'. According to *Democrat Update*, the amendments to the Bill will ensure that the new laws 'provide a fairer balance between the rights of workers and employers, and much greater protection for workers in disadvantaged bargaining positions'.

The debate on the Bill took up a near record amount of the chamber's time — 49 hours and 23 minutes! This was only just beaten by the 49 hours and 56 minutes of chamber time spent on the *Native Title Bill* in 1993.

EUTHANASIA BILL TO SENATE COMMITTEE

On 27 November 1996, the Senate agreed that the Senate Legal and Constitutional Legislation Committee inquire into and report on the provisions of the *Euthanasia Laws Bill 1996*, and in particular:

- the desirability of the enactment of the provisions;
- the constitutional implication for the Territories of the enactment of the provisions;

- the impact of the enactment of the provisions on the Northern Territory criminal code; and
- the impact on and attitudes of the Aboriginal community.

The closing date for submissions is 12 December 1996 and they should be sent to The Secretary, Senate Legal and Constitutional Legislation Committee, Parliament House, Canberra ACT 2600.

The Committee is required to report to the Senate on or before 24 February 1997. ● CH

ACT

RECORD COMPENSATION PAYMENT FOR SACKED VISION IMPAIRED WORKER

(*Melvin v Northside Community Services Incorporated*, HREOC No. H95/93, decision delivered 19/7/96)

The Human Rights and Equal Opportunity Commission's Disability Discrimination Tribunal has made a record award to a Canberra childcare worker for a dismissal which unfairly discriminated against her on the basis of her disability. Mrs Melvin was an infant childcare worker with over a decade of exemplary service in her job. Throughout that period she wore spectacles with thick lenses and to read fine print she would lift her glasses and bring the print close to her face. Without substantiation, some workers raised concerns that Mrs Melvin may have been unable to perform her work safely. The CEO of Northside Community Services, after making some but inadequate enquiries, summarily stood her down. A month later, and without further enquiry into whether Mrs Melvin's eyesight really did render her incapable of the safe performance of the inherent requirements of her job, and without any attempt to consider the possibility of accommodating her disability in the workplace, she was dismissed.

The Tribunal found that as a procedural matter the primary onus was on the employer to make all necessary enquiries to determine whether, with or

without accommodation, Mrs Melvin's disability did render her incapable of performing her job safely. It also found as a fact that Mrs Melvin's vision impairment did not render her incapable of the safe performance of her job. Mrs Melvin was awarded a sum of \$46,000 in compensation for past and future economic losses as well as \$10,000 for the considerable mental distress occasioned by her being treated unfairly and discriminated against. The total compensation is the highest amount yet awarded in a disability discrimination case.

Mrs Melvin has, however, found that compensation for the wrong is not a satisfactory substitute for her job. She has been unable to regain employment in childcare and believes that despite vindication from the Tribunal, employers attach stigmatising meaning to her case. She is 50 years of age and retraining has not yet assisted her to regain employment. She faces the poor employment prospects of the older age person. Northside Community Services have complained that this payout threatens their solvency.

Community legal educators can note that this is a case to prove that prevention is better than any cure that can be offered. Mrs Melvin was represented by Dr Chris Bell, Disability Discrimination Legal Service, Canberra. Northside Community Services was represented by Mr Tal Williams, Sneddon Hall and Gallop, Canberra. ● CB

NSW

HEROINES OF FORTITUDE

On 30 October 1996, the NSW Department for Women released a report on women's experiences in court as victims of sexual assault. The title of the report, *Heroines of Fortitude*, is taken from a comment made by one of the judges in the study. In sentencing a man who had sexually assaulted his victim, over a long period spanning her childhood and after she turned 16, the judge said, 'The victim is a heroine of fortitude . . . it is a tribute to the human spirit that she has survived'.

It is also a tribute to the human spirit that many of the women in the study survived their experiences in court. Despite changes to offence definitions and rules of evidence in sexual assault trials made in 1981, the study found that many complainants were still discredited and attacked during cross-examination. The types of questions asked by defence barristers clearly indicated that outdated and unacceptable views about the meaning of women's dress, behaviour, whereabouts, drinking or drug use habits, still permeate the minds of men accused of sexual assault, and are perpetuated in court by their barristers.

About one-third of the 150 women in the study were accused of fabricating their stories in order to obtain money through a victim's compensation claim. Half were questioned about their drinking on the day of the offence. Half were accused of behaving in sexually provocative ways. Almost all were accused of lying. Where the complainant was a woman with a disability, this fact was sometimes used to undermine her credibility as a witness. Aboriginal women, who were over-represented in the study by a factor of 10 compared to the proportion of Aboriginal women in the general population, had a particularly difficult time, from both the prosecution and the defence.

The report is the outcome of a two-year study of all trials of serious sexual assault charges conducted in the NSW District Courts between 1 May 1994 and 30 April 1995. The charges were those laid under ss 61I, 61J and 61K and the repealed sections 61B, 61C and 61D of the *Crimes Act 1900* (NSW). All complainants (or principal witnesses for the prosecution) in the study were women over 16. The study covered 150 hearings, comprised of 77 trials (where the accused pleaded not guilty) and 39 sentence hearings (where the accused pleaded guilty).

Only 31% of those accused who pleaded not guilty were convicted. Of those who were convicted, about 80% were sentenced to a term of imprisonment, although none was given the maximum sentence available for the offence. In many instances, sentences were reduced because the man had been intoxicated at the time of the assault, and the sentencing judge considered that he may therefore have 'misread the signals'!! One judge, justifying the imposition of a relatively lenient sentence, said, 'There seems no doubt that it was

the alcohol that you drank that made you behave as you did'.

The findings of this study should come as no surprise to those working in the sexual assault field, or indeed, to women who have been victims of sexual assault and have been courageous enough to act as the principal witness for the prosecution in the trial of their alleged offender. It remains to be seen what will be done in response. ● JB

their future cell-mates. According to Correctional Services Minister Steve Hatton, with double-bunking and 'some crowding', capacity could be extended to approximately 600. If the new sentencing laws work as expected, they'll need every one of those double-bunks. ● RG

Queensland

Northern Territory

ONE STRIKE AND YOU'RE IN

While the Northern Territory's Country-Liberal Party Government has attracted international attention with its euthanasia legislation, back home on the range it's still riding the good old law-and-order bandwagon for all it's worth. By the time you read this, the Territory's new sentencing legislation will have been enacted, imposing a minimum 14 days imprisonment for first-time adult property offenders, and a minimum 28 days detention for juveniles convicted of a second property offence.

Introducing the legislation to Parliament in October, Attorney-General Denis Burke pronounced that 'home invasions, vandalism and motor vehicle theft . . . threaten the very fabric of society in the Territory', and that 'the vast majority of Territorians support this initiative', which, he paradoxically claims, is aimed at 'those who persist in flouting the law'.

This 'vast majority' does not include the NT Bar Association, the NT Association of Criminal Lawyers, the NT Aboriginal Justice Advisory Committee, Aboriginal legal aid agencies, youth support agencies, the Opposition, or the Territory's Chief Magistrate, all of whom have publicly condemned the Bill. In responding to criticism that the new laws will effectively remove the courts' sentencing discretion, the Attorney-General has helpfully explained that 'this Government and Territorians want the courts to hand down harsher penalties and we are setting what is considered to be the bare minimum'.

Coincidentally, the NT government has just opened a brand-new hi-tech Correctional Facility in bushland south of Alice Springs. Although built to accommodate up to about 300 inmates, prisoners have already been put to work in the gaol workshop building beds for

SEVERE HEARTBURN

The Federal Member for Oxley, Pauline Hanson, continues to amaze with her antics and is causing severe heartburn for all the major political parties. National Party branches continue to invite Hanson to speak at their meetings while Nationals leader and Premier, Rob Borbidge, seeks to repudiate her views. Borbidge's concerns have focussed on economics, particularly the tourism trade and primary produce markets in Asia. The Labor Party has spoken strongly against Hanson but must be well aware of opinion polls which indicate that support for Hanson is strongest in seats held by Labor (not that there are many of those in Federal politics).

LEGAL AID VISION

The Legal Aid Office Queensland (LAO) has produced a *Legal Aid Vision* Information Paper which suggests major changes are ahead for legal aid in Queensland. The proposals include:

- providing legal casework services on the basis that 'Legal Aid's legal practice is a profit centre'. The idea that a profit can be made from providing services to people who must meet very stringent means tests is fundamentally flawed.
- the introduction of franchise-style arrangements and maintenance of a reduced salaried workforce.
- a move away from regional offices towards 'local access centres' which do not have administrative responsibilities.
- a more contractual basis for the relationship between LAO and community legal centres.

Seeking to do more with less is a laudable objective but in this case it must be asked whether enough of the legal aid system will be left to provide a comprehensive set of services.

CJC INQUIRY

The battle between the Borbidge Coalition Government and the Criminal Justice Commission continues. The Government raised the stakes by announcing an 'independent' Inquiry into the CJC and was criticised for doing so while Kenneth Carruthers, QC was still conducting the CJC's Inquiry into matters related to the Mundingburra by-election. Carruthers was rightly concerned that the independence of his Inquiry could no longer be assured, so, after obtaining legal advice, he resigned. The Government then stymied attempts by the Labor Opposition to have Carruthers return. Opposition leader, Peter Beattie, had proposed legislation which would have ensured that the independence of the Carruthers Inquiry would be respected by the Government review of the CJC. The CJC Mundingburra Inquiry will now go ahead without Carruthers but will face a difficult task in getting action taken on any adverse findings it makes. A further CJC Inquiry is now to be conducted in relation to allegations that the Police Minister, Russell Cooper, was involved in another 'election deal', this time with prison officers, prior to the Mundingburra poll.

COTTON FARMING

On a positive note, the Government surprised many observers recently by taking steps to prevent proposed cotton farming in the Cooper Basin in Western Queensland. Strong concerns had been expressed by both farming and conservation groups in relation to the introduction of such a water-intensive form of farming in such an arid area. ● JG

South Australia

GOOD NEWS AND BAD NEWS

The good news is that the attempt by the State Government to introduce 'general deterrence' as a consideration when sentencing juveniles has foundered on the rock of the Legislative Council. After intense lobbying by youth groups, academics and others concerned that such a principle would erode the rationale for a juvenile justice system in the first place, the Opposition Labor Party and Democrats combined to defeat the legislation.

The bad news is that the State's prisons are reported to be seriously over-

crowded. Prison chaplains, in particular, have been vocal in criticising the situation that many prisoners find themselves in. The Ombudsman has begun an inquiry into the concerns before deciding whether he will initiate a formal investigation. Some of the critics of the overcrowding have suggested that international standards with respect to prison conditions have not been observed. We await further instalments. ● BS

Victoria

PERSONAL INJURIES

Victorian personal injuries solicitors have been shocked to learn of the Kennett Government's dramatic amendments to the WorkCover scheme. Under new provisions effective from 14 November, claimants will no longer be able to rely on a secondary psychological or psychiatric condition to qualify for the top level 30% impairment category. Additionally, permanent impairment payments over \$5000 will no longer be paid in a lump sum but will be paid in instalments instead. The changes will apply to road accident victims as well to those injured in the workplace.

In a bid to save \$400 million, the Government argues that the new provisions in the *Accident Compensation (Further Amendment) Act* are necessary to stop rorting in the system and in customary fashion have chosen a cut-throat approach rather than more rigorous supervision of psychological assessments. The reality of the provisions mean that hundreds of claimants with serious psychological conditions will be excluded from long term and weekly payments as well as common law damages if they are excluded from the 30% impairment category.

As yet it is unclear how the amendments will effect claimants with existing injuries.

PRIVATE PRISONS

Further questions have been raised about the propriety of the contract between the State Government and operators of Victoria's new private prison, the Metropolitan Women's Correctional Centre. Criticism has been directed at the adequacy of prison facilities and security following a report which indicated that security was inadequate, that there was a high rate of drug use, including three non-fatal overdoses and that assaults on officers had taken place.

The primary concern regarding the new prison involves the secrecy of the contract with the State Government and the lack of accountability of a private company to the public. This is reflected in the fact that it is unclear what incidents or problems the company is obliged to report, as the contract is unavailable for scrutiny. It is problems of this nature which critics of the privatisation of the prison had envisaged when the sale was first proposed. EC

WA

SENTENCING

New sentencing laws came into effect in Western Australia on 4 November 1996. The *Sentencing Act 1995*, the *Sentence Administration Act 1995* and the *Sentencing (Consequential Provisions) Act 1995* create a package of legislation which consolidates and extends sentencing laws and penalties.

The new laws are designed to provide a greater range of sentencing options. Among the legislative changes is the introduction of an Intensive Supervision Order for serious offenders which provides mandatory supervision of an offender in the community. The order may include the option of a curfew which requires an offender to remain at a particular place for between two and twelve hours on any day. The sentencing package also provides for the option of a suspended sentence for less serious offences. Under the new laws, the Chief Justice of Western Australia now has the opportunity to report in writing to the State Parliament on any matter connected with sentencing.

Provisions have also been introduced to compensate and protect victims of crime. Courts are able to impose separate compensation or restitution orders in favour of a victim. The court may also impose a restraining order on an offender even though a complaint has not been made.

While it is still too early to assess the effect of this legislative package, there is already criticism of the failure of the legislation to come to terms with inflexible parole provisions. ● SW

DownUnderAll Over was compiled by Jenny Bargen, Chris Bell, Elena Campbell, Jenny Earle, Jeff Giddings, Russell Goldflam, Catherine Hawkins and Sonia Walker.

BACKWARDS TO THE FUTURE

The bleak blue line

IAN FRECKELTON writes in the year 2025, painting a grim vision of sensitive new age police and paramilitarisation.

First of all, let me make clear the basis of my writing this piece. I am now old and for my future I no longer care. I want to make it explicit that I received the request to write this in an unmarked hand-delivered envelope in my postbox on 15 September 2025 from the LSB Committee. The letter did not betray who its author was. I do not know, have not known for 12 years and do not want to know who is on the Committee.

But let me say this. The fact that the *Alt.LJ* has been driven underground and into editorial anonymity is symptomatic of so much that has gone awry with our society over the last quarter of a century. During the mid and latter part of the 1990s dissent ceased to be a viable form of expression of opinion, as the Pauline Hanson-driven push became more and more pronounced. While Hanson and her followers never achieved a formal position of government responsibility, history now shows how influentially she tapped into, and ‘actioned’, as the bureaucrats used to say, unspoken fears and bigotries that characterised Australian sentiment. Tragically, she and her party drove political discourse further and further to the right. Diversity of political opinion was the first casualty.

Groups such as those who participated in and contributed to the *Alt.LJ* were singled out for attention because their contributions to debate ceased to be ‘in the public interest’. First came the amalgamations of newspapers, then unnamed patriots commenced to launch personal and vitriolic attacks on prominent sympathisers of the *Alt.LJ* and others in comparable organisations, such as Councils of Social Services, members of dissentient Church groups and, of course, the much reviled members of Councils for Civil Liberties. One by one we were ousted. At first our jobs just mysteriously ceased to be available. Later, the measures became more physical. However, the lack of potential for employment had become very serious by the turn of the century because social security benefits had changed fundamentally in character. Entitlement had become discretionary and dependent on a range of informal factors, such as the ‘Diary Test’ and then progressively on largely unarticulated factors, including ‘willingness to work as directed’. Review by the Social Security Appeals Tribunal ceased to be possible with the abolition of that body in 1998. Those few jobs that could be applied for were frequently taken by the unemployed who were required to demonstrate their bona fides for eligibility for benefits by working for the dole.

Later things became more oppressive — in order to protect the community from the disgruntled who sought to undermine confidence in the institutions of state. Immigration was all but stopped in order to prevent the incursion of the dissentient from incompatible cultures and in order to ‘consolidate the national character’. Many of us were imprisoned; others were beaten by state apparatchiks. Some of us, under pressure, publicly renounced what we were told were our ‘socially damaging’ views. And who can blame them? Recanting was the only way to ensure not becoming part of the infamous, but never publicly revealed ‘Not to be Employed List’. Having one’s name on the List guaranteed outcast and impoverished status with others such as the indigenous inhabitants of Australia who by then had been ‘emancipated’ from welfare dependency by the government — ‘No Work as Directed, No Handouts!’, as the signs everywhere used to proclaim.



From the late 1990s some of us were impudent enough to suggest that the police were increasingly involved in the enforcement of the ruling party’s ideology. This was dismissed as anachronistic Marxist paranoia. However, it became more and more apparent as the years passed by that the new censorship laws meant that nothing unfavourable to the government could be published about the research that some of us were collecting anecdotally — the absence of officially released data precluded any other form of research. It was all so ironic after Prime Minister Howard’s announcement in the first of his terms in government that his stewardship would be marked by a recognition of the values of free speech. Policing became more and more a tool of the government of the day, which from time to time changed leaders but not its fundamental character.

It is strange to look back with nostalgia upon the early days of the Criminal Justice Commission in Queensland and of the National Crime Authority for what we would now classify as their basic commitment to people’s rights. That was hardly the perception at the time. Neither body of course lasted into the 21st century in its own right, both being gradually starved into non-performance by reduction of funds. Who will ever forget the triumphal expression on the face of John Elliott at ‘that party’ which he hosted for all comers when the NCA was finally ‘merged’ into the Australian Federal Police?

Policing went through many painful periods during the late 1990s. The 1996 Australian Law Reform Commission (ALRC) Report calling for external investigation of complaints against police was the last great success for those of us who campaigned publicly for police accountability. It was not long afterwards, of course, that the ALRC’s funding came under attack, with a carefully orchestrated campaign of vilification and accusation against key members and former members of that body. None of the accusations were ever proved but the damage was done to the credibility of ALRC recommendations. Little by little, the ALRC withered into insignificance. The task of formulating law reform proposals thereafter was given to ideologically compatible ‘think tanks’, which were championed as being ‘independent of

government' and, unlike the ALRC, even of government funding!



Changes appeared to come over the face of policing, emerging out of the New South Wales Wood Royal Commission which lasted for so many years. The era of the 'SNAP' (sensitive new age police) began, although we learned all too quickly that appearances can be deceptive and that closer to the mark was the emergence of what Jude McCulloch now more than 30 years ago had the gall to proclaim was the militarisation of our police forces. With the expedited promotion of policewomen came the unchanging iron fist in the new velvet glove. How naive were those reformers of early days, like myself, who believed that mere gender change to the profile of police would introduce greater humanity and sensitivity to minority rights

What happened, of course, was that men ceded some of their positions of dominance at the head of police forces but were replaced by more sophisticated, media friendly females who in fact possessed just as much of the brutality as their male predecessors but could put a charming and 'feminine' public face on it. As a public relations exercise, starting in New South Wales and the Northern Territory and followed eventually in Victoria and Queensland, the 'de-masculinising' of policing leadership appeared a great success, for a time, until the fabric of the velvet glove became unmistakably bloodied. The emergence of the phantasm of sensitive new age police was in inverse proportion to the behaviour of police on the street.



A few independent bodies to investigate public corruption were established, but they achieved remarkably little in retrospect. The great initiator was the Criminal Justice Commission, later followed by the Ethical Standards Investigator in New South Wales. At first government funding was adequate. Then, bit by bit, it drained away among interminable legal disputes about the meaning of various of the technical terms in the enabling legislation and about the civil liberties of police and other government employees under investigation. The increasing politicisation of judicial appointments contributed at the start of this century to the resolution of these problems in a way acceptable to governments none too keen on intrusive external scrutiny.

In the end there was a body in every jurisdiction with responsibility for investigating complaints against public officials of corruption, conflict of interest and excessive use of force. Each was independent in name, but dependent on funding obtained from recovery of assets from government employees found guilty of misconduct by the State courts. This was part of the incentive-driven prosecutorial and investigative system that commenced to evolve in the late 1990s. Unfortunately, the investigation bodies never were able to recoup enough from those who were the subject of adverse determinations and were always reliant on 'donations' from governments or other entities for continued viability.

As well, this meant that for investigators they primarily had to use not just serving police, but rather those serving police made available by Commissioners. Naturally, these were judiciously selected by the Commissioners and the separation between civilian scrutiny and the subjects of investigation became utterly illusory. At times, it almost seemed that police who were under investigation were aware of impending raids and interviews before investigators had

started their work. Investigations were selective, methodologically as flawed as they had been in the days of internal police investigations of complaints against police, and rarely resulted in any significant prosecutions. Being in name independent, however, made the hypocrisy of their inefficacy the more distasteful.



Looking back, the territorial tensions and then the First Kiwi War of 2010 against New Zealand, were really the turning points for Australian policing. Until then, reform of institutional corruption was theoretically possible. For years allegations had been made by politicians in Australia about the destabilising influence of Kiwis and about the attempts of New Zealanders to interfere with Australia's fiscal entitlements. When ASIO announced in 2008 that it had foiled a New Zealand government plot to assassinate our then President, emotions erupted and not only did war ensue two years later but the nature of Australian policing changed probably forever. The rhetoric of community policing took on new sinister connotations, the uniform response to the presence of police became that of fear and the arming of police was formalised with their being absorbed (for administrative convenience, no more!) as a division of the Department of the Military.

The role of police in identifying Kiwis and Kiwi sympathisers 'for national security purposes' resulted in still more 'generous' powers of search, seizure, detention for questioning and use of discretionary interrogation techniques than had ever been contemplated previously. Unfortunately, the powers were not limited to the Kiwi crisis and were extended to police work generally. What history has taught us is that a civil right lost is a civil right not easily regained. Long after the Kiwi crisis was resolved and the War won, as it always would be, governments re-elected with an increased mandate and whispers suppressed that the menace had never been any greater than the Kuwaiti threat against Iraq had been last century, the enhanced police powers remained and commenced to be turned against the non-compliant within the civilian population. Rights of public assembly had gone, even gestures toward accountability ceased to be made and the concentration was upon protecting the ability of governments to discharge their democratic mandate to govern without impediment. The government and the police became one. Opposition to either was visited with the revivified charge of treason.

Ian Freckleton is a Melbourne barrister.

ENVIRONMENTAL LAW

Lawyers for forests

DAVID HEILPERN discusses ethical dilemmas for green lawyers.

It is cold and foggy and dark. The convoy of geriatric four-wheel drives snakes its way along the ridge top in Richmond Range State Forest, way west of Kyogle. Red-neck country. The moon is setting on one side, and the first rays of sunlight are visible only by a milkeness in the fog on the other. It is isolated and we are tired but we are near our destination.

The bulldozer sits in a log dump, looking almost alive in the mist and we stand in awe for a moment as our joints re-set themselves after the jarring ride. Within three minutes a tripod is erected over the beast, and neck lock and other devices that look remarkably like torture equipment are positioned for 'lock ons'. I put on my 'legal observer' shirt, we light a small fire, the radio crew makes contact with Lismore Base, mobile telephones are charged, the video camera is on and we wait for the loggers to come. I look around the motley crew that now feels like family, having spent many nights on previous blockades together. A genuine tribe. Aged 6 to 60, some dreads, some crew-cuts, many tatts, but all so committed and determined. We sing to quiet guitar, we reminisce about previous campaigns, a poem is read and we wait for the loggers to come. Some sleep, some smoke, some make warm sweet tea and we wait for the loggers to come.

The blockade

The sound of machinery echoes through the hills, breaking the silence and some scurry to place branches on the road. A North East Forest Alliance (NEFA) banner is hoisted and the chain of four-wheel drives moves slowly down the hill and stops at the blockage. A spokesperson, emerging almost organically from the group, moves forward and greets the loggers with a smile and a welcome and a statement that there will be no logging here today. 'In fact', she says, 'this is a deferred area, there should be no logging at all here, the logging is illegal, and we have seized your equipment'. It has been my experience that a red-neck and his dozer have a symbiotic relationship — separation, when caused by greenie, dole-bludging activists, is likely to engender rage and violence. Hence the camera.

'You fucking cunts have no right to be here, get off my dozer, get out of the way, I'm here to earn a day's wages, who's paying you, you fuckwits.' All responses are met with a smile. The loggers are shown those people who are locked on and who are on top of the tripod and they are invited to a cup of tea. 'Youse have no right to be here youse cunts.'

'Well, we do, this is state forest, we can be here if we want — the forest is not closed, and you should go back to State Forests and get advice, and this area is reserved under all agreements.'

'Bullshit.'

'Well, would you like to speak to our lawyer?'

And on cue I emerge from the shadows, clutching my briefcase and mobile telephone, suited and tied, shaved even. I introduce myself to the loggers, who stand in stunned silence, and I lecture them on the complexities of the deferred forest agreements, the amendments to the Forestry Act and Regulations, the defence of necessity and the right of free speech, assembly and protest. Without a word, they retreat to their vehicles, and drive off to go to State Forests. Another blockade has begun.

The lawyers

Lawyers for Forests is a group of green lawyers who are committed to providing 24 hour-a-day legal support, advice and representation for environmental activists at blockades and other demonstration sites. We go with and stay with blockaders, assisting with police liaison, legislative interpretation, pre and post arrest advice and representation. Based on the North Coast of New South Wales, we have now attended seven blockades, most of which have been managed

by NEFA. We are currently negotiating a protocol with police for blockades, and have prepared written advice for protesters on their legal rights and obligations. We help make claims for victims compensation when loggers or others attack blockades, ensure that charges are laid for acts of violence, and provide on-the-ground advice for the lawyers working on court challenges.

It is wonderful work — rarely do lawyers have the opportunity to spend days in the bush, surrounded by music and children and learning to identify trees and the marks of endangered fauna. It is of course also risky work. We have been on blockades where loggers violently attack in the night, where people are seriously injured, where trees are being felled around people and where bulldozers are driven dangerously in an effort to dislodge a blockade. There is the ever-present threat of arrest, and the personal toll of having to give difficult advice without having had a shower for three days. Sometimes, it rains.

Some of the advice is complex. A woman chains herself by the neck to a cattle grid on the border of the State Forest and private land, thus blocking a convoy of logging trucks and a dozer. The logging operation is not authorised, or if it is, it is not within the Commonwealth-State Agreements or it is possibly otherwise illegal. The police inform the woman that if she does not release herself she will be arrested. She replies that she cannot release herself, she hasn't got the key, and mock calls for the key bring no response. We are currently in the Land and Environment Court seeking an injunction to save this virgin, old growth forest classified as crucial for two species of endangered fauna and one of endangered flora. I am asked whether she could be successfully prosecuted for hindering police or intimidation or anything else. The advice must be immediate. Answers please!

The campaign

We have had some notable successes. At a recent blockade, a security guard was charged with assault after our intervention. Police tend to behave better when a suited lawyer is watching, side by side with the video camera. False information about the law, espoused by loggers or government agencies, can immediately be corrected.

At one blockade, the loggers had formed a blockade of their own, trying to stop us from getting out of the forest. As an aside, the logic of this move caused much amusement. After all — we wanted to be in the forest. A member of Lawyers for Forests, wearing a legal observer shirt, got out of the car on approaching their blockade, and explained clearly to them the law of false imprisonment. She then proceeded to write down their number plates. Their blockade was broken, which was just as well as we were running out of water back at the camp.

Blockades have been an effective tool in saving the forests of the North Coast of New South Wales since the battle for Terania Creek. NEFA, a non-organisation from a legal point of view, has been co-ordinating the fight in the forests and in the courts, often at great personal cost to the activists. Hundreds of arrests were made stopping forest activities that turned out to be unlawful. The police would blindly step in, following the directions of the Forestry Commission, and brutally arrest environmentalists who were, as it turned out, in the right. Of course charges were not dropped for this reason, and despite the war eventually being won, the battle left many activists with criminal records and fines. This led

to a highly developed system of liaison between NEFA and the police and to the formation of Lawyers for Forests.

But it does raise some interesting ethical dilemmas. How far should officers of the court go in providing advice to those who are probably breaking the law? Should these people be lawyer-free in situations where they are at real risk and where the presence of a lawyer seems to make a difference? How can we effectively represent people when there is a real risk of being a witness to the proceedings oneself?

Of course one can intellectualise some clever responses — lawyers in such circumstances are not participating in a criminal activity, just observing, communications are privileged, representation and observation are assigned to different lawyers. But in the end the personal, the political and the professional are merged and a commitment to the environment overwhelms. If you would like to join Lawyers for Forests and have some experience in criminal or environmental law, contact Lawyers for Forests, c/- David Heilpern, PO Box 157 Lismore 2480.



Day four at the blockade and the Minister has just ordered a cessation of logging in the whole area pending an investigation into how such a 'tragic error' could have been made. NEFA has succeeded in protecting yet another stand of our native forest — for now. So, back to the office to catch up.

David Heilpern teaches law at Southern Cross University. He is also Solicitor for Nimbin HEMP and the founder of Lawyers for Forests.

LEGAL AID

When will lawyers ever learn?

CASSANDRA GOLDIE examines the threat to community legal education in Western Australia.

In October 1995, the Commonwealth and State governments commenced a joint review of legal aid in Western Australia. Both the Law Society, as representative body for the private profession, and Law Access¹ made submissions. Each of these bodies recommended to the Review that Legal Aid WA should reduce, and if necessary, abandon its community legal education (CLE) activities.² They argued that Legal Aid's core function should be to fund litigation.

The Commonwealth recently announced a \$120 million cut to national legal aid funding. Is this an opportunity for these recommendations to be taken on board? Is CLE on its way out?

This article warns against that approach. It argues that CLE is critical to the success of an effective, more humane and less costly form of access to justice for disadvantaged people. It suggests that the recommendations from the private legal profession are retrogressive, and contrary to current international thinking.

The development of CLE

Traditionally, Legal Aid WA gave little emphasis to CLE.³ The reasons are complex, but are linked to the nature of the legal profession as a whole, which has seen its role as providing people with legal advice and representation, one on one. The lawyer's job was to take over the client's problem, typically by negotiation, leading to litigation when a settlement could not be reached. Legal Aid WA saw its role as supporting that traditional approach by responding to requests for advice and representation and providing assistance when people could not afford to pay for it themselves. Legal Aid WA did not actively seek out its clients but would wait for them to apply for help.

This approach was similar to the traditional public health system. People only went to the doctor when they got sick. The doctor took responsibility for getting the patient better. People had little awareness of how to keep healthy, and were often kept in the dark about their illness and treatment.

However, there is evidence in public health that government and the profession have taken on the challenge to find a better way, recognising that it was not in the community's interest to spend public money supporting an expensive, crisis-driven health system.

In the last decade, there has been a significant shift in the nature and extent of public health awareness. There is public education about iron counts, HIV/AIDS, eating better foods, and the importance of exercise. People are encouraged to see their doctor early, and to understand ill-health prevention.

The solution-oriented approach to legal aid delivery

The previous Commonwealth Government commissioned several enquiries into access to justice,⁴ driven by a recognition of the failure of the existing system to meet community needs. Broadly, these enquiries supported a paradigm shift in the delivery of legal aid, analogous to that in public health.

In particular, the National Legal Aid Advisory Committee (NLAAC), challenged legal aid bodies to help disadvantaged people to avoid and resolve legal problems early and without confrontation and litigation. This was also the recommendation of a 1993 Churchill Fellowship study into legal aid⁵ and remains a theme, it would seem, of the Federal Attorney-General, Darryl Williams, QC.⁶

In order to achieve this paradigm shift, NLAAC recommended that legal aid intervene earlier through the provision of timely legal advice. It also supported education directed to 'imminent or probable needs of individuals or people with a common interest to protect or assert legal rights and interests'.⁷

Legal Aid WA has sought to implement early intervention in a range of ways, including a CLE program targeted at disadvantaged groups. The CLE program concentrates on community workers, who are uniquely placed to recognise legal problems early and support their clients in getting legal help before they are in crisis. This approach can be demonstrated by an example.

Legal Aid WA provided a training course for workers from women's refuges. The very next day, one of the workers called Legal Aid — for the first time. One of her residents, illiterate and petrified, was facing warnings about her children being apprehended by the Department of Family and Children's Services. Legal Aid provided a grant of aid for advice and negotiation with the Department. The advocacy

for this woman (at an estimated maximum cost of \$600) may result in an early resolution of the issues. It has avoided the woman coming to Legal Aid WA, after the event, in need of expensive legal representation in formal court proceedings, at an average cost of \$1750-\$2200 for a 3-5 day trial.

In 1995-96, Legal Aid WA involved about 3500 people in its CLE activities, providing various courses for workers in domestic violence, crisis and financial counselling, migrant issues, disability and mental health.

Legal Aid WA has conducted a number of evaluations to establish whether its program is on track.⁸ As part of the 1995 review of legal aid in WA, external consultants evaluated a sample course for migrant community workers. The results confirmed that participants had increased their confidence in assisting their clients, with improved knowledge of legal issues, and effectiveness in dealing with legal problems. As a *direct* result of the course, 85% of the participants had referred clients to Legal Aid WA, with 70% having referred clients to other legal services, as well. This direct referral increases Legal Aid WA's ability to intervene earlier and limit the trauma — and cost — involved in providing assistance.

Another indicator of the effectiveness of Legal Aid WA's CLE program is the number of calls subsequently received from participants regarding their clients' legal problems. In 1995-96, Legal Aid WA provided legal advice to 671 community workers over the telephone about their client's legal problem, representing a 479% increase from 1993-94. This increase indicates a growing legal awareness in the community, directly attributable to the CLE activities. Importantly, this trend improves Legal Aid WA's ability to resolve client problems early, ideally in the community setting, without the client needing to come to Legal Aid at all.

But how much is CLE costing? In 1995-96, Legal Aid WA spent less than 2% of its budget on CLE and development activities.⁹ By contrast, 89% was spent representing clients in court or providing one on one advice and assistance. This hardly represents a major shift away from traditional services.

1995 World Legal Aid Conference

Justice Bhagwati delivered the keynote paper at the 1995 World Legal Aid Conference in Malaysia.¹⁰ He argues that, at least in the developing country context: 'The traditional legal services program, which is confined only to giving legal aid or advice to those who come for it, can never succeed'. He points out that this kind of program relies on the false assumption that people are aware that they have a legal problem, and assertive enough to take action to deal with it.

Justice Baghwati calls for a 'strategic' legal services program, which:

does not regard litigation as playing an important or even significant role in the life of the poor and hence refuses to consider the court as the centre of all legal activity.

He isolates a number of key features of the program, including education, decentralised services, and public interest litigation.

Justice P.N. Baghwati argues that a *primary* objective of a legal aid system should be to increase the legal awareness and assertiveness of the disadvantaged. He suggests that the *best* method for achieving this is to provide education to 'different classes of social workers who work among the poor'.

This strategy is directly in line with the direction that Legal Aid WA has taken with its CLE activities in recent years. Legal Aid WA has recognised that, with the limited funds available, it must be more strategic in how it provides legal assistance, a lesson advocated by Justice Baghwati in the developing world context where legal aid funding restrictions are extreme.

Conclusion

If the recommendation of the Law Society of Western Australia and Law Access to reduce or abandon the CLE program were followed, what would be the result?

Legal Aid WA would:

- return to the traditional legal service program;
- accept its role as a passive bureaucracy, waiting for people to come to it to 'apply' for help;
- reject any responsibility for increasing the legal awareness and assertiveness of the disadvantaged; and
- ironically hear from the *most* aware and the *most* assertive, rather than the most disadvantaged in our community.

Most importantly, Legal Aid WA would turn its back on the opportunity to minimise the costs — both human and monetary — associated with resolving legal problems. A CLE program is central to any early intervention strategy.

The position taken by the Law Society of Western Australia and Law Access represents a disappointing lack of recognition by the private legal profession of the critical role of CLE to access to justice.

This article does not suggest that litigation assistance is not important. Clearly it is critical. However, surely the issue here is not whether Legal Aid WA should be — or should not be — involved in education, but rather the wholesale inadequacy of the funding provided by government to support the essential functions of a strategic legal aid system — and a truly solution-oriented approach to access to justice.

That should be the real debate.

Cassandra Goldie is Community Resource Manager, Legal Aid Western Australia. The views expressed in this article do not necessarily reflect the views of Legal Aid Western Australia.

References

1. Law Access is a scheme of the Law Society of Western Australia, coordinating pro bono legal assistance in the private sector.
2. The Law Society recommended that: 'Funding of non-litigation approaches [which includes CLE] must take a lesser priority, and if necessary, be abandoned, given Legal Aid's scarce resources and the large and increasing demand for assistance in litigious cases': 'Legal Aid Review Submission', 1996, p.14. Similarly, Law Access submitted that: 'It is a nonsense for Legal Aid WA to pursue education and information resource programs if there is inadequate funding for the delivery of high quality legal advice and advocacy to the disadvantaged once you have informed them of the legal rights that they have . . .': Legal Aid Review Submissions, 1996, pp.19-20.
3. The article focuses on Legal Aid WA's community legal education activities. However, the author wishes to emphasise the equally important and complementary role played by community legal centres in the delivery of CLE to disadvantaged people.
4. See NLAAC: 'Legal Aid for the Australian Community,' 1987-1991; Access to Justice Advisory Committee: 'Access to Justice Report', 1994; Australian Law Reform Commission: 'Equality before the Law', 1994; Commonwealth Government: 'Justice Statement', 1995.

References continued on p. 299

Letter

Dear Editors,

I have put quill to parchment because I was startled to discover a new word recently — 'contestation'. It appears not only in the August 1996 editorial but also in Andrew Sharp's article on the facing page.

I confess that a number of ALJ articles have had this effect on me in recent years. It seems that my befuddlement is in proportion to the growing numbers on the ALJ editorial committee — currently a whopping 61 people. Perhaps you could devote a space to explain unusual and post-modern concepts and expressions.

Back to the editorial. The editors assert that equality before the law is an assumption of the law. I would have thought it was a principle of law. It is said to be problematic because it is not properly applied; and further, that some people confuse equality with sameness. This is the opposite of what is described by the principle — that people, though different, be treated equally.

Those who would apply the principle of equality before the law by reliance on what the editors describe as 'the standard of the western white male' are surely not applying the principle properly.

Is the principle itself wrong? Or cannot it be made to work without being 'contestation-ous'? If the principle of equality before the law causes harm in practice, do the 61 members of the ALJ editorial committee have a working replacement? And by the by, those downtrodden zygotes who triumphed in that property case ('Zygotes as children', p.165) — did the law apply the western white male concept to them?

Gary Sullivan

West Heidelberg Community Legal Service

Editors' Reply

We encourage debate about the purpose of the journal and the meaning and use of law. Your criticisms draw attention to what we hope are some challenging ideas and language. We view the 'Alternative' Law Journal as a forum that explores issues that challenge dominant interpretations of law. This includes developing strategies to make the law work for the clients of legal centres, exploring contemporary developments in social theory, or anything else. We do not find these issues necessarily exclusive. Indeed, theorising the law may lead to valuable directions to deal with problems that confront legal practitioners.

Helen Macdonald and Margaret Cameron

Dear Editor,

I read with interest the article in the August edition of your journal entitled 'Lawyers, lawyers and more lawyers!'

Great care needs to be taken in analysing statistics at any time and this is particularly the case in looking at industries such as the legal profession where most of the entities in the sector are partnerships, not companies.

For example, Francis Regan concludes that the legal services industry's profits grew substantially in the five year period to June 1993. Because of the partnership structure evident in law firms, the operating profit for the industry would include the total earnings of all of those people who are partners in law firms. These people are not paid salaries and so one really can't compare operating profits in this industry with the measure of operating profits in other industries where a corporate structure generally applies. To take a very simple example, if a two partner firm with gross fees of \$1m per annum had expenses of \$850,000, then the firm would be earning an operating profit of \$150,000 with each partner (assuming they were equal partners) earning an income of \$75,000. If, in the next year, the firm admitted a new partner (also to be an equal partner) and its expenses fell from \$850,000 to \$790,000, then the operating profit of the entity would have grown from \$150,000 to \$210,000 — an apparently very healthy increase of 40%. However the income of the individual partners in the business would have actually fallen from \$75,000 to \$70,000. Hardly a cause for great celebration!

It is for this same reason that it is not at all surprising that the profit margin for all legal services businesses was nearly six times the profit margin for all non-farm businesses in the economy generally. It is because many of the people who work in the sector are partners who take their total earning from the profit margin not via salaries. The conclusion that 'this is undoubtedly an extremely profitable industry' does not therefore necessarily flow from the fact that the profit margin is high compared to other businesses. The report on p.4 of the *Australian Financial Review* of 27 September 1996 (copy attached) certainly paints a very different picture.

I think that it is also important to point out that the data which was analysed in this article dealt with the period from 1988-1993. Whilst this survey period included the 'recession that we have to have' I think it is fair to say that the period also included a very significant property boom in the late 1980s and, furthermore, the impact of the recession flowed through into the legal services market later than it hit other sectors. Lawyers and other professional advisers tend to be busier in periods when the economy is rising or falling rapidly than in more stable times.

The article in your August issue paints a very rosy picture of the profession. I think that there would be many working in the profession today who would not share that conclusion. The industry has been undergoing enormous change with great competition for work and declining fees. For example, fees for residential conveyancing work, the staple of many suburban and country firms, are said to be lower in absolute terms (not just in real terms) today than they were in 1980! Many traditional sources of work have disappeared and labour costs have continued to grow in what is essentially a people business. In addition, I am sure that it would be a common theme across the profession that the hours being worked and the pressures on turnaround times have increased significantly over the past ten years.

Rob Stewart
National Managing Partner, Minter Ellison

Author's reply

Mr Stewart seems to have fallen into the trap of failing to distinguish between what he wanted to see in my article and what it was about.

My article discussed the ABS survey of the Australian Legal Services Industry for the period 1988-93. I focused in particular on the survey data in relation to growth in employment and income. But neither the ABS survey or my article discussed the period after 1993. It is possible that things have deteriorated dramatically since then as Mr Stewart suggests. In fact I commented towards the end of the article that 'This is not to say that the future may bring substantial change'. It is now up to Mr Stewart and others to demonstrate with hard data that things have deteriorated dramatically since 1993 as he suggests. But that was not the purpose of my article.

Goldie references continued from p.297

5. Huxtable, P., 'An Examination of Some Foreign Legal Aid Schemes with Implications for Australia', 1993.
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7. National Legal Aid Advisory Committee, 'Legal Aid for the Australian Community', July 1990, p.246.
8. Nilon, C., 'An Evaluation of the Effectiveness of the Child Support Forums operated by the Legal Aid Commission of Western Australia', 1988; LAWA: 'Armadale Domestic Violence Intervention Project', 1994; LAWA: 'Pilbara Community Legal Service Project', 1994; LAWA: 'Migrant Worker Legal Information and Referral Training Evaluation Report', 1995; McKelvie, G. and O'Rourke, M., 'An Evaluation Study of the Legal Aid Child Access Forum Western Australia', 1995; LAWA: 'Community Legal Education in Tenancy Law', 1995; LAWA: Domestic Violence Information and Referral Training', 1995; Integra Pty Ltd: 'An Evaluation of the Legal Aid Migrant Workers Program', 1996.
9. This figure reflects staffing and disbursement gross costs associated with Legal Aid WA's live CLE and publication production and distribution, as well as its networking and consultation activities.
10. Baghwati, P.N., 'Legal Aid in Crisis — The Present and the Future', World Legal Aid Conference, 2-4 May 1995, Kuala Lumpur, Malaysia. Justice Bhagwati is known as the father of the legal aid system in India, and is a recipient of the International Bar Association Award for his contribution to the field of legal aid at a state and international level.

LEGAL AID CRISIS

The Federation of Community Legal Centres (Victoria) is looking at the impact of changes to Legal Aid Guidelines on access to justice. If anyone knows of cases where the refusal of legal aid has led to an injustice, or exposed clients to risk, please write and tell the Federation about it.

Contact: Liz Curran
Federation of CLCs (Vic.)
GPO Box 1139K
MELBOURNE 3001

Mr Stewart also raises the question of profitability measures. But perhaps he should read the survey rather than use the old line about 'statistical interpretation'. I merely discussed the ABS data that demonstrate conclusively that this was a very profitable industry in that period. On any profitability measure the profession was doing very well. Mr Stewart does not take issue with this overall conclusion. Even using the measure preferred by Mr Stewart (allowing for partners income to be subtracted from profits) the industry's profit level was three times that of non-farm businesses in the economy generally. The real issue here seems to be that Mr Stewart does not want readers to think that the profession is ever very profitable. He may like us to think this but the data does not support such a conclusion.

Francis Regan

Huxtable article continued from p.275

References

1. Maital, S., *Executive Economics. Ten Essentials for Managers*, The Free Press, New York, 1994, p.233.
2. Porter, M.E., *The Competitive Advantage of Nations*, MacMillan, Hong Kong, 1990, p.71.
3. Thompson, A.A. and Formby, J.P., *Economics of the Firm*, Prentice-Hall, New Jersey, 1993, p.405, adapted from M.E. Porter; 'How Competitive Forces Shape Strategy', (1979) 57(2) *Harvard Business Review* 137-45.
4. Australian Bureau of Statistics, Legal and Accounting Services, Australia 1992-93, p.1.
5. National Legal Aid, 'Meeting Tomorrow's Needs On Yesterday's Budget', 1996, p.10; National Commission of Audit Findings, Report on Aboriginal and Torres Strait Islanders Legal Services, 1996, p.63.
6. Fife-Yeomans, J., *The Australian* , 5 October 1996.
7. Thompson, A.A. and Formby, J.P., above, p.410.
8. Maital, S., above, p.229.
9. Peter Huxtable undertook an extensive study of North American and European legal aid schemes, under a 1993 Churchill Fellowship.

1998 Churchill Fellowships for overseas study

The Churchill Trust invites applications from Australians, of 18 years and over from all walks of life who wish to be considered for a Churchill Fellowship to undertake, during 1998, an overseas study project that will enhance their usefulness to the Australian community.

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Aboriginal Dispute Resolution, A Step Towards Self-Determination and Community Autonomy

by Larissa Behrendt; Federation Press, 1995; 115 pp; \$16.95 softcover.

Larissa Behrendt is a distinguished graduate of UNSW and the first Aboriginal scholar to receive a scholarship to complete her doctorate at Harvard University. She is a Eualeyai woman whose country lies in northwest NSW. In this new work, Behrendt addresses issues about problem solving methods within Aboriginal communities and the inadequacies and injustices of imposed methods. Her focus in the book is on disputes over land.

Behrendt succinctly reviews the arrival of the British and the acquisition of sovereignty by the British Crown. She demonstrates how the imposition of the common law, with *terra nullius* as the fictional basis for its reception in Australia, rendered the laws of Aboriginal and Torres Strait Islander people invisible. Behrendt explains that the concepts of connection to land, of both the indigenous and non-indigenous systems, have no common indices, therefore there had been no accommodation in the common law for Aboriginal custodial relationship with land. The overturning of *terra nullius*, as the basis for the reception of the common law, in *Mabo v Queensland* (No. 2) revealed the common law mechanism whereby native title to land could be recognised, but it also confirmed the dispossession of their land which affects most Aboriginal people.

Aboriginal people's experience of the imposed legal system has been one of continual oppression. It was the tool whereby the invaders took their land. As such Behrendt argues convincingly, the legal system has been complicit in the socio-economic deprivations which Aboriginal people have suffered since 1788. Analysis of the criminal 'justice' system shows that Aboriginal people are treated grossly unequally by that system. The legal system has also only afforded its protection to Aboriginal people when they have conformed with its dictates. For Aboriginal people who have tried to live their lives in accordance with their traditions, the common law has provided no protection and indeed has been the tool for punishment for such commitment. Against this

background, Aboriginal people have little basis for accepting that the existing non-indigenous legal system is likely to provide them with a fair and just outcome for many of the problems with which they must deal — particularly where their interest in land is at stake.

In arriving at a community-based system for dispute resolution, there is an important distinction to be drawn between imposing problem solving from the orthodox channels of the common law system, and mechanisms which are drawn from within Aboriginal communities. Behrendt argues that alternative dispute resolution mechanisms must be developed which embody the cultural values of indigenous people and are acceptable to those communities because they have had input into their development. Such mechanisms will serve the interests and cultural integrity of the communities but will also provide a pathway to more acceptable dealings with entities which are outside the communities — such as mining companies and government agencies. Requiring these bodies to recognise such mechanisms is a less radical step than the force which has been applied compelling Aboriginal people to fall within the framework of the non-indigenous legal system.

Behrendt sets out the traditional structures within Aboriginal communities which provide dispute handling mechanisms. She explains the cultural background to these features and then demonstrates how they may be brought into play to assist a community with the broad range of issues which arise, particularly when dealing with land. She describes a model procedure which allows for full expression of grievance and interest, and the application to the particular problem of the full set of community values. Her language is direct and accessible. She is highly persuasive about the merits of her scheme. She applies the principles to a variety of different Aboriginal communities from the traditional to the urban, demonstrating that her argument may be applied across the spectrum of the very different

ways in which Aboriginal people are living.

While Behrendt focusses on the imposition of non-indigenous law there is some recognition that different aspects of this law provide a useful tool for communities in relation to their dealings with outside groups. A powerful example is the right to withhold consent to mining which is in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In relation to negotiations which must take place due to this legislative imperative, Behrendt's model has much to recommend it — not only because the outcome is likely to be more acceptable to the community but also because it will have been arrived at with proper respect for the community with dealings based on equality between the parties. Also, the better and stronger the agreement, the more successful the partnership between the parties to any agreement will be.

For inter-community dispute resolution, the same observations may be made about Behrendt's proposals. The implementation of the *Native Title Act 1993* (Cth) has brought a new pressure to bear on communities to resolve sensitive issues of culture and connection. Many communities are composites of what are known as 'historical' people (those who were brought to an area often without choice) and traditional people (those who can show that the area in which they live has always been their country). In order to bring a native title claim, distinctions between these people, who are part of the contemporary Aboriginal community, may need to be negotiated. Ensuring Aboriginal people have input into the process by which their community self-defines when developing a native title claim, should mean that the outcome will have more legitimacy and may unify where division is already occurring.

All of these matters are important indicators of self determination for Aboriginal communities. Behrendt's book is itself a welcome contribution to the development of autonomy for Aboriginal people.

SUSAN PHILLIPS
Susan Phillips is a Sydney barrister.

Managing Mortality, Euthanasia on Trial

by Ian Parsons and Christopher Newell; Villamanta Publishing Service, Geelong, 1996; 208 pp; \$24.95 softcover.

The first legislation in Australia — and indeed the world — legalising active euthanasia has recently come into effect. There has been extensive publicity surrounding the preparation and passage of the *Rights of the Terminally Ill Act 1995* (NT) and the various challenges that are still occurring.

Managing Mortality covers many of the current issues but it is different from other books on euthanasia in several ways. First, as suggested by the title, the book presents a 'trial' of the issues by a 'jury' who are asked to decide, on the basis of evidence from 'witnesses', what decisions should be made for particular terminally ill people.

The jury includes people from all sides of the euthanasia debate:

renowned advocates (Marshall Peron, former Chief Minister of the Northern Territory who introduced the NT Act in Parliament, Dr Darren Russell, one of the Victorian doctors who admitted that they had helped patients to die, and Dr Helga Kuhse, Monash University philosopher);

renowned opponents (Margaret Tighe, President of Right to Life Victoria and Chairwoman of Right to Life Australia, Nicholas Tonti-Filipini, Roman Catholic bio-ethicist, the Most Reverend Dr Keith Rayner, Anglican Primate of Australia, Dr Brendan Nelson, former President of the AMA and Tony Keenan, Australian Federation of AIDS organisations);

disability workers (Elizabeth Hastings, Australian Disability Discrimination Commissioner, Tony Lawson, former President of the Victorian Guardianship and Administration Board);

disabled people (Joan Hume, quadriplegic activist writer on disability issues, and Anne McDonald, cerebral palsy, formerly Kew Cottages);

friends of the disabled (Dina Bowman, policy analyst whose disabled child died in infancy, and 'Charles' whose AIDS-infected lover was helped to die).

The second feature of the book is that it focuses on specific cases in discussing the philosophical issues. The cases are those of the 'witnesses', including:

Joanne, 58, with progressive cancer, blind, chronic nausea, distressed, whose husband supports her wish to die but whose children oppose it;

- Danny, 32, a keen athlete, quadriplegic and seeking death after an abseiling accident;
- Milan, 34, with AIDS-related dementia and infections controlled by drugs — if they were withdrawn, he would die slowly and painfully;
- Abdul, born intellectually disabled but happy until he contracted lymphatic cancer in his 20s, causing pain, distress and death within 12 months;
- Beth, a newborn baby with severe spina bifida that will allow her no potential for independent quality of life and will always require extensive medical attention and who will die if medical support is withdrawn.

The bulk of *Managing Mortality* discusses the traditional issues in the euthanasia debate, often directed to the stories of the witnesses, using the views of the jury which the authors tape-recorded and transcribed. Should mentally competent people be allowed to choose to die? Should earlier expressed wishes of once-competent people be followed when they are no longer competent? Should euthanasia be extended to non-competent people, like children and people with intellectual disabilities? Is there an ethical difference between allowing people to die by non-treatment and active intervention? What should be done if people reject palliative care? Is AIDS unique in terms of inevitable outcome and, if so, does it provide a compelling reason for changing the law? What impact might the legalisation of euthanasia have on the availability and provision of health care and other support services? Will people no longer trust doctors and be afraid to seek medical care if euthanasia is lawful? (Many other underlying and incidental questions are listed for consideration, both arising from the case studies and from the discussion in each chapter, on pp.143-53.)

The jurors' views on questions such as these are placed side by side in each chapter to allow readers to compare their responses. At the end, the two authors summarise their own conclusions — Ian Parsons, a community educator with Villa-manta Legal Service, as Counsel for Euthanasia; and Dr Christopher Newell, Senior Lecturer in Medical Ethics and Disability Studies at the University of Tasmania, as Counsel against Euthanasia.

The feature of the book, however, that was most interesting for me was its exploration of the link between euthanasia and disability. This is illustrated by the first question put to the jurors: Why do people choose to die? The expected response from the pro-euthanasia perspective is that people want to die because they have severe pain or distress; they want to 'control' their time of death; they are concerned for their family and carers; they are afraid of what will come — loss of dignity, independence, self-worth, depression etc. But perhaps 'we [as a community] tend to wish people with disabilities 'out of the way' because they threaten us all' (p.20); and 'in a climate where euthanasia is lawful, Joanna is, in fact, even more likely to feel that she is a burden and, therefore, that she in a sense owes it to her family to seek an early death' (p.21). These ideas are repeated in the questions for further thought and discussion: 'Are physical and social norms and stereotypes of perfection a factor behind requests to die?' 'Is disability worse than death and why?' 'Do [media accounts of disability] suggest dominant attitudes that treat people with disability, or those on the margins of society, less favourably?'

Both authors are experts in disability issues — one from his own experience. Dr Christopher Newell lives with a disability that has threatened his life on several occasions; and Ian Parsons works for Villamanta Legal Service, a State-wide community legal service for people with disabilities in Victoria. Also, as noted earlier, several jurors have disabilities or work with disability issues. It is not surprising, therefore, that the exploration of community attitudes towards disability, and their link with views on euthanasia, is a particular strength of the book.

For legal readers, it will perhaps be disappointing that, although there are many references to 'the law', there is no mention of any of the legal cases in which judges are slowly coming to terms with changes in community attitudes and expectations in relation to dying patients. Only one juror is a lawyer (Tony Lawson) and the Bibliography includes only two legal articles (one by Margaret Otlowski in this journal ((1995) 20 *Alt.LJ* 90-3)). Also, despite the attempt to 'contextualise' the type of decisions that must be made about people seeking euthanasia, and to make them less 'abstract', by presenting the witnesses' stories, these soon become shorthand descriptions for a

common situation: 'the quadriplegic athlete'; 'the seriously ill newborn' etc. People are far more diverse and life more complicated than this categorisation suggests — though time and space are, of course, limited!

In brief, there is much in the book that will interest legal readers about the

philosophical and ethical debate in relation to euthanasia, particularly its link with community attitudes to disability. Proponents and critics of euthanasia alike should find it provocative.

LOANE SKENE

Loane Skene is Director of Studies, Health and Medical Law, the University of Melbourne.

Pink Triangle—The gay law reform debate in Tasmania

by **Miranda Morris; UNSW Press, Sydney, 1995; 134 pp, index; \$27.95 softcover.**

Few books display so vividly the complexities of the role and operation of law in our late 20th century society as Miranda Morris' *Pink Triangle — The gay law reform debate in Tasmania*. Disarmingly slim, the book nevertheless packs a heavy punch in its simple narration of the events and attitudes which thrust Tasmania into the world spotlight and earned it international condemnation from the United Nations Human Rights Committee. The continued refusal of Tasmania's Upper House to decriminalise acts of sexual intercourse between consenting adults of the same gender only serves to heighten the relevance of this book published late last year, and makes the essential questions asked by the author about Tasmanian society even more engrossing.

Pink Triangle charts the course of the homosexual law reform movement in Tasmania from its early beginnings at an information booth at the weekly Salamanca Markets in Hobart. The discrimination and persecution which the Tasmanian Gay and Lesbian Rights Group (TGLRG) endured as the Hobart City Council sought to smother their voice by banning them from the marketplace is recounted in such a way that it is difficult for the reader to contain his or her indignation as the arrest toll mounts.

The activities of the TGLRG at Salamanca were remarkably mild and so the response of the Council and the police seem even more extraordinary. The display of various logos and slogans was prohibited as was the collection of signatures to petition for law reform. Morris forcefully recreates the sense of oppression which must have charged the air of the Salamanca Markets in 1988, and brings to the reader's attention parallels with the deprivations of human rights which occurred in Europe and culminated in World War II. This historical context is present throughout the book

(indeed it is a mental association made by the title) though thankfully it is employed with subtlety and without a tendency towards melodrama.

The outrage engendered by the early chapter on Salamanca is the powerhouse for the remainder of the book, which can easily be read in one sitting. Morris shifts the focus from the confrontations at Salamanca to the no less disturbing public debate which she methodically covers at various levels and stages. The most pleasing thing about this book is Morris' heavy reliance on quotations from Hansard, the media and private interviews. By skilfully blending the results of her research she presents the myriad of views which were exchanged in the reform debate which is the focus of her work. The frightening bigotry and ignorance reflected in some of the opinions (but notably those quoted in the chapter concerned with the Parliamentary debates) would be lost in any attempt to paraphrase. By letting the key figures speak for themselves, Morris is able to present as objective a narrative as possible. She also exposes the depth of passion felt on both sides of the struggle — passions which remain after a United Nations ruling, the involvement of Amnesty International, the enactment of the Commonwealth's *Human Rights (Sexual Conduct) Act 1994* and the continued efforts of politicians in the Tasmanian Lower House.

So absorbing is the story of the TGLRG's fight for law reform and the views of all those involved (the chapter dealing with the response of several religious denominations is particularly fascinating), it is perhaps easy to lose sight of the fact that all this activity and debate is the product of two legislative provisions contained in the *Criminal Code 1924* (Tas.). Indeed the style of the book is distinctly non-legalistic and this may frustrate some readers. However, it

is hardly surprising given that Morris is a social historian seeking to explore what it is about Tasmania — and more specifically its early history and relationship to the mainland — that led to such concerted and confrontational opposition to the recognition of gay rights.

While that is undoubtedly an interesting question, this reviewer found that the book's strength lay in its depiction of a battle where both sides recognised the power and authority of law in society. The feeble compromise suggested by some Tasmanians that the laws remain as a symbol of disapproval but not be actively enforced was unsatisfactory to both sides. The role of law in reflecting and, indeed, determining society's acceptance or rejection of homosexuals is just as important as the other factors which undoubtedly led to the formation of the key players' beliefs.

Additionally, the book provides a very good demonstration of the law-making process for lay people and law students. From the lobbying of citizen's interest groups, through government policy formulation, and then to debate in a bi-cameral Parliament, this example is rounded out by reference to the international law and Commonwealth legislation which sought to override the effect of the Tasmanian *Criminal Code*. The TGLRG is currently seeking a declaration from the High Court that the *Human Rights (Sexual Conduct) Act 1994* does indeed have this effect.

Inevitably, the question must arise — for whom is this book intended? I do not think it was a question which Morris addressed — nor need she have. This book is of interest to many sectors of the community, namely those which still suffer from discrimination due not only to sexuality, but also their gender, age, race or political beliefs. It also raises many questions for those of us involved in the law and can assist us in appreciating the enormous social impact of the area in which we work and our possible role as agents for legal change. But ultimately, *Pink Triangle* should be read, as Justice Kirby suggests in his foreword, by all 'those who believe that Australia is a basically tolerant country'. Morris' work serves as a reminder to us of the fragility of basic freedoms. It is the responsibility of all Australians, but in particular the legal community, to ensure that the hard won gains of this century are not lost as we enter the next.

ANDREW LYNCH

Andrew Lynch teaches law at the University of Western Sydney.



BITS

Understanding Company Law

by Phillip Lipton and Abe Herzberg; LBC Information Services 1995; 6th edn; 745 pp; \$65.00 softcover.

Understanding Company Law is a fabulous book. It's the only reason I passed company law. Lefty lawyers generally don't need to be experts on the Corporations Law but it's nice not to fail.

Lipton and Herzberg divide the book into fairly standard chapters on membership, dividends, takeovers, receivership etc. It is well set out and easy to both read and understand. The sixth edition incorporates changes made by the *Corporate Law Reform Act 1994* (Cth) and the *Corporations Legislation Amendment Act 1994* (Cth) but not those made by the *First Corporate Law Simplification Act 1995* (Cth) or those proposed in the *Second Corporate Law Simplification Bill*.

Understanding Company Law is an excellent source for students, particularly during that pre-exam panic cram phase. However, it may not be suitable for all lay people. I lent my copy to a physicist friend who was thinking of setting up a company. If a man who wrote a thesis on the right-handedness of the universe couldn't understand it, what hope is there for mere mortals? FW

MAJAH, Indigenous Peoples and the Law

edited by Greta Bird, Gary Martin and Jennifer Nielsen; The Federation Press, 1996; 298 pp; \$35.00, softcover.

This book contains essays on a wide range of topics of interest to people familiar with issues in relation to Aboriginal people and contemporary Australian society. Many of the contributors are distinguished commentators in their fields, such as Chris Cunneen, Stanley Yeo and Jenny Blokland. It is the first of a series of annual monographs to be published by the Faculty of Law and Criminal Justice of Southern Cross University.

The series is introduced by the Foreword of Sir Gerard Brennan and has the general purpose of critically examining the place and appropriateness of law in the wider struggles for justice. For this first in the series, the specific focus is on 'the perception of Australia as a post-colonial state . . . (with) the authors assert[ing] that Indigenous peoples in Australia remain colonised peoples'. The essays address important and interesting questions such as 'The Price of Compromise: should Australia Ratify ILO Convention 169?' by Lisa Strelein, and Mark Harris' piece on 'reconstructing the Royal Commission — Representations of 'Aboriginality' in the Royal Commission into Aboriginal Deaths in Custody'. Parallel experiences overseas are contrasted with those in Australia.

The edition is very worthwhile. The tone of some of the essays is earnest and clearly written over a fairly long time span. As a result closer editing may have been required to update references which are now inaccurate. Some of the essays are written from personal experience rather than a strictly scholarly perspective which enhances the insights available in the work. ● SP

Generation f: Sex, Power and the Young Feminist

by Virginia Trioli; Reed Books 1996; \$14.95.

This book really doesn't need to be reviewed again given the media fuss that justifiably accompanied its release but I want to have my go anyway.

Generation f is largely a riposte to Helen Garner's *The First Stone* and the associated wave of neo-conservative bile that threatened to swamp young feminists after its release. In the book, Trioli successfully defends her generation against the charges of apathy and, perhaps more importantly, 'woosiness'.

Trioli is an award-winning journalist and it shows. *Generation f* flows well and is a pleasurable easy read. Intellectually, the book is fairly lightweight but it makes no pretence to be other-

wise. It was designed as a vehicle for younger feminists to have their say about the cause and is a valuable call to arms that I recommend to all chicks and babes. ● FW

VI for Short

by Sara Paretsky; Penguin 1996; 246 pp; \$12.95.

VI for Short is a collection of short stories written by Paretsky between 1982 and 1995 featuring the indomitable VI Warshawski, PI.

I wasn't expecting to enjoy this book as much as I did. The short story format suits Paretsky's punchy style at the same time as providing some discipline: for once she doesn't have the room to digress about Paretsky's appearance. Phew.

The stories cover a broad range of subjects from championship sport to classical music. They do not follow a strict chronology as far as the details of VI's life goes. Paretsky apologises for any inconsistencies in an opening note. I don't think they matter, particularly given that all my favourite characters from the novels get a look in: Lotty, Max, Mr Contreras and the beloved dog, Peppy.

There seems to be an attempt to appeal to the dyke market in *VI For Short* via a lesbian character and the tough, sporty heroine. This is compounded by the author description in the book which states that Paretsky lives with a 'Chicago physicist and their golden retriever'. Paretsky's cover is blown in the press release, however, which reveals that the physicist is a husband.

Comparisons between Paretsky's work and Patricia Cornwell's novels seem inevitable. Both authors have created tough heroines with Italian backgrounds and relationship problems. VI is more 'streets' than Cornwell's detective; very Chicago.

VI for Short is a good read, especially on the way to work or at the beach. The book will probably even appeal to that alarmingly large portion of the population who 'don't read short stories' because of the narrative thread provided by the Warshawski character. FW

BITS was compiled by Susan Phillips and Frith Way.



MENTIONS

PUBLICATIONS

New Ways for Courts to Assess Service to Clients

The University of Wollongong has released a package of standards for court use in assessing the quality of their service to the public. The package contains two books, 'Standards and Benchmarks' and 'The Review Process'. The publication was compiled jointly by the New South Wales Local Courts and the Centre for Court Policy and Administration at the University of Wollongong who hope to work with courts in NSW, Victoria and South Australia to develop similar benchmarks relevant to other jurisdictions. The standards are based on the core principles governing courts, access to justice, equality, fairness and integrity, independence and accountability and public trust and confidence.

The package is available from the Centre for Court Policy and Administration, Faculty of Law, University of Wollongong, 2522.

For further information contact Professor Helen Gamble, Dean of the Faculty of Law, tel 042 21 3638 or, Dr Rick Mohr, Research Director, Centre for Court Policy and Administration, tel 042 21 4632.

'Communicating with the Human Rights Committee'

This publication is the first in a series of booklets to be produced by the Australian Human Rights Information Centre. The first edition provides a comprehensive and user friendly guide to the Optional Protocol to the International Covenant on Civil and Political Rights. It was created to inform non-government organisations, students, lawyers and community groups assisting people whose rights under the Covenant have been breached. The guide covers Australia's position regarding the Optional Protocol, the workings of the United Nations Human Rights Committee, and the procedure required for bringing an individual communication under the ICCPR, as well as under the Convention on the Elimination of Racial Discrimination and the Convention Against Torture.

The publication is available from the Australian Human Rights Information

Centre c/- Faculty of Law, University of NSW, Sydney 2052, for \$5.00 including postage. Cheques made payable to AHRIC.

REPORTS AND PAPERS

Rights of People with Disabilities

The Australian Law Reform Commission has released a report 'Making Rights Count', which criticises the inadequacy of Commonwealth disability services legislation.

The Commission states that the legislation should ensure that funding decisions for services recognise the rights and interests of people with disabilities. The statutory objectives of new legislation should include achieving greater independence, employment opportunities and self esteem, for the almost 3.2 million people with disabilities living in Australia. However, the current legislation is narrowly focused on regulating the funding and accountability of providers of disability services, without focusing on the needs of the people who require such services. The Commission has also recommended the establishment of the Office of the Equal Status of People with a Disability to ensure national co-ordination of services and to develop internal and external complaint mechanisms so consumers can air their grievances.

For further details contact, Leora Harrison, ALRC Public Affairs Officer, tel 02 9284 6309.

The report is available on the ALRC's homepage at <http://uniserve.edu.au/alrc/>

Drug law reform

The University of Technology in Sydney has submitted to the Australian Law Reform Commission inquiry into the National Crime Authority and Australian Federal Police, a research paper 'Drug Law Reform — Tough on the Causes of Corruption'.

The paper examines how prohibitive drug laws stifle effective policing and provide a corruptive influence on the police force that enforces such laws. The preparation of this paper was undertaken by student volunteers at the University's Community Law Centre, working in conjunction with the Red-

fern Legal Centre and the Drug Law Reform Foundation.

This project heralds the introduction of a new undergraduate course in Community Legal Research, to be offered by the University's Law Faculty in 1997.

For more information please contact Peter O'Brien at the UTS Community Law Centre tel 02 9514 2914.

NEW INTERNET SITE

The Parliament of New South Wales has launched an internet site.

Information available at the site includes: comprehensive explanations of the operations, procedures and legislative process of the Parliament, as well as biographical information on all Ministers and Members from both Houses.

Daily Hansards, business papers, bills before the Houses and 'what's on' information for each day, are also available at this site, as well as access to many of the resources and databases of the Parliamentary Library and Parliamentary Archives.

The site address is
<http://www.nsw.gov.au/parliament>

NEW NEWSLETTER

The Victorian Women's Council is starting a quarterly newsletter entitled *In Women's Interests*. They welcome any contributions for the first edition.

The email address for further details, or to send your contributions to is:
owa@vdoj.vic.gov.au

TIM McCOY PRIZE

The Tim McCoy Prize is awarded annually by the Tim McCoy Trust for some special contribution to the community. The 1996 prize was awarded to the Federation of Community Legal Centres (Victoria) for their campaign to save the Telephone Interpreter Service as a free service for clients of legal centres. The Trustees emphasised at the presentation of the award that it is particularly important for the legal centre movement that its peak advocacy body represent legal centres and their clients to government.