

Pandora's Box

IN THE SERVICE OF JUSTICE 2008



A publication of the Justice and the Law Society
UNIVERSITY OF QUEENSLAND

Pandora's Box

IN THE SERVICE OF JUSTICE

2008



Editors

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Editorial

Welcome to a landmark edition of *Pandora's Box*, the first edition to be published by the Justice and the Law Society of the University of Queensland.

This year's theme, '*In the service of justice*' was chosen in recognition of our recent change of name. Essays selected for this edition examine the people, processes and institutions that serve justice, as well as the meaning and relationship of justice and law.

In their annual general meeting of 2007, the members of the Women and the Law Society voted unanimously in favour of a change of name to become the Justice and the Law Society. This change was made to reflect our broader aims and concerns in the fields of law and justice. The change also reflects a strategic move to expand our audience, to better reflect our interest in issues of social justice, and to encourage more male members to engage with issues of gender equality: be it within the law school; the legal profession; or the community at large.

The Justice and the Law Society continues to provide a voice for women law students at the University of Queensland and actively maintains a focus on gender equality. The retention of the name *Pandora's Box* illustrates both our desire to preserve our heritage as WATL, and a symbolic encouragement of female empowerment. We have also continued our strong associations with a number of women's professional groups. However, we believe in advocating on behalf of all marginalised groups in society, whether they be oppressed on the basis of gender, race, religion, sexuality, social status, homelessness or any other factor.

Our mandate continues to reflect these enduring values:
Social Justice, Gender Equality and Professional Education.

It is therefore clear that the change of name was never a change in the society or its objectives. The change only reflects the gradual evolution of the society since its inception in 1993, as we respond to the needs of current and future students. Thus it only seemed logical, that considering the constant formation and growth of WATL, the name be changed to reflect the broadened focus of the society's activities.

This year's theme has encouraged a diverse array of topics and interpretations. We are very excited to include so many inspirational and thought-provoking articles from a number of prominent legal academics, practitioners and judiciary (both present and future).

Please enjoy *Pandora's Box 2008*.

Laura Hogarth and Eleanor Proust



Pandora's Box for the uninitiated:

Pandora's Box is the annual academic journal published by the Justice and the Law Society (JATL) of the University of Queensland. The journal is a forum for academic discussion of legal, social justice and political issues, which has been in publication since 1994.

Pandora's Box is so named not because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story - the inquiring mind – for that is what the legal mind should be. We therefore seek to fill Pandora's Box with bold ideas and questions for our readers' inquiring minds.

Academic articles submitted for publication in Pandora's Box are peer reviewed through a double-blind reviewing process, and Pandora's Box is now listed as an official peer reviewed publication on Ulrich's International Periodical Directory. Other submissions, such as speeches and interviews, are not subject to formal peer review due their informal nature.

Some submissions from undergraduate law students of the University of Queensland are also included in the publication. Since 2000, JATL has run the Magistrates' Work Experience Program. Students selected to participate in the program are required to submit a paper examining an issue of law or legal procedure that came to their attention during the program. The papers are entered into a competition, judged by members of the University of Queensland law faculty, and the winning papers are included in the publication.

As of this year, due to a new professional relationship with the Australian Legal Philosophy Students Association (ALPSA), we are proud to include in our publication one of the winning papers of ALPSA's annual student essay competition as well.

Upwards of 200 copies of *Pandora's Box* are distributed each year to JATL members, including members of the judiciary, the legal profession and law students. Copies are also held at the Queensland State Library, the National Library and the law libraries of a number of Australian Universities. Each year's publication is launched at the Justice and the Law Society's Annual Professional Breakfast.

Additional copies, including back issues, are available for sale through the Justice and the Law Society: jatl@law.uq.edu.au



Foreword

In keeping with the Pandora's Box 2008 theme, 'In the service of justice', contributors were invited to submit papers examining the people, processes and institutions that serve justice, as well as the meaning and relationship of justice and law. We are delighted to be able to publish submissions relating to all of the above categories, briefly summarised below.

People

Aaron Rathmell's contribution is an interview of Elizabeth Morley, Principal Solicitor at the Redfern Legal Centre. In the interview Elizabeth Morley recalls her life and experience in the community legal sector. Aaron Rathmell's annotations provide valuable background information to give the reader a deeper understanding of the material.

Processes

The Hon Justice Kirby has submitted a short piece encouraging better discourse between the courts and the media.

Nora Götzmann, an ALPSA student essay competition finalist, argues for an explicitly gendered standard of the 'reasonable person'.

Anita Clifford, winner of the Magistrates' Work Experience Program student essay competition, evaluates the strengths and weaknesses of Domestic Violence Protection Orders.

Rachel Docker, Magistrates' Work Experience Program student essay competition finalist, examines the processes surrounding domestic and family violence matters in the Murri Court.

Institutions

Rachel Docker, in her essay mentioned above, also explains the Murri Court as an institution of law and justice.

The Hon Justice McMurdo AC submitted a paper discussing the Queensland Bar and its role in the justice system of Queensland.

The meaning of law and justice

Stephen Keim SC's article discusses the rule of law in the context of the case of Dr Haneef.

George Williams presents an argument for a Charter of Rights in Australia, in the interests of justice.

The relationship between law and justice

Sanmati Verma examines the breakdown of the relationship between law and justice in the sphere of anti-terrorism and concepts of 'security'.

Professor Margaret Thornton traces the history of feminism in legal education and practice, questioning the influence of feminism on the Australian legal academy.

Professor Bernadette McSherry examines the treatment of people with mental illnesses under the law.

David Morrison and Clare Cappa examine the connection between law and justice through the utilisation of therapeutic justice in family law.

Improving the discourse between courts and the media

The Hon Justice Michael Kirby

This article is based on an address given by the Honourable Justice Michael Kirby of the High Court of Australia on the presentation of the Victorian Legal Reporting Awards. The address was given in the Library of the Supreme Court of Victoria on 8 May 2008.

There is a problem between the media and the courts in Australia. It is a source of frustration in both camps. Many in the media think that judges are pompous out of touch gits who have insufficient love for free speech and inadequate respect for the free press. Things are not helped by the strange dress that judges sometimes have to wear, the elevated platform on which they are seen doing their job, the obtuse language they occasionally use and the power they wield – including over the media. Although increasingly relics of the past, wigs are a special target of media comments. Even the High Court judges are usually portrayed in cartoons wearing wigs, although we have not done so since 1986.

When media comes into direct contact with the judiciary, they tend to dislike the fact that judges are less susceptible than other branches of government to media pressure and seduction. In defamation cases, contempt proceedings, decisions on FOI disputes and cases affecting the big commercial investments of the media, the judiciary of Australia comprise the untouchables. If you have as much power in society as the Australian media tend to have, and you meet an immovable object like the judiciary, the shock to the system can cause frustration and anger. This sometimes spills over into the unworthy thought that this is a group of over-mighty officials who need to be cut down to size. That, after all, is a very Australian reaction.

For their part, the judges are often disillusioned with the media: their bold as brass assertions of high motives and their supposed dedication to truth, justice and the Australian way. For judges, observing media coverage of cases in which they participate, there sometimes seems to be a big gap between what the public is told and the actuality at the work face.

Judges lament the disappearance of many dedicated legal correspondents. They realise the power that the print media still has (despite falling sales) over the daily agenda of talk-back radio, breakfast television and hence political discourse in the nation. Yet secretly, judges are rather proud that they are the on branch of government, and one of the few places in society, that cannot be overborne by media power.

There is some merit in the perspectives on both sides of this divide. It is the nature of the judicial role that judges must be cut off from daily contact with the media similar sources of influence. Too close an association might lead to the same degree of contamination that can be seen in the political branches of government, occasionally the bureaucracy and sometimes other formerly respected institutions like the universities and the churches. The lesson of life seems to be that getting too close to the media exposes those who do so to the peril of dancing to the media's tune. That is why most judges realise that it is best to keep a distance.

I suspect that this is the reason that most judges are not in favour of television cameras in the courtrooms. For me, this is just a natural development, adapting to the alterations in modern methods of communication. But many judges are afraid that over-close proximity will lead to manipulation. Tiny grabs from complex trials will be extracted to maximise shock, horror and outrage. Distortion of news about the courts will be increased. Some judges might even be tempted to play to the gallery and forget the most important people in the courtroom – the parties to the case.

The Australian judiciary has recently become aware of the research findings of a legal researcher, Dr Pamela Schulz.¹ She has studied newspaper headlines and media stories in her home State, South Australia, from 2002 to 2006. Her study produced a consistent pattern of reporting which, she believes, amounts to an attempt, especially by headlines, to establish what she calls 'discourses of disapproval and disrespect'. She thinks that this phenomenon is designed to intensify criticism of the courts, to enlarge disapproval and disrespect for their work and to promote a damaging public attitude of fear and mistrust. Piled on top of distrust of politicians, churches, the monarch and officials, who will be left to protect the public in the dire predicament described in the headlines? You guessed it: only the media and their editorialists – supported perhaps by one or two politicians who dance to their dismal tune.

Dr Schultz collects the many screaming headlines that give rise to this conclusion. A lot of these concern the tried and trusted field of sentencing of offenders. Everyone can have an opinion on this subject. Although Australia's imprisonment rate is now edging to be one of the higher rates in the world – much higher than most European countries – few sentences are adequate for certain commentators. 'An outrage', the banner screams. 'Call for inquiry grows', 'Premier orders DPP to appeal'. This is the 'fear discourse'. But it is backed up by an attack discourse with descriptions of judges as 'Holidaying at taxpayer's expense' or 'Summer nick-off'. More 'Outrage'. 'This is not justice'. And so forth.

In interviews recorded by Dr Schulz, Australian judges reacted to these attacks in a generally restrained way. They supported the principles of a liberal democracy. They expressed acceptance of the media's right to report and also to critics. But they regretted the lack of real understanding about the courts. They cared about criticism and puzzled about how to counter ignorant and inaccurate reporting. They admitted that being a judge in Australia is not being in 'a popularity contest'. Judges know that they generally have to 'cop it sweet'.² After all, their oath is to administer justice 'without fear and favour'.

Still, there are things that we could do to improve the relationship between courts and the media, without getting so close that judicial, or for that matter media, independence would be endangered.

- Judges need to understand media pressures – especially deadlines and brevity.
- Judicial reasons need to include pithy summaries that can be picked up to give an accurate and authentic idea to the public of what the courts are on about.
- Media liaison officers in the courts need to be more proactive.
- Maybe judges need to reconsider cameras in the courts under strict conditions. Indeed, this is already happening at all levels.
- The appointment of specialist court reporters is an urgent requirement. The amount of specialist court reporting has actually fallen off during my thirty years service in the judiciary.
- The media need to understand better the judicial role and maybe judges need to take more time to explain it.
- In the age of electronic media, sticking to printed handouts, even in email format, is no longer good enough. The judiciary somehow needs to get into the electronic age and to speak directly about the dedication, wisdom and devotion that judges usually display in their often tedious and stressful daily work.

¹ Pamela Schulz, *Courts on Trial: Who Appears for the Defence? Courts, Communication and Confidence: A Critical Discourse Analysis of Politics, the Judiciary and Media Reporting Justice*, Uni of South Australia, Doctoral Thesis (2007).

² Pamela D Schulz, 'Rougher than usual media treatment: A discourse analysis of media reporting and justice on trial' (2008) 17 *Journal of Judicial Administration* 223 at 227.

One of the interesting reports in Dr Schulz's study describes how courts in the Netherlands have been prepared to redirect justice reporting by appointing *Persrechters* or 'press judges'. These are serving members of the judiciary who will go on television and radio to explain justice messages accurately. According to Dr Schulz, these commentators have helped develop a keener sense of the actual work that judges do, of its difficulty, of its importance and of why superficial reports and alarmist headlines are often false and misleading.

It may be time for us in Australia to work towards something similar. Sadly, if we wait for most media outlets to provide quality reports of what really goes on in our courts, we may wait a very long time. Media want it short, sweet and interesting. Judges know, it is often not like that.

The age of infotainment is upon us. But the judiciary itself needs to help find a workable antidote. I respect the small group of legal journalists who try hard to report the law as it really is, including with justifiable criticism where that is warranted (as it sometimes is). I honour notable journalists in this class who have died in the last year – including the outstanding Roderick Campbell of the *Canberra Times*. I acknowledge a few fine exemplars who have left the media for greener pastures, like Marcus Priest of the Australian Financial Review. I congratulate the winners of this year's Legal Reporting Awards. Awarding prizes for good journalism on legal matters is admirable and a step in the right direction. But more is needed. For the good of our society and its institutions of justice, it is time to think of radical solutions. Both the media and the courts are vital to a free, questioning and just society. We all have a stake in raising the standards.



In the service of Justice: the Queensland Bar needs you!

The Hon Justice Margaret McMurdo AC

This article is based on an address given by the honourable Justice Margaret McMurdo of the court of Appeal to the Women Barristers Association's Annual Celebratory Dinner. The address was given in the Essoign of Owen Dixon Chambers in Melbourne on 29 November 2007.

For tens of thousands of years before British settlement, Indigenous communities in what is now Queensland were served by their own system of dispute resolution, lore and justice, in which women played a vital role, both socially and spiritually¹ although a role different to that of Indigenous men.

When the colony of Queensland was founded in 1859, its parliamentary and legal institutions were based on the Westminster system and the common law of England. Women could neither vote nor become lawyers. This female disempowerment had an entrenched history. In ancient Athens, widely considered the birthplace of western justice and democracy, at least for free men, women could litigate only through guardians.²

Historically, litigation has always been challenging for both men and women. Until Pope Innocent III abandoned the practice in 1215, trial was not by judge or jury but by combat. English barrister, Sadakat Kadri, explains:

"The ritual required plaintiff and defendant to prove that [God] would take their side in a fight, and after weapons were blessed – to neutralise blade-blunting spells and the like – victory would go to whoever reduced the other to submission or death. There were subtle variations. Women, priests, and cripples generally had to hire professional fighters. German jurisdictions often found other ways to level the odds: a man might be buried waist-deep and armed with a mace, for example, and his female opponent allowed to roam free but given only a rock in a sack in which to avenge her armed but handicapped male opponent."³

Gratefully fast-forwarding from 1208 Germany to 2008 Queensland, I recall the federal election last November. On election night, both past and future Prime Ministers spoke courteously about the other in concession and acceptance speeches. The newly elected Deputy Prime Minister, Julia Gillard, the first Australian woman to hold that role and a lawyer, graciously and authoritatively spoke about former Prime Minister Howard's important contribution over 30 years to Australian public life. Despite political differences, she praised his leadership on limiting gun ownership and its positive community effect. The change of government was seamless. In March this year, I voted in local elections, another obligation on a busy weekend, fitted somewhere in between shopping, gardening, cooking, attending children's sport, judgment writing and preparing Monday's cases. The make-up and leadership of many local councils changed without me giving more than a passing thought to the process. Occasionally, graphic media reports force me to reflect on the lives of those in countries like Zimbabwe, Burma, Tibet, Pakistan or, closer to home, Fiji. I realise I am blessed to live in Australia under the protection of its fine electoral system and democratic institutions.

But universal suffrage for Queenslanders is a surprisingly recent development. Indigenous men were specifically excluded in 1885 from voting in the colony of Queensland.⁴ In January 1905, non-Indigenous women obtained the right to vote in Queensland elections. Indigenous Queenslanders were not given the

¹ Susan Purdon & Aladin Rahemtula (eds), *A Woman's Place: 100 Years of Queensland Women Lawyers* (2005) 1-7

² Sadakat Kadri, *The Trial, A History from Socrates to O J Simpson* (2006) 6.

³ Above 27-28.

⁴ Australian Electoral Commission, *History of the Indigenous Vote* (2002) 4, 13.

right to vote in Queensland elections until 1965 with enrolment only becoming compulsory for them as for other Queenslanders in 1971.⁵

Until enabling legislation was enacted in 1905, the term "person" in statutes authorising admission to the legal profession throughout the western world was construed as not including women.⁶ Since 1905,⁷ Queensland women lawyers have had the right to be part of the independent legal profession, a logical democratic development from the earlier granting of suffrage to Queensland women. That is because the legal profession has an institutional role in a democracy and, like all institutions, the community is more likely to have confidence in it if its membership broadly reflects the society in which it operates. Queensland women have been slow in exercising this right. Agnes McWhinney⁸ was the first Queensland woman to be admitted to legal practice in 1915, and not until 1966 did Naida Haxton become the first woman to practise at the Queensland Bar.⁹ As I shall explain, this under-representation of women in the Queensland legal profession and especially at the Bar and on the Bench, has meant that women have been under-represented in Queensland's democratic governance.

The judiciary, together with the legislature and the executive, is an integral arm of the government of Queensland. Effective democratic government is reliant on the concept of the separation of the powers exercised by those three arms so that no one arm of government can exercise or abuse total power. The government through the legislature, elected by universal suffrage, makes the majority of Queensland's laws. An independent judiciary interprets those laws and with the assistance of an independent legal profession develops the common law and ensures the realisation of citizens' rights against other citizens or against the state. An independent executive ensures that orders of courts in respect of those rights are enforced. As Justice Stevens of the US Supreme Court noted in delivering the majority opinion in *Hamdan v Rumsfeld*:¹⁰ "[t]he accumulation of all powers legislative, executive and judicial in the same hands ... may justly be pronounced the very definition of tyranny." In Queensland's democracy, an independent legal profession has a duty to ensure that every citizen has access to the rule of law, enforced by independent courts, providing equal justice for all, regardless of gender, race, skin colour, religion, power, wealth or sexuality. The High Court of Australia recognised in *The Australian Communist Party v Commonwealth*¹¹ that the essence of a modern democracy is the observance of the rule of law.

Independent lawyers have a crucial role in the enforcement of the rule of law. They have a fiduciary duty to protect and pursue their clients' rights, unswayed by the power, privilege or wealth of others and subject only to their duty to the court as officers of the court. Ensuring access to the rule of law will sometimes require advocacy on behalf of the least popular and least attractive members of society against governments, the rich and powerful, and in defiance of populist views and media and public harassment. Ultimately a lawyer will pursue those rights in independent courts, presided over by judges who determine disputes according to their oath or affirmation to at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of office according to law to the best of their knowledge and ability without fear, favour or affection.¹²

Until comparatively recently the low numbers of Queensland women lawyers, especially at the Bar and on the Bench, has meant the female jurisprudential perspective has been absent from the development of the common law and the enforcement of the rule of law.

⁵ *Elections Act Amendment Act 1971* (Qld), s 6.

⁶ *Re Edith Haynes* (1904) 6 WALR 209, 213-214.

⁷ *Legal Practitioners Act 1905* (Qld).

⁸ Susan Purdon & Aladin Rahemtula (eds), *A Woman's Place: 100 Years of Queensland Women Lawyers* (2005) 369-378.

⁹ Above 245-246.

¹⁰ No 05-184, June 29, 2006, 12.

¹¹ (1951) 83 CLR 1, 193.

¹² *Constitution of Queensland 2001* (Qld), sch 1.

Prior to 1990, there were no women judicial officers in Queensland. Many have since been appointed, to the advantage not just of women but of the whole legal profession and the wider community. The increase in numbers of women lawyers and judges has not been similarly reflected in the numbers of women at the Queensland Bar and at the highest levels of the legal profession. This is despite the fact that for many years women have graduated from Queensland's law schools in equal or greater numbers to men and with at least their share of the glittering prizes. The loss has been Queensland's. Whilst women barristers and judges remain very much a minority, women's jurisprudential perspectives are not fully heard and acted upon, community perceptions of justice may be diminished and confidence in democratic governance may be lessened.

As a means of addressing the under-representation of women and other non-traditional groups in the law, Justice Ruth McColl AO has expressed cautious support for a formal and thorough examination of the process of judicial appointments in Australia. Her Honour observed that she did not want to rehearse "yet another recitation of indigestible and depressing statistics contrasting the number of women graduating from law school with outstanding academic qualifications with the number of women in the profession, let alone on the bench. ... [We] ... could recite these statistics in our sleep."¹³

Whilst I empathise with Justice McColl's astute observations, I do intend to use statistics to show the current unsatisfactory low representation of women at the Queensland Bar. Statistics provide some yardstick by which to measure progress, or the lack of it. They help establish the need for positive change. They provide a catalyst for a conversation about developing strategies to bring about change. They are an anchor point against which to measure the value of remedial strategies undertaken.

In Queensland in 2008, we have a Governor and Governor-General-elect, Ms Quentin Bryce AC, an admitted barrister who, although she never practised, has been a great supporter of and advocate for women in the law. Last year, Queensland Federal Court justice, Susan Kiefel, joined Victoria's Justice Susan Crennan so that two of the seven members of the High Court of Australia are now women. On 30 July this year, I celebrated my tenth anniversary as President of the Queensland Court of Appeal. Thirty-three per cent of my Supreme Court colleagues are women, including Justice Catherine Holmes on the Court of Appeal, Justice Margaret White, the first woman Supreme Court judge, and Justice Roslyn Atkinson, the first woman Chair of the Queensland Law Reform Commission. Over 20 per cent of District Court judges, including Chief Judge Patsy Wolfe and Judge Leanne Clare SC, the former and first woman Queensland Director of Public Prosecutions, are women. Thirty-two per cent of Queensland magistrates, including former Chief Magistrate Di Fingleton, are women. The President of the Queensland Law Society is Ms Megan Mahon, a 38 year old lawyer from Toowoomba with two school-age children. All this suggests that women lawyers are well represented in Queensland, a far cry from 18 years ago when there was not one woman judicial officer.

But the paucity of women at the Queensland Bar, which primarily provides the independent legal advocates who assist courts in developing the common law and in upholding the rule of law, belies that conclusion. In 2004-2005¹⁴ there were 577 junior members of the Bar of whom 85 (14.7 per cent) were women and 71 silks, only one of whom was a woman. Overall 13.4 per cent of the Queensland Bar were women. Presently, it has 899 members, 808 juniors of whom 145 (17.9 per cent) are women and 91 silks, four (4.4 per cent) of whom are women. That means that currently, the Queensland Bar is comprised of 16.6 per cent women. In four years there has been some, albeit slow, progress: 16.6 per cent up from 13.4 per cent. At this rate it will take another three decades to reach roughly equal numbers of men and women at the Bar in Queensland.

Last year, not only were no Queensland women barristers appointed senior counsel, there was not one woman applicant. The Bar Association of Queensland ("BAQ") constitution requires that two of its Council

¹³ Justice Ruth McColl AO, 'Women in the Law' (2006) Winter *Bar News* 38.

¹⁴ Figures provided by the Queensland Bar Association.

members must be women, two must be silks, two must be regional members, two must be members of between three and 10 years standing and one must be a member of less than three years standing. Last year 40 barristers stood for election; six or 15 per cent of the candidates were women. Only two of the six were elected to the Council, representing 11.8 per cent of Council membership, an even smaller proportion than the already small proportion of women at the Bar.

Since I have been President, the Queensland Court of Appeal research officer records the percentage of women in the total number of appearances by barristers. In 2004 a little over 16 per cent of appearances were by women barristers. Concerningly, this calendar year less than 6.5 per cent of total appearances were by women barristers. That is almost a 10 per cent decrease in appearances by women barristers in Queensland's highest court over the last five years.

One reason for this regression may be that the small number of senior women at the Queensland Bar is regularly depleted through judicial appointments. Because they are so few, the depletion is proportionately high. But this is not a satisfactory response. There are simply too few women at all levels of the Queensland Bar. In a recent survey of Queensland women barristers, the most frequent response as to why the proportion of women at the Bar has remained low was "children or family responsibilities".¹⁵ In one sense I find this surprising. My experience was that once a barrister's practice is established, the Bar offers a degree of flexibility, albeit tempered by a challenging level of unpredictability, well beyond that available as an employee. Provided flexible child care is accessible, life at the Bar can be family-friendly.

Unquestionably, a major reason for the scarcity of Queensland women barristers is that recognised in the seminal study of the status of women at the Victorian Bar by Hunter and McKelvie:¹⁶ even when barriers to entry to the Bar for women are absent, solicitors' briefing practices themselves present a variety of barriers to women's advancement.¹⁷ Professor Rosemary Hunter explains:

*"Women barristers, like women lawyers everywhere and in all branches of the profession, tend to find themselves in the less prestigious and less remunerative courts, practice areas and cases (Schulz and Shaw, 2003¹⁸)."*¹⁹

In 2004, the Law Council of Australia, recognising that this is a general professional problem, not a women's issue, sought to remedy it through its Equal Opportunity Briefing Policy.²⁰ The policy has been adopted by the Bar Association of Queensland, together with a commendable 20 point policy on equal opportunities for women. It has also been invoked in Queensland by government, by many legal firms and by government agencies. The policy does not directly require women to be briefed but that participants consider briefing women and regularly report on their efforts. Professor Hunter notes that such model briefing policies remain tentative and incomplete.²¹

Queensland women barristers inform me that the policy's widespread adoption has had little impact on the quality and quantity of work they receive. Too often, solicitors' firms pay no more than lip service to the policy, so that they can claim compliance.

¹⁵ "Summary of Responses by Women Barristers and Judicial Officers to BAQ Questionnaire, August 2006", *Bar Association Queensland*, August 2006.

¹⁶ R Hunter and H McKelvie, 'Equality of Opportunity for Women at the Victorian Bar: A Report to the Victorian Bar Council' (1998) *Victorian Bar Council*, Melbourne.

¹⁷ Rosemary Hunter, 'Discrimination Against Women Barristers: Evidence from a Study of Court Appearances and Briefing Practices' 12(1) (2005) *International Journal of the Legal Profession* 5-7.

¹⁸ Schultz, U & Shaw, G (eds), *Women in the World's Legal Professions*, Oxford, Hart Publishing, London, 2003, pp103-121.

¹⁹ Rosemary Hunter, 'Discrimination Against Women Barristers: Evidence from a Study of Court Appearances and Briefing Practices' 12(1) (2005) *International Journal of the Legal Profession* 3.

²⁰ Law Council of Australia, "Model Equal Opportunity Briefing Policy for Female Barristers and Advocates", *Equal Opportunity*, Law Council of Australia, Canberra, 20 March, 2004.

²¹ Rosemary Hunter 'Discrimination Against Women Barristers: Evidence from a Study of Court Appearances and Briefing Practices' 12(1) (2005) *International Journal of the Legal Profession*.

Professor Hunter argues that model briefing policies do not deal directly with homo-sociality (the way in which men network, socialise and feel most comfortable with male peers). She contends that this is a significant contributor to women not being briefed in proportion to their numbers at the Bar, particularly as male solicitors in private law firms remain the greatest source of work for barristers. This, she contends, is the hardest factor to describe and to address. But she is tentatively optimistic: younger male solicitors do not seem to exhibit the same gender biases as their older colleagues.²² Like Professor Hunter, I am optimistic that our young men lawyers will be part of the solution: young male barristers will encourage and support their women colleagues at the Bar and young male solicitors will brief them, thoroughly and often.

The New South Wales government has recently announced a policy considerably more far-reaching than the Equal Opportunity Briefing Policy in an attempt to redress the imbalance of female barristers at the New South Wales Bar where, much as in Queensland, only one in five barristers are women, ranking it as one of the most male-dominated professions in the State. It will encourage all its government agencies to brief equal numbers of male and female barristers.²³ I understand the Queensland government under its first female premier, Anna Bligh, is now also considering this policy.

Solving the problem of low female membership of the Bar is not a woman's issue. Good-hearted, right-thinking men within the legal profession and in the wider community, and there are a lot of them and not all of them are young, want the issue resolved. They want to be part of the solution which they recognise is in the service of justice, not just to women, but to all members of the legal profession and broader community. Ensuring that the Queensland Bar is a place where clever, ethical, hard-working young women lawyers are welcomed and where they apprehend they can enjoy a challenging, exciting and in every sense rewarding life-long career is essential. The solution will be achieved when there are roughly equal numbers of women and men at all levels of seniority at the Queensland Bar.

On this issue, Queensland can learn from Victoria which has undoubtedly led the way in Australia in making women more welcome at the Bar. Perhaps this was because of the early contribution of women like Joan Rosanove, who was admitted to the Bar there in 1923. I was certainly inspired by her biography²⁴ when I was a young lawyer. By contrast, the first woman at the Queensland Bar, Naida Haxton, was not admitted for another 23 years in 1966.²⁵

An even more significant factor behind the Victorian Bar's leadership in providing a female-friendly environment was the Hunter and McKelvie report.²⁶ The report's credibility and effectiveness was enhanced by the support given to it by Justice Stephen Charles, then of the Victorian Court of Appeal. Justice Charles recognised that strong representation of women at the Victorian Bar was important for the strength and credibility of the profession generally and ultimately the community's confidence in it.

A third reason why the Victorian Bar is seen as relatively woman-friendly is the work of the Victorian Women Barristers Association ("WBA"). Last year's WBA activities included support of women in Timor Leste; awareness-raising of the evil trafficking of south-east Asian women and girls into Australian prostitution; forging links with Melbourne women law students; seminars on general CLE and gender issues, especially those affecting women barristers; the oral history project of past convenors and the related e-film; the touring exhibition, "Women Barristers in Victoria, Then and Now"; and the study in partnership with Victoria University of why barristers leave the Bar. The WBA has, over many years, nurtured and supported Victorian women barristers and those women who may consider joining the Victorian Bar.

²² Above 43-44.

²³ Brian Robins, 'Challenge to legal boys' club', *Sydney Morning Herald*, July 9, 2008 <http://www.smh.com.au/articles/2008/07/08/1215282835421.html>.

²⁴ Isabel Carter, *Woman in a Wig: Joan Rosanove QC* (1970).

²⁵ Susan Purdon & Aladin Rahemtula (eds), *A Woman's Place: 100 Years of Queensland Women Lawyers* (2005) 245-246.

²⁶ R Hunter and H McKelvie, 'Equality of Opportunity for Women at the Victorian Bar: A Report to the Victorian Bar Council' (1998) *Victorian Bar Council*.

For those sceptics who still do not comprehend why the Queensland Bar needs to become female friendly, Durham University's Erika Rackley in a recent article²⁷ explains:

*"Did you hear about the Law Faculty who refused a woman's application to become a student because her presence would 'distract the attention of the young men'? Or about the attempt to challenge a planning tribunal's decision on the grounds that the tribunal was pregnant? ... Surely you must have heard about the US law student graduated third in her class and was offered a job in a top US law firm – as a legal secretary? ... Did you hear about the judge, who, on her appointment to the bench, received the traditional honorary membership of the Tattersall's Club, Australia's self-proclaimed premier private members' club, only to find this hastily withdrawn once they realised she was a woman?"*²⁸

Most of Rackley's horror stories have positive endings. She concludes:

*"Remember Belva Lockwood – the student refused entry to the University of Columbia's law faculty because her presence would distract the attention of young men – she went on to become the first woman to be admitted to practise before the US Supreme Court. And the top ranking student offered the job of legal secretary, that was Sandra Day O'Connor, the first female judge to sit on the US Supreme Court. You can't have forgotten about the female judge asked to leave the room after dinner so that her male colleagues could enjoy their port and cigars in peace – that was Brenda Hale, and she refused to go. How about the ... attempt ... to disqualify a ... female judge ... because [she was] pregnant ... well, [it] ... eventually failed ... Finally, remember Tattersall's, the male members-only club who withdraw their invitation to a newly appointed judge on learning her sex ... well, some things never change."*²⁹

Rackley's tales (and most trail-blazing women lawyers have their own as good or better) affirm that the position of women in the legal profession has improved as the proportion of women lawyers and judges has increased. They encourage me in thinking that the present woeful under-representation of women at the Queensland Bar will change.

Society has positively evolved since ancient Athens when women could litigate only through guardians and from medieval Europe's trial by combat. Twenty-first century women advocates will never have the chance to ascertain how they would have fared with their rock in the sack against the likes of David Jackson QC, Walter Sofronoff QC or Bret Walker SC buried waist-deep and armed with a mace!

The equal participation of women in an effective independent legal profession is to the benefit, not only of women and girls, but also of men and boys. A dearth of women barristers diminishes and undermines the effectiveness of the independent legal profession's democratic role so that ultimately it is a community problem. That is why the legislature is so eager to ensure that women play their appropriate role in the third arm of government, the judiciary. That is also why leading male jurists, including Justice Michael McHugh³⁰ and Justice Michael Kirby,³¹ when speaking extra-curially, argue for more to be done to assist women to participate equally at the Bar.

²⁷ Erika Rackley, 'Judicial Diversity, the Woman Judge and Fairy Tale Endings' 27(1) (2007) *Legal Studies* 74-94.

²⁸ Above 77.

²⁹ Above 91-92.

³⁰ The Hon Michael McHugh AC, (Speech delivered at a dinner to mark the occasion of the presentation of Senior Counsel at the High Court, Canberra, January 2005), *provided by Mr Dan O'Connor, Chief Executive, Bar Association of Queensland*, 2005; The Hon Michael McHugh AC, 'Women Justices for the High Court' (Speech delivered at a High Court Dinner hosted by Western Australia Law Society, 27 October 2004).

³¹ The Hon Justice Michael Kirby AC CMG, 'Women in Law - Doldrums or Progress?' (Speech delivered at a Women Lawyers of Western Australia function, Perth, 22 October 2003; The Hon Justice Michael Kirby AC CMG 'Women Lawyers - Making a Difference' (1998) 10 *Australian Feminist Law Journal*, 125; The Hon Justice Michael Kirby AC CMG 'Women in the law - What next?' (2002) 16 *Australian Feminist Law Journal* 148.

Women and men Queensland law students, like Justice Michael Kirby and former Justice Michael McHugh and Stephen Charles, can be part of the solution. I urge you to consider a career at the Queensland Bar. For the diligent and ethical who enjoy legal argument, it is a stimulating and rewarding career. Whether you are a man or a woman, a barrister or solicitor, a legal academic, an in-house corporate lawyer, a community legal service lawyer or a policy-making bureaucrat, you can support and nurture women at the Bar and encourage other women with the requisite skills to join it. When they are equally represented at all levels of seniority at the Queensland Bar and Bench, women will at last be fully contributing to the development of the common law and ensuring access to the rule of law in the service of justice and the good governance of democratic Queensland.



The rule of law questions raised by the case of Dr. Haneef

Stephen Keim SC

This paper was delivered to a seminar of the Queensland chapter of the International Commission of Jurists at the Bar Common Room in Brisbane on 16 April 2008.

The Rule of Law

In my opinion, the leading paper in recent years¹ on the content and nature of the rule of law is the Sixth David Williams Lecture delivered on Thursday, 16 November 2006 for the Centre for Public Law² by the United Kingdom's senior Law Lord, Lord Bingham of Cornhill.

In his speech, Lord Bingham stated the fundamental principle represented by the rule of law and then eight sub-rules which are integral to that principle. I will state them briefly as a backdrop to the events concerning Dr. Haneef.

The core of the rule of law, according to Lord Bingham, is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. The principle was stated pithily by John Locke in 1690 as "Where-ever law ends, tyranny begins"³.

The first sub-rule of Lord Bingham is that the law must be accessible and so far as possible, intelligible, clear and predictable.

The second sub-rule is that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. The broader and more loosely-textured a discretion is, the greater scope for subjectivity and arbitrariness, which is the antithesis of the rule of law. The sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned determination.

The third sub-rule is that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

The fourth sub-rule is that the law must afford adequate protection of human rights. This is where modern rule of law theory departs from Professor Dicey. However, a failure to include a degree of substantive moral content in the concept has the potential to reduce the rule of law to facile legalism. Lord Bingham says:

"A state which savagely repressed or persecuted sections of its people could not ... be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp ... were the subject of detailed laws duly enacted and scrupulously observed."

The minimum level of human rights protection or substantive moral content to amount to the rule of law will remain a matter of some controversy.

¹ Although the recent case of *Corner House Research v Serious Fraud Office (the BAE Systems Case)* found at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/71.html> (downloaded 16 April 2008) is another valuable source of discussion of the rule of law.

² Print and audio copies of the speech may be accessed at http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php (downloaded 16 April 2008).

³ From the *Second Treatise of Government*, section 202.

The fifth sub-rule is that means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

The sixth sub-rule is regarded by Lord Bingham as of fundamental importance. Ministers and public officers at all levels must exercise the powers conferred on them, reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.

The seventh rule is that adjudicative procedures provided by the state should be fair. This sub-rule includes the emphasis on open justice. It includes the need for independent and impartial adjudicators. It includes the disclosure of evidence (including evidence useful to the defence) and includes a meaningful right to be heard.

The final sub-rule is that the state must comply with its obligations in international law, the law which whether deriving from treaty or custom and practice, governs the conduct of nations.⁴

Lord Bingham's speech, of course, expanded on this bare statement of the rule and sub-rules in a way which gave them life which may not have been present in this bare recitation.

Introducing Dr. Haneef

I now turn to discuss the events of the last nearly 10 months in which, according to Mr. Keelty, Dr. Haneef has been the subject of remorseless and unremitting expenditure of resources directed at Dr. Haneef's reputation as a law abiding person.

The secret to all storytelling, whether the novel; legal submissions; or documentary making is the chronology. This chronology of the State's actions against Dr. Haneef has been modified many times as new events have come to my knowledge and to match the interest of various audiences. My experience has been that the chronology, itself, is powerful, dramatically, and I will try to exclude my editorial comment from the narrative. At the end, I will engage in some musings trying to link the story to the principles espoused by Lord Bingham.

The Chronology

On 25 July 2006, Dr. Haneef gave his SIM card to his second cousin, Sabeel Ahmed.⁵ Dr. Haneef was about to leave Britain for his home in Bangalore and had no further use for the card.

On Friday, 29 June 2007, failed attempts were made to bomb two London nightclubs.

On Saturday, 30 June 2007, Sabeel's brother, Kafeel Ahmed, sent his brother access codes to an email. He then drove a Jeep Cherokee into Glasgow airport and, thereby, set himself alight. After being kept alive by life support machines, he passed away on 2 August 2007. Sabeel did not access the email message until some time after the Glasgow attack but, after his arrest, he failed for some time to tell police of the email and its contents.⁶

⁴ The New South Wales Council for Civil Liberties has published a number of documents looking at ways in Australia's law enforcement agencies can be made to comply with Australia's obligations under the *Second Optional Protocol to the International Convention on Civil and Political Rights aiming at the Abolition of the Death Penalty*. The treaty was ratified by Australia in 1990.

⁵ The date is taken from the charge brought against Dr. Haneef.

⁶ David Marr, *Police Ignored Strong Evidence Showing Haneef's Innocence*, SMH, 14 April 2008.

Dr. Haneef was arrested at Brisbane Airport on Monday 2 July 2007.⁷⁸ He was questioned for 50 minutes at the airport from 11.05pm.

Dr. Haneef was taken to AFP headquarters at Wharf Street. After Dr. Haneef waited for over two hours in an interview room at AFP headquarters, he was allowed to sleep and questioned the next day from 11.01 am. He did not want a lawyer present. He freely answered the nearly 12 hours of questions that the two police officers wanted to ask him.⁹

At 10.15am on 3 July 2007, an order was made by Mr. Jim Gordon, magistrate, extending the 4 hour questioning time by 8 hours.¹⁰ At 5.30pm, Mr. Gordon extended the investigation or questioning time by another 12 hours, the maximum allowed under part 1C Crimes Act.¹¹ An order to specify time during which Dr. Haneef could be held without questioning (referred to as “downtime”) in an amount of 48 hours was made by Mr. Gordon at 11.05pm on that same evening, 3 July 2007.¹²

By 3 or 4 July, London time, UK police had accessed Kafeel’s email message.¹³ That message made it adequately clear that Sabeel had no knowledge of his brother’s actions or plans and was not part of any terrorist organisation. That was accepted, last week by Justice Calvert-Smith on Sabeel’s sentence hearing. The AFP has never made this information available to Dr. Haneef’s defence lawyers. The AFP refuses to acknowledge if or when it received this information.¹⁴

On 5 July 2007, two AFP officers arrived in London to work cooperatively with UK authorities in relation to the investigation.

A further order for specified time of 96 hours was made 7.05 pm on Thursday, 5 July 2007. Dr. Haneef’s solicitor, Peter Russo, was present but was excluded from the room while Mr. Gordon read secret information tendered to him by the AFP applicant.¹⁵

I was engaged on Friday, 6 July 2007.

On Monday, 9 July 2007, I appeared on an application for 5 days of downtime. I argued that a failure to provide the basis on which the application was being made was a breach of natural justice implied by s.23CB(6) which provides “the person, or his legal representative, may make representations about the application”. After my submissions, Mr. Gordon adjourned the matter for two days to allow the AFP to obtain legal advice. He made an interim downtime order for two days.¹⁶

⁷ Most of the facts that are not within my own knowledge are taken from an application by Adam Simms pursuant to s.23CA(8)(m) *Crimes Act 1914* (Commonwealth) (“the Crimes Act”) and Statutory Declaration in support also by Mr. Simms, a Special Member of the Australian Federal Police (“the AFP”). These documents were provided to Dr. Haneef’s lawyers on Wednesday, 11 July 2007. The application was tendered to the magistrate hearing the downtime applications, Mr. Jim Gordon, and the Statutory Declaration was made by Mr. Simms before the magistrate at approximately 2.30pm, that same day.

⁸ The arrest was pursuant to s.3W Crimes Act. The alleged offence was pursuant to s.102.7(1) *Criminal Code* (Commonwealth) (“the Code”). The mental elements for this offence included an element that Dr. Haneef **knew** the organisation to which he supplied the SIM card was a terrorist organisation.

⁹ In fact, he declined to answer one question which sought his attitudes to the Iraq and Afghanistan conflicts.

¹⁰ Section 23CA(4) Crimes Act provides for a maximum investigation period of 4 hours. Section 23DA allows for extensions of the investigation period by a judicial officer. The maximum cumulative extension allowed is 20 hours. See sub-section 23DA(7).

¹¹ Subsection 23DA(7) Crimes Act.

¹²¹² Downtime is provided for in s.23CA(8). Many of the heads of downtime require no order. The categories include the time to convey the person to the holding facility (s. 23CA(8)(a)); suspension of questioning to communicate with a lawyer or family (s. 23CA(8)(b)); and so on. Specifying downtime by a judicial officer is provided in section 23CB and referred to in s.23CA(8)(m).

¹³ See David Marr, *Police Ignored Strong Evidence Showing Haneef’s Innocence*, SMH, 14 April 2008. Marr’s source suggests that UK police had accessed the email within 72 hours of Sabeel Ahmed’s arrest.

¹⁴ This information is taken from press reports. As well as Marr’s article (footnote 13 above), see Natalie O’Brien at <http://www.theaustralian.news.com.au/story/0,25197,23552271-2702,00.html>.

¹⁵ This exclusion is documented in an affidavit by Anna Cappellano, read in a subsequent hearing before magistrate Gordon.

¹⁶ The order was unnecessary. Section 23CA(8)(h) has the effect of authorising downtime during the time it takes to decide an application for downtime.

On Wednesday, 11 July 2007, the AFP was represented by Mr. Howe, a Queen's Counsel from Canberra. Dr. Haneef's lawyers were provided with Mr. Simms' Application and Statutory Declaration in support. This material states, inter alia:

"The investigation in Australia and the UK has significantly progressed ... There is a continuing need to collate and analyse information sourced from overseas authorities ... To date, UK authorities have executed multiple warrants with many warrants still progressing ... Relevant evidential material has been, and continues to be, forthcoming from these warrants ... A senior UK officer has arrived in Australia to assist with the investigation ... Two AFP officers were sent to the UK (arriving on 5 July)". (Emphasis added.)

I argued that Mr. Gordon should disqualify himself on the ground of apprehended bias in that he had spent time alone with the applicant in previous applications where Dr. Haneef and his lawyers were not present; when he had sent Mr. Russo out of the room; and when he had heard and granted applications for search warrants. Mr. Gordon adjourned until Friday to consider the matter.

On Friday, 13 July 2007, the AFP withdrew their application for more downtime. Mr. Gordon did not have to decide the application to disqualify himself. That evening, going into the next morning, Dr. Haneef was questioned for another 12 hours using up the balance of the available 24 hours of questioning time.

Early on Saturday, 14 July, Dr. Haneef was charged with an offence pursuant to s.102.7(2) of the Code.¹⁷

On that Saturday, I applied for bail for Dr. Haneef before magistrate, Ms. Jacquie Payne. Pursuant to s.15AA Crimes Act, I needed to show that there were "exceptional circumstances". One of the grounds relied upon to show exceptional circumstances was the weakness of the Crown case. I relied on Mr. Simms' material as indicating the weakness of the case as well as aspects of the submissions by the DPP officers who appeared for the Crown.¹⁸

Unbeknownst to any of Dr. Haneef's lawyers, shortly after the bail application finished, four senior Australian Federal Police officers, David Craig, Frank Prendergast, Ramzi Jabbour and Luke Morrish, discussed the possibility that the bail application might be successful.¹⁹ They came up with a contingency plan. They would get the Minister for Immigration to cancel Dr. Haneef's visa. This would allow them to keep Dr. Haneef in detention. At 5.22pm on Saturday, Mr. Craig was able to report that these "contingencies" were "in place". Mr. Craig does not say to whom in the Minister's office or to whom in the Department of Immigration and Citizenship he spoke, to put the plan in place. On Monday morning, 16 July 2007, at 8.10 am, Mr. Morrish, one of the Australian Federal Police officers, forwarded Mr. Craig's affidavit to Peter White, a high ranking officer in the Department of Immigration and Citizenship. Mr. White would, shortly thereafter, prepare all the documentation which would allow the Minister for Immigration, Mr. Andrews to cancel Dr. Haneef's visa.

¹⁷ The mental element for this offence only involves recklessness as to whether the organisation to which the SIM card was given was a terrorist organisation. This was different to the charge on which Dr. Haneef had been arrested where the mental element was knowledge that it had been a terrorist organisation.

¹⁸ One of those officers, Mr. Porritt, said on the question as to what matters were relied on by the Crown to show that Dr. Haneef was reckless as to whether the persons to whom he gave the SIM card constituted a terrorist organisation, "He lived with these people [since acknowledged to be wrong]; he may have worked with these people; he associated with them."

¹⁹ See <http://www.theaustralian.news.com.au/story/0,25197,22688973-601,00.html> . This page includes the link to the emails discussed (viewed 5 November 2007).

At approximately 11.30am on that Monday, bail was granted by Ms. Payne, subject to sureties amounting to \$10,000. In her decision, Ms. Payne said:

“The case against [Dr. Haneef] as told to me on Saturday, was a SIM card which belonged to [Dr. Haneef] was left in the United Kingdom with his second cousin with whom he was residing. There was no evidence before me the SIM card was used in any terrorist activity.

Further, the SIM card was given to the UK suspect 2 [Sabeel], more than 12 months ago, and, in relation to the element of the offence there have been no submissions to support the element of the offence that the defendant was reckless, other than that he was living with UK suspects 1 and 2 [Kafeel] and he gave the SIM card to UK suspect 2.”

In setting out her reasons for granting bail, Ms. Payne also said:

- “1. The Crown does not allege that the defendant has any direct association with any terrorist organisation and further [concerning] the provision of the resource, the SIM card, the defendant ...was reckless as to whether the organisation was a terrorist organisation.*
- 2. There is no evidence or submission that the SIM card was used or associated with any terrorist attack or activity other than being in a vehicle that was used in a terrorist attack.”²⁰*

Shortly after 1.00 pm, the same day, Mr. Andrews cancelled Dr. Haneef’s work visa, thus executing the arrangements of the AFP officers who had been party to the emails. If Dr. Haneef were to meet his bail sureties, he would immediately be taken into immigration detention.

On the following afternoon, I placed an envelope containing a copy of the transcript of Dr. Haneef’s first interview by the AFP in a taxi which I directed to Mr. Hedley Thomas, journalist for the *Australian* newspaper. On the following day, I acknowledged that I had been the source of the transcript upon which Mr. Thomas had reported.

On Friday, 20 July 2007, ABC journalist, Raphael Epstein, broke a story on ABC news and current affairs programs, that UK police had not found the SIM card in the burning Jeep at Glasgow airport but in Liverpool near where Sabeel Ahmed was arrested. No one from prosecution or AFP sources had corrected Mr. Porritt’s statement in the intervening 6 days.

Ms. Payne had adjourned the criminal proceedings until 31 August 2007 for a committal mention. Dr. Haneef’s lawyers filed an application seeking that the charge be struck out or amended on the basis that it had omitted a crucial element of the offence charged. This application was made returnable on 30 July. The element concerned the allegation that the resources given (the SIM card) would help the organisation to whom it was given (the terrorist organisation) engage in a terrorist act.

The Commonwealth agreed with the need to amend the charge. However, they sought to have it put off to until the committal mention date at the end of August. Dr. Haneef’s lawyers insisted that the matter be dealt with on the proposed mention day, 27 July 2007.

²⁰

Mr. Porritt had told the Court in response to a direct question from the magistrate that the SIM card was found in the burning Jeep at Glasgow airport. That statement was not corrected even though there was a later hearing on the Saturday (the magistrate wanted assistance as to cases on “exceptional circumstances). There was no attempt to correct the statement when the Court reconvened on Monday, 18 July 2007.

As it turned out, on Friday, 27 July 2007, both Mr. Macsporrán SC, who appeared on the mention for the Crown, and Mr. Bugg, the Commonwealth Director of Prosecutions, announced that the charge would be discontinued.²¹ Magistrate, Ms. Wendy Cull, struck the charge out. Mr. Bugg announced that he had considered the evidence held by the Crown as well as evidence likely to be obtained from investigations still being carried out in considering whether there was any prospect that a conviction would be obtained. The prosecution had collapsed.

On Tuesday, 31 July 2007, Mr. Andrews released an extract from a chat room conversation of 2 July between Dr. Haneef and his younger brother. The extract was singularly selective.²² Mr. Andrews suggested that the conversation supported his decision to cancel the visa.²³

On Wednesday and Thursday, 8 and 9 August 2007, Geoffrey Spender J. heard a case seeking to set aside the decision of Mr. Andrews cancelling the visa.

On 21 August, Spender J. set aside the cancellation of the visa but stayed his own order to allow his decision to be appealed.²⁴

The Full Federal Court²⁵ heard the appeal on 15 and 16 November 2007. On 21 December 2007, they upheld Spender J.'s decision. They found that Mr. Andrews had acted on a misapprehension of the proper construction of the character provisions in s.501 *Migration Act 1958* (Commonwealth).

On the day the decision was handed down, new Minister, Chris Evans, announced that he had considered an up to date brief from the AFP and that he would not cancel Dr. Haneef's visa.²⁶

On 16 January 2008, Chris Evans announced that he would not seek special leave to appeal the decision of the Full Federal Court.

Observations

The whole of the circumstances involving Dr. Haneef's treatment are to be inquired into by Mr. Clarke QC, a retired judge of the New South Wales Supreme Court. Accordingly, since I may be involved in that process, I cannot express definitive opinions about matters which may be the subject of that inquiry. However, I will outline matters which may conflict with the rule of law principles outlined by Lord Bingham.²⁷

The detention provisions in part 1C of the *Crimes Act* raise a number of rule of law questions. The way in which these proceedings were conducted raise further questions.

The issue of detention without trial is controversial. Although such provisions existed in the Crimes Act since 1991, they had not previously been used. One may ask what was extraordinary about what was alleged against Dr. Haneef to make use of such proceedings appropriate. It raises questions about the use of discretion to

²¹ See <http://www.news.com.au/heraldsun/story/0,21985,22143907-661,00.html>. Mr. Bugg had announced, some days earlier, that he was conducting a full review of the case.

²² A police translation of that chat room conversation is available in the record of Dr. Haneef's second interview with police.

²³ See <http://www.abc.net.au/news/stories/2007/07/31/1993348.htm>.

²⁴ See <http://www.austlii.edu.au/au/cases/cth/FCA/2007/1273.html>.

²⁵ Consisting of Black CJ, French and Weinberg JJ. See <http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/203.html>.

²⁶ <http://www.abc.net.au/news/stories/2007/12/21/2125622.htm>.

²⁷ There are fundamental questions about the nature of our anti-terrorist laws which were obvious well before Dr. Haneef was arrested. I do not intend to address those broader questions. For discussion of the broader questions, see Andrew Lynch, Edwina MacDonald and George Williams, editors: *Law and Liberty in the War on Terror*, The Federation Press, 2007 and *Watching Brief: Reflections on Human Rights, Law and Justice* by Julian Burnside, Scribe Publications, 2007.

allocate rights in the criminal justice process.²⁸ It raises questions about the minimal human rights content of the law relating to criminal investigation.²⁹

The making of orders was until 13 July carried out on the basis of information not provided to the detainee or (when he had them) his lawyers. The information was only provided reluctantly and at the assistance of Dr. Haneef's lawyers. This raises questions about the fair and impartial conduct of proceedings which took away Dr. Haneef's liberties and had an adverse impact on his reputation.³⁰

The contact between the magistrate making the orders and the investigating police in private raised questions about impartiality and independence of the process. Those questions got to be argued but were not decided when the application was withdrawn.³¹

The conduct of the hearings in a non-open court situation raised questions about the openness of justice.³² The legislation does not proscribe open hearings but the parties to the hearing felt constrained even about even telling journalists who the magistrate hearing the applications was and the press felt constrained about publishing that information.

The recent revelations about the Jihad email and its implications for the position of Sabeel Ahmed raise questions about the bona fide of the police investigation. The failure of the investigators ever to pass this information on to Dr. Haneef's lawyers or to the public raises questions about the respect given to disclosure obligations and fair and open justice.³³

The attitude of police and prosecutors to a fair and impartial justice system has also been raised by the incident of the misleading SIM card information. Prosecutor, Clive Porritt, probably, by accident, told the Court that the SIM card was found in the burning jeep in Glasgow. That was wrong. Dr. Haneef and his lawyers had no idea where the SIM card was found. It seems that many people in the AFP would have known that the SIM card was found in Liverpool when Sabeel Ahmed was arrested. However, no one, prosecutor or police officer, bothered to tell the court or the public that this information was wrong until on 20 July 2007, when ABC journalist, Raphael Epstein, using UK sources, broke the truth of the matter. No one has explained why the courts and the public were misled for 6 days or how long this might have continued. This raises real questions about the principle that the courts be impartial and that they be places where the procedure and system is fair. A keystone of a fair court system is that the prosecutors; the police; and all lawyers who appear before the courts must never mislead the court as to factual matters or matters of law. Any failure by authorities to comply with this obligation raises real questions for the rule of law.³⁴

The dropping of the criminal charge against Dr. Haneef by DPP, Mr. Bugg, suggests that the criminal case was always weak. Subsequent information about the Jihad email strengthens that impression. It is to be remembered that Dr. Haneef gave very full answers in both his interviews. This weakness of the case raises a lot of questions about the decision making which resulted in continued detention of Dr. Haneef and, after two weeks of detention, the charging of Dr. Haneef. Was this decision making being made professionally by considering relevant material and without extrinsic factors being given weight? If this did not occur, any failure goes to the heart of the criminal law being an example of the application of the rule of law.³⁵

²⁸ The second sub-rule.

²⁹ The fourth sub-rule.

³⁰ The seventh sub-rule.

³¹ Again, the seventh sub-rule.

³² Open administration of justice is mentioned in Lord Bingham's primary statement of the rule.

³³ The primary statement of the rule of law and the seventh sub-rule are two aspects of the rule of law raised by these factors.

³⁴ The seventh sub-rule in particular.

³⁵ The sixth and seventh sub-rules.

There has been a perception in the community that the discretions under Migration Act to deport people on character grounds are broad and impartial. There is a perception that Mr. Andrews, although he has always denied this, may have exercised his discretion for reasons associated with politics and not the merits of Dr. Haneef's character. The doubt about this issue is strengthened by the fact that Mr. Evans, presumably on very similar information, from the same source, came to a completely opposite conclusion. Mr. Keelty has contributed to this impression by his statement that he always considered the criminal case against Dr. Haneef was weak and had told prosecution authorities of these doubts.³⁶ These matters raise the element of the rule of law that requires discretions to be exercised transparently and only for the purpose for which they were granted.³⁷

Conclusion

Time (both in delivery and preparation) has allowed a consideration of only some of the questions raised by Dr. Haneef's treatment. However, this very incomplete analysis does indicate that many questions going to the principles expressed by Lord Bingham are raised by the treatment of Dr. Haneef by Australian institutions.

Hopefully, Mr. Clarke's inquiry will elucidate a lot of the factual matters in due course. The normative questions which arise may be debated for a long time into the future.



³⁶ See <http://www.austlii.edu.au/au/cases/cth/FCA/2007/1273.html>. The statement was made in an interview published in the now defunct *Bulletin* magazine.

³⁷ See the second and sixth sub-rules.

At the coalface: A life in community law

Aaron Rathmell

Elizabeth Morley is the Principal Solicitor at Redfern Legal Centre. She speaks to Aaron Rathmell about her life and experience in the community legal sector, discussing her early days as a progressive lawyer, volunteering, current funding issues and the involvement of large commercial firms in pro bono work. Aaron's annotations appear in italics.

"I was at university in the 1970's during demonstrations around the Vietnam War. At the same time, prison reform was an issue. There was also a lot of discussion about things like victimless crime and the obscenity laws.¹ There was a lot of questioning of the way people had always done things. Although, I was not what you would describe as a 'student radical'. I came from a family that voted conservatively and viewed the world fairly conservatively."

The energy of the Vietnam moratorium marches in May 1970 invigorated a range of social change movements in Cold War Australia and. After the election of the Whitlam Labor government in 1972, a "reformist mood permeated all walks of life".²

"By the end of the time I was at university, I was doing some work for the Council of Civil Liberties on a voluntary basis in relation to the Nagle Royal Commission."

The NSW Council for Civil Liberties (CCL), established in 1963 to promote individuals' rights to privacy, freedom of expression and freedom of association, made submissions to the Nagle Royal Commission into NSW Prisons, in particular Katingal Special Security Prison at Malabar, where prisoners were isolated from natural light, air and human contact. Nagle recommended Katingal be closed, and it was, in 1978.

"Nevertheless, I still saw my legal career fairly conservatively: as going into a normal firm and working as an ordinary solicitor, wherever that might take me. Initially, I entered private practice. To some extent it was a case of my career being shaped by the job I got rather than the career being chosen by me. I was placed in the job I got because I looked like the staff partner's wife. That was fine, but my clients were largely insurance companies and the firm had a fairly rampant and exploding workers compensation section for insurance companies. Rather than being persuaded to the client's point of view, I found working on that side of the fence only revealed to me aspects of that side of the fence I didn't like. There were at least a couple of cases that I think were fairly illuminating for me."

Elizabeth maintained her interest in progressive causes while working in the corporate sector.

"I was involved with the Women's Lawyers Association and had been an office bearer at one stage. In that role I became aware of meetings being held in relation to establishing a women's legal centre. A public meeting was held where seventy women lawyers or so attended. There was a discussion about what role there might be for such a legal centre. The debate turned around whether it should be an advice and casework service or instead a resources service that addressed the systemic issues, and the debate there between a charitable model of service delivery and a rights-based model of service.³ This had picked up a bit on issues that had been raised in jurisprudence courses.

¹ Under the 'obscenity laws', film and book censorship decisions were made on an ad hoc basis by government officials and judges acting alone. This has been replaced by the modern system of community-driven ratings classifications.

² See J Basten, R Graycar & D Neal, 'Legal Centres in Australia', (1983) 6 *UNSW Law Journal* 163.

³ Basten et al, above n 2, p 171. The authors distinguish between a model which combines casework with law reform and community education initiatives, and a purely casework model, described as a "'band-aid' casework approach".

It was clear that the core people who were driving the women's legal centre were in favour of the resource model, seeing the connection between structural issues, feminism and rights. We worked to develop a proposal to the Legal Aid Commissioner, which eventually became the Women's Legal Service. This is the late 1970's. There was no money for even stationery, so we did things like held a dance. It was at that grass roots level that many of the legal centres were operating still. The ones that existed – Redfern, Marrickville, really very few – existed on borrowed services, dingy back rooms and scrounged equipment.”

The Redfern Legal Centre (RLC) was the first of its kind in NSW, founded in 1977 by lawyers, academics and student volunteers (with strong ties to the University of New South Wales). The Marrickville Legal Centre followed in 1979. Both centres sought to redress the injustice caused by a lack of access to affordable legal services for disadvantaged people. Both were part of a legal centres “movement” in Australia, which developed “as a working critique of the relationship between the legal system and the poor in the early 1970s”.⁴ They continue to thrive on a mix of federal and state funds as well as private sector donations, offering advice regarding, inter alia, domestic violence (including a court support service), credit and debt, consumer complaints and tenancy.⁵ The NSW Women's Legal Service was eventually established in 1982. It pursues access to justice and empowerment for disadvantaged women through a casework service, law reform campaigns and community legal education.

“I had been working for a couple of years by that stage, had finished my articles and been admitted. I was increasingly disenchanted working for a large firm in the city. I planned to go overseas and do the standard new graduate thing: work for two years, take some time off to travel, and I enrolled to learn Italian in Italy. Then an opportunity came up to do a locum at Minters before I left, so I did that. It was very interesting to see the cultural difference between firms, but I was still working for insurance companies.”

“When I went overseas I knew I wanted to move towards the community legal sector or alternate law in some way. I also knew it was a difficult decision to go straight from corporate to community, because one's image does get tied up with the expectations of where you work and how people see you and react. Some go into the commercial law world and become, not seduced, but, dependant on the income. I knew it was going to take me out of my comfort zone and so part of the reason for taking time overseas and travelling was to break that totally. As it was, it took me three years to get back. I never did get to my Italian in Italy but I did a whole lot of other things.”

“When I came back, I got a job as a casework solicitor at Marrickville Legal Centre. For me, that job was the marriage of my philosophical and political position, a professional position and also, if you like, a strand in my life that was creative – a performing arts type of interest. It brought all the strands of my life together. I was able to produce something of use: to make people's lives better. It was so exciting. I threw myself into it with huge enthusiasm for the causes, the structural issues, law reform issues that arose from practice, the actual client issues that arose and the support for the volunteers at the Centre. All those things were absolutely fascinating. To this day, I think it was all incredibly valuable and that's why I chose to work where I'm working.”

“My other passion in life was boating and sailing and when the Sydney Peace Squadron came along, that was another very strong area where I could marry two strands of my passions: a view as to what was right and something that was creative – direct action on the harbour.”

⁴ On the political and social foundations of the community legal centres movement in Australia, beginning with the Fitzroy Legal Centre in Melbourne in 1972, see Basten et al, above, n 2. The authors conclude that “the genesis and role of legal centres cannot be fully understood unless seen as part of the outburst of social action groups which came about in the late 1960s and early 1970s ... outside the framework of political parties and the established welfare system”, p 185. Their description of the structure and service delivery method of community legal centres remains generally accurate.

⁵ See casework statistics in Redfern Legal Centre, ‘Annual Report 2006-07’, available at <http://www.rlc.org.au/about/annualreports.html>, last accessed 20 May 2007, p 15.

The Sydney Peace Squadron was founded in the 1980's by anti-nuclear activists – some of whom are prominent in government and academia today. They confronted a US Nuclear warship on Sydney harbour in 1986 by forming a flotilla of sailboats and surfboards. After taking time off for the anti-nuclear activities in the late 1980's, Elizabeth sought a change of career and life-style through part-time involvement in community law, which heralded new opportunities.

"I was the community representative on a number of industry and government councils for most of the 1990's, including Telstra's Consumer Consultative Council, which I was chairperson of for some years. Subsequently I was involved with the Telecommunications Industry Ombudsman. I was on the Gas Council regulating the NSW gas industry, on the board of the Sydney Market Authority, on the council of the Financial Services Complaints Resolution Scheme, on the Licence Compliance Board for the regulation of electricity retailers and distributors in NSW, on the Property Services Council which regulated real estate agents and conveyancers and a number of other bits and pieces during that time. I was quite involved in the debates around National Competition Policy reform and the introduction of competition into a number of our utilities."

Around the same time, Elizabeth became a parent.

"Towards the end of the 1990's, the needs of my child – who has a disability – and my need for a more dependable income stream and regular hours meant I needed a change. I also took the view that the reason I had been on the boards and committees was because of my experience at the coalface of what people experience. That had been the reason I'd actually had something relevant to contribute. How could I continue to claim that relevance if I didn't go back to work with that group and renew that experience and relevance?"

"So I began to look at community legal centre jobs and when one came up with the Disability Discrimination Legal Centre, I took that. That was an incredibly rewarding and interesting experience in terms of where I was personally in life, with my child. On a very practical level, this made me reassess assumptions about normalcy every time I spoke to someone about their situation. It made me reassess why things are done the way they are, whether they have to be done that way and whether there is a way things can be structured to be more inclusive and accessible. That's very valuable experience. It's not just intellectual, not just emotional, not just political, but fundamental. It was also very testing because it's a state-wide service with very limited resources and large demand, strung between trying to operate at the high policy level and giving people advice and support."

The NSW Disability Discrimination Legal Centre (DDLC) was established in 1994 to assist people with disabilities understand their disability discrimination rights and access justice. Like other 'community' sector law services, the Centre also performs an activist function, promoting law reform and raising awareness of discriminatory public attitudes and practices.⁶ After four years with the DDLC, Elizabeth moved into the role of Principal Solicitor at Redfern Legal Centre in 2003, where the problem of limited resources was also pressing.

"One of the core funding problems is that, more and more, funding is for particular projects. Yet, if you are going to deliver services to disadvantaged communities, there has got to be a commitment to the ongoing provision of services. Otherwise all you do is identify problems, raise expectations and do nothing to address them.⁷ I think there needs to be much more commitment to the ongoing provision of core funding. The Legal Aid Commission funding at state and federal levels has been fairly predictable, but we rarely get a full offsetting of inflation. It's always a problem."

⁶ The DDLC is a specialist legal centre, rather than a community legal centre in the sense of being tied to a particular geographical community. Nonetheless, it and others like it, for instance, the Consumer Credit Legal Centre and the Public Interest Advocacy Centre, are still considered as part of the community legal centre tradition, thriving on and fostering community participation. They are also members of the Combined Community Legal Centres Group, New South Wales.

⁷ Project-based funding also raises questions about the independence of legal centres from governments, who may be reluctant to fund a proposal that involves investigation into, and criticism of, government performance on a particular issue.

There have also been efforts by some government departments to tie legal centre funding to productivity measures, which sometimes have a curious application in the community sector.

“What we’re talking about is face-to-face delivery with humans who are disadvantaged. There are very few productivity gains you can make in that, in people on the ground talking to other people. So to think that you can in some way do more with less is having yourself on.⁸ And the nature of our clients is such that putting information on the web site isn’t necessarily helpful. Some of our clients don’t have the hardware or the software or even the literacy skills. Also, a telephone advice service is not adequate. It doesn’t make up for the fact that they need someone to tell them to, for instance, write a letter of demand, and to help them write that letter of demand. You really need people on the ground.”

In addition to Law Society and NSW Bar pro bono referral schemes, large commercial firms are increasingly offering to share the community sector’s caseload, taking on cases pro bono through a designated firm-community liaison officer or even ‘pro bono partner’. However, there are difficulties placing some of the most needy clients with firms, especially those with disabilities and mental health issues.

“In a great majority of our cases, disability is an operative factor. I’m speaking in terms of disability generally, not just mental illness. Disability operates in creating the marginalisation of the client in the past which has helped create whatever problem has arisen, has put them in a position of poverty, has impacted on their ability to negotiate, achieve, resolve and deal with whatever the issue is. That disability may then act as a barrier to them accessing the justice system or advice services within the justice system.”

“Mental illness is also, for a lot of our clients, a very real and significant factor. As to the percentage, I don’t know. A lot of our clients would not identify themselves as having a mental illness. We may guess at it, but there is no diagnosis and there is no self-awareness from the client. Certainly a lot of them are at some level of stress, frustration and depression by the time they get to us.”⁹

“It’s much easier to place a client for big firm pro bono assistance who doesn’t have communication difficulties or a mental illness. It’s easier to place someone who is easy to communicate with, who keeps appointments.”

“A lot of the corporate funding that’s around – which the government is relying on for the future delivery of welfare services – is generally geared towards involving the people of the firm in delivery.¹⁰ They are looking for things that their staff can feel good about. They’re looking for something their staff can be engaged with. It’s not necessarily dollar funding, and there is nothing wrong with that. But for us, it’s an ongoing issue of predictable delivery of a service that is going to be there and that is reliable.”

“There is also an issue around the concept of the ‘deserving poor.’ But what we are trying to deliver is a rights based service that is delivered without us making judgments about whether these people are deserving or not. For us, it’s about all individuals’ rights to participate in the community and for their issues to be put fairly on the table, for them to be treated with dignity even though they might not fit someone’s image of the deserving poor. It’s not for us to make that call.”

⁸ For a critique of the approach of Coalition Commonwealth governments to funding after 1996, see M Rix, ‘Community Legal Centres and Pro Bono Work: For the Public Good?’, (2003) 28(5) *Alternative Law Journal* 238. The author argues the Commonwealth has attempted to “manage CLC’s as government agencies”, p 240. Notwithstanding this, and centres’ heavy reliance on government funding, they continue to “strongly and successfully assert their autonomy and independence of government”, p 241. See also M Noone, ‘Mid-Life Crisis: Australian Community Legal Centres’, (1997) 22(1) *Alternative Law Journal* 25; J Jukes & P Spencer, ‘Buying and Selling Justice: The Future of CLCs’, (1998) 73 *Reform* 5; and more recently L Schetzer, ‘Community Legal Centres: Resilience and Diversity in the Face of a Changing Policy Environment’, (2006) 31(3) *Alternative Law Journal* 159.

⁹ Only 20% of clients, however, formally identify themselves as having a disability: see ‘Selected Client and Service Statistics’ in Redfern Legal Centre, above n 5, p 15.

¹⁰ Reliance by community legal centres on funding from establishment law firms may sit uneasily with their genesis as ‘outsiders’ to the legal profession and as community-driven activists; and yet such funding can be immensely valuable.

Predictability of funding is fundamental when the demand for free – or at least affordable – legal advice seems insatiable. Inevitably, when funds from government and the private sector dry up, community legal centres have to turn people away.

“One of the downsides of community practice is you have to say ‘no’ as often as you do, for a couple of reasons. First, you have to say no because you don’t have enough people, enough staff hours to deliver. The service can’t be exhausted by the first people who contact it.”

“Second, some people often don’t have a legal remedy. You can live with that on the basis that you can still give your client resources and some power just by talking through with them – why and how – and by telling them the name of their local member of parliament.¹¹ It can provide closure sometimes because they’ve done everything they can to try to resolve the matter and they don’t have to keep beating their head against a brick wall. Even just treating the client with dignity and understanding can give the client a better feeling about their inclusion in the process, even if you have to say ‘no, you don’t have a remedy.’ There are professional ethics and responsibilities that come into that equation as well.”¹²

“One of the risks that community legal workers run is thinking that, no matter how tired and exhausted they are, their situation is still better than their clients’, so they can take on one more case. You can’t do that. You do have to have clear limits and boundaries about what you are going to do and you have to have plans. But saying no to someone who is getting pretty desperate about his or her situation, whatever it is, does take a toll on you.”

In this respect, Elizabeth says the student volunteer service is invaluable. In 2006-07, RLC alone benefited from around 33,000 hours of volunteer service, with some 230 volunteers on the books at any one time.¹³ These volunteers help share the load of listening to what are often traumatic experiences and coming up with ways of helping the client to move forward.

“If our core staff had to take it all, they wouldn’t last – there is too much vicarious trauma. So while the volunteers might wonder sometimes how productive they are, there is evidence around which says that, when delivering legal services in a human rights way, the way people experience the service is one of the biggest outcomes for the client. Merely listening and responding to the client, with patience and understanding, with the willingness to make it accessible and to make the advice and support accessible, is itself a huge achievement. Volunteers, by sharing that load across many people, make a huge, huge, huge contribution, let alone by assisting with their actual legal knowledge and skills. I think our volunteers do a good job, provided we put in place the right culture and support for them. The reason they volunteer is because they’ve got the commitment to deliver.”

¹¹ On the role of community legal centres in promoting inclusiveness and realising equality before the law and “legal citizenship”, see M Rix and S Burrows, ‘The Foundations of Legal Citizenship: Community law, Access to Justice and the Community Legal Sector’, (2005) 30(3) *Alternative Law Journal* 126.

¹² For instance, s 347 of the *Legal Profession Act 2004* (NSW) in relation to restrictions on commencing proceedings without reasonable prospects of success. Community legal centres are defined in that Act by s 240 and made subject to legal professional rules by s 241.

¹³ Redfern Legal Centre, above n 5, p 8. The number of active volunteers recorded nearly doubled from the previous financial year.

In addition to her burgeoning client caseload, Elizabeth performs a managerial and supervisory function, overseeing the RLC's ethical and professional responsibilities, structure and budget. The diversity of her earlier work experiences has proven an important asset.

"I think people should get some life experience and some professional experience before they settle into anything, but I wouldn't be categorical about what's the best experience for an individual. It may be of benefit if you worked in a litigation firm where you become familiar with court processes and procedures. That can bring some benefits to a community legal centre. On the other hand, there are things that the corporate sector doesn't teach, like the ability to talk to one of our clients, the ability to see how an argument over a hundred dollars can be of 'make or break' significance for a client, to see where the structural issues lie and why they are in need of reform."





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A Charter of Rights for Australia

Professor George Williams*

Over recent years Australia has locked up children in conditions that have caused many of them to become mentally ill. It seems unthinkable that this could have occurred, yet it has. The problem was the law, which said that the detention of people seeking asylum in Australia was mandatory. That law was applied without exception, even to unaccompanied children who were already suffering trauma.

One of these children was five-year-old Shayan, who arrived in Australia in March 2000.¹ Along with other members of his family he was taken to the Woomera detention centre, a facility ringed by desert in South Australia. While in detention, Shayan witnessed hunger strikes and riots, saw authorities responding with tear gas and water cannons, and watched as adult detainees harmed themselves. By December that year, the detention centre's medical records reveal that Shayan was experiencing nightmares, sleep disturbance, bed wetting and anxiety. He would wake in the night, gripping his chest and saying, 'They are going to kill us.' He also drew pictures of fences containing himself and his family.

Three times during that year the detention centre managers strongly recommended to the government that Shayan be moved from Woomera. Despite further recommendations and psychological assessments reporting high levels of anxiety and distress, it was several months before he and his family were moved to Villawood detention centre in Sydney.

At this time, Shayan was diagnosed with post-traumatic stress disorder. During the next few months he was admitted to hospital eight times for acute trauma and, because he refused to drink, dehydration. He also became more withdrawn. Medical staff consistently recommended that he should be removed from detention and drew a direct link between Shayan's trauma and his experiences in detention. It wasn't until August 2001 that the government transferred him into foster care. He was separated from his parents and sister until they were released in January 2002.

Shayan was one child among many. The statistics make for grim reading. According to the Human Rights and Equal Opportunity Commission, the number of children in immigration detention peaked at 1923 in 2000–01.² Some of these children had arrived in Australia unaccompanied by family members or friends. Between 1 January 1999 and 20 June 2002, for example, 285 unaccompanied children arrived in Australia seeking asylum; all of them were detained.³ By the end of 2003, a child placed in detention was kept there for an average of one year, eight months and 11 days.⁴ Some children were detained for more than three years.⁵ Most of the detained children were found to be refugees and so were eventually released into the community: over the four year period from July 1999 during which most of them arrived, 92 per cent of the 2184 detained children were found to be refugees.⁶

The detention of children like Shayan was first made possible by amendments made to the *Migration Act 1958* (Cth) in 1992 during the time of the Keating government. The change provided for the mandatory detention

* Anthony Mason Professor, University of New South Wales. This article was developed from A Charter of Rights for Australia (UNSW Press, 2007).

1 Shayan's story is set out in Human Rights and Equal Opportunity Commission, A Last Resort? National Inquiry into Children in Immigration Detention (2004) 343-348.

2 Ibid 61.

3 Ibid 697.

4 Ibid 68.

5 Ibid 70.

6 Ibid 61, 66.

7 Migration Amendment Act 1992 (Cth).

of asylum seekers. In other nations, it would have been counter-balanced by another law, called by names such as a bill of rights, charter of rights or human rights act, setting out and protecting people's fundamental human rights. In Shayan's case, this might have included the rights of children and more general rights such as freedom from arbitrary detention. By contrast, the Australian immigration law was unchecked. In fact, when it was challenged in the courts it was held to be legally unobjectionable.

The High Court of Australia ruled on the detention of children in 2004 in *Re Woolley; Ex parte Applicants M276/2003*.⁸ The case involved four children of Afghani nationality, aged fifteen, thirteen, eleven and seven, whose parents had brought them to Australia in 2001. Held in the Baxter detention centre near Port Augusta in South Australia, they sought a court order for their release, arguing that the mandatory detention regime in the *Migration Act* did not apply to children.

This argument was unanimously rejected by the court on the basis that the Act was expressed in clear terms, with no exceptions made for children. According to Chief Justice Murray Gleeson: 'It is hardly likely that Parliament overlooked the fact that some of the persons covered ... would be children. Human reproduction, and the existence of families, cannot have escaped notice.'⁹ It was also argued on behalf of the children that the law breached the Australian constitution. This too was unanimously rejected on the basis that the constitution did not guarantee their freedom from involuntary detention.

That decision permitted the detention of children. A further case that year, *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,¹⁰ went further, finding that detention remains lawful even where the conditions are harsh or inhumane. A final High Court decision in 2004, *Al-Kateb v Godwin*,¹¹ added that the detention could be indefinite. Ahmed Al-Kateb arrived in Australia by boat in December 2000 without a passport or visa. Taken into detention under the Migration Act, he sought refugee status but was refused. In June 2002, Al-Kateb indicated that he wanted to leave Australia for 'Kuwait, and if you cannot please send me to Gaza.'¹² In August he stated, 'I wish voluntarily to depart Australia, and ask the minister to remove me from Australia as soon as reasonably practicable.'¹³

Al-Kateb was born in Kuwait in 1976 of parents of Palestinian origin. Simply being born in Kuwait did not confer Kuwaiti citizenship, and the absence of a Palestinian nation left him 'stateless' – that is, a citizen of no nation. The Commonwealth sought unsuccessfully to remove him to Egypt, Jordan, Kuwait and Syria as well as to Palestinian territories (which required the cooperation of Israel).

Faced with this stalemate and no foreseeable end to his detention, Al-Kateb applied to the courts for his release. In nations like the United Kingdom¹⁴ and the United States,¹⁵ judges have found that the law does not permit indefinite detention. But the Australian High Court found by four to three that the Migration Act and the Constitution permit unlimited detention. It was decided that Al-Kateb could be held in detention until his removal from Australia, which in turn depended on an independent state of Palestine coming into existence or some other nation agreeing to receive him.

One of the majority judges, Justice Michael McHugh, conceded that Al-Kateb's situation was 'tragic.'¹⁶ He also noted that 'Eminent lawyers who have studied the question firmly believe that the Australian Constitution

8 (2004) 225 CLR 1.

9 Ibid 8-9.

10 (2004) 219 CLR 486.

11 (2004) 219 CLR 562.

12 Ibid 602.

13 Ibid 602.

14 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704.

15 *Zadvydas v Davis* (2001) 533 US 678.

16 (2004) 219 CLR 562 at 581.

should contain a Bill of Rights.’¹⁷ But in the absence of such a law he found that ‘the justice or wisdom of the course taken by the parliament is not examinable in this or any other domestic court’ since ‘it is not for courts... to determine whether the course taken by Parliament is unjust or contrary to basic human rights.’¹⁸ With these words, McHugh spelt out what it means for Australia not to have a charter or bill of rights. Without this instrument, there may be no check on laws that violate even the most basic of human rights.

It took a damning report in 2004 from the Human Rights and Equal Opportunity Commission,¹⁹ community pressure and dissent within the Howard government’s own ranks before, in 2005, the Australian government decided to stop detaining children in inhumane conditions. Even then, the government tried to return children to detention in 2006 with a proposed law²⁰ that would have sent all unauthorised people arriving by sea to offshore detention centres. The government only withdrew the proposal when faced with pressure from its own members and the wider community.

The 2004 Human Rights and Equal Opportunity Commission report found that the government had failed to adequately protect and provide for children in areas such as their physical safety, mental and physical health and education. Children detainees were found to be suffering clinical depression, post-traumatic stress and anxiety disorders, among other conditions, and exhibited symptoms including bed wetting, sleep walking and night terrors. Some children even became mute, refused to eat and drink, attempted suicide and physically harmed themselves. In a 2003 study, nineteen out of 20 children were diagnosed with a major depressive disorder and half were diagnosed with post-traumatic stress disorder.²¹

This is just one illustration of how Australia’s human rights record has major blemishes when it comes to protecting vulnerable people – Indigenous peoples, the homeless and people with a mental illness, for example – from harm. These problems exist despite the fact that the fundamental rights of humankind have been set down in a written document, the Universal Declaration of Human Rights, adopted soon after the Second World War by the members of the newly formed United Nations. After recognising in a preamble the ‘inherent dignity and... the equal and inalienable rights of all members of the human family,’ the declaration sets out our basic rights as ‘a common standard of achievement for all peoples and all nations.’ These rights are described in a straightforward way and include:

3. Everyone has the right to life, liberty and security of person.

5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. 9. No one shall be subjected to arbitrary arrest, detention or exile.

19. Everyone has the right to freedom of opinion and expression.

Like the *Magna Carta of 1215* – the ‘great charter’ whereby King John and later English monarchs agreed to limits on their authority – the Universal Declaration of Human Rights has a symbolic power that exceeds its legal effect. While the declaration now forms part of customary international law and is seen as binding on all nations, it cannot be enforced in Australian courts. But this does not detract from its cultural and political importance. The declaration is invoked throughout the world (the UN website has over 300 translations of the document²²) and is often a rallying point for those who have been denied their basic freedoms.

Since the Universal Declaration was adopted, many other treaties and conventions have set out in more detail the basic rights of all people. Two of the most important are the International Covenant on Civil and Political

¹⁷ Ibid 594.

¹⁸ Ibid 595.

¹⁹ Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

²⁰ Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

²¹ Ibid 392.

²² <<http://www.unhchr.ch/udhr/index.htm>> at 23 May 2008.

Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966. Together with the Universal Declaration, they are often referred to as the 'international bill of rights.' Both covenants entered into force internationally in 1976 and were ratified for Australia by the Fraser government.

When Australia ratified these covenants we agreed to make them part of our domestic law. While laws have been passed in a few areas such as freedom from discrimination on the basis of race, neither covenant has been enacted in full by federal parliament, which leaves Australia in breach of international law. While the covenants have not been implemented federally, the International Covenant on Civil and Political Rights forms part of the law of two parts of Australia, the Australian Capital Territory with its Human Rights Act 2004 and Victoria with its Charter of Human Rights and Responsibilities Act 2006.

Before the Universal Declaration was adopted, few nations possessed a charter of rights. The United States was the most important exception. Its constitution was adopted in 1789 and a bill of rights containing civil and political rights was added – in the form of the first ten amendments – in 1791. The most famous of these, the First Amendment, states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Other amendments set out rights that have been popularised through television, such as the Fifth Amendment ('taking the fifth') that no person 'shall be compelled in any criminal case to be a witness against himself.' On the other hand, the US Bill of Rights is also a creature of its time and the Second Amendment states: 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'

Since the Second World War, other nations have adopted new constitutions or changed their existing legal systems to bring about a charter or bill of rights. Some, such as the Bill of Rights in South Africa's 1997 constitution, cover economic, social and cultural rights, including rights of access to adequate housing, health care services and sufficient food and water. Section 39 of the constitution states: 'When interpreting the Bill of Rights, a court... must consider international law and may consider foreign law.' This reflects the heavy reliance placed by the drafters of the South African Bill of Rights on international conventions, as well as their belief that extensive borrowing from international and other national sources would speed up acceptance of and faith in the new post-apartheid regime.

More than a half century after the Universal Declaration was adopted; all but a few nations possess some form of charter of rights. Even the United Kingdom, from which our own legal system is derived, now has the *Human Rights Act 1998*. That Act is based partly on the 1982 Canadian Charter of Rights and Freedoms and the New Zealand *Bill of Rights Act 1990*, both of which give less power to courts than does the US Bill of Rights. These and other similar laws affect how people understand their place in society and their relationship with government. Once adopted, they become a crucial part of what it means to have a modern democratic system of government based on the rule of law. No western nation has given up a charter of rights once adopted.

Australia is now the only democratic country in the world that does not have a national charter of rights. Indeed, among all nations, democratic and not, only a few lack a charter. Apart from nations in the midst of political upheaval or under military rule, the only nations I can identify without some form of charter of rights are Bhutan and Brunei. Other nations that did not have such a law have recently gained one. Afghanistan, for example, gained a charter of rights when its new constitution came into force in 2004, as did Iraq after a referendum held in October 2005.

Of course, the fact that nations such as Afghanistan, China, India or South Africa possess a charter of rights does not mean that human rights are better protected there than in Australia. A more useful comparison would be to look at how rights are protected in nations with like political traditions and economic resources – countries like Canada, New Zealand, the United Kingdom and the United States. A charter of rights is only one factor in how well human rights are protected, and only a legal measure at that. Other features of a society also matter a great deal, such as its culture and wealth.

Supported by a robust and open political culture and a nation's capacity to meet the basic demands of its people, a national charter of rights could make a real difference to the protection of basic freedoms. It would give legal effect to many of our basic freedoms for the first time. While Australians often assume that they have these rights, the charter would turn them into law.

Like the Universal Declaration of Human Rights, a charter of rights could also have a symbolic force that promotes important values like freedom, community responsibility and tolerance of cultural diversity. In fact, the most important contribution a charter of rights can make is not the benefit it brings to the small number of people who succeed in invoking rights in court. It is how it can help to prevent the making of bad laws and how it can be used to educate, shape attitudes and bring hope and recognition to people who are otherwise powerless.

The impact of a formal statement of rights at the community level was demonstrated by a 2003 study of the Americans with Disabilities Act 1990. Researchers David Engel and Frank Munger interviewed 60 people with disabilities and examined their life histories.²³ They found that the new law was having a profound effect, but not in terms of court actions. Indeed, none of their interviewees had brought such a case. Instead, they found the law affecting 'the way people talk and think, usually in social contexts far removed from the courts.'²⁴ In granting basic rights to people with disabilities, the Act 'played a crucial role in their lives.'²⁵ They went on: 'Rights transformed their self-image, enhanced their career aspirations, and altered the perceptions and assumptions of their employers and co-workers – in effect producing more inclusive institutional arrangements.'²⁶ The study demonstrated how the legal protection of rights enhanced the culture of rights protection at the individual and community levels, with a very positive effect on the day-to-day lives of people with disabilities.

A charter of rights could also have a powerful effect on the making of new laws and on improving the accountability of governments to the people. Take the example of what might happen if an Australian parliament were to pass a new law like the Northern Territory mandatory sentencing regime introduced in March 1997 for minor property crimes.²⁷ This law applied to a wide range of offences, with minimum penalties for each 'strike' irrespective of its seriousness. Strike one meant fourteen days in prison, strike two 90 days, and for three strikes or more the minimum prison term was twelve months. Not surprisingly, the new law led to an alarming rise in the imprisonment rates of Indigenous people, including women and children.

First, the existence of a charter of rights would make it more likely that human rights concerns would be raised as the law was passed, rather than at some later time. At present, problems can go unnoticed and unreported if an issue is only aired years after the law has come into force, and the impact can be devastating. After mandatory sentencing was introduced in the Northern Territory in March 1997 the imprisonment rates of

23 David Engel and Frank Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (University of Chicago Press, 2003).

24 Ibid 2.

25 Ibid 253.

26 Ibid 253.

27 *Sentencing Amendment Act 1996* (NT); *Juvenile Justice Amendment Act 1996* (NT).

Indigenous people rose alarmingly.²⁸ Yet the issue did not reach the national political agenda until three years later. Costly delays are inevitable where there is nothing within the parliamentary process itself to require that legislation is examined against human rights standards. The charter would help to prevent these problems occurring by playing a role before each new law is enacted.

Second, a charter of rights would create a reference point against which to examine proposed laws. These laws would be debated in parliament and within the community not only according to how they meet external international standards, but also on the basis of our own developing sense of human rights. This would strengthen the law-making process and, through parliamentary committees, community interaction with the political system.

Third, even if the law were passed, the charter of rights would provide a means for an independent determination of whether the law breaches human rights. In the courts, an affected person could argue for an interpretation of the law that protects rights, or even that the law is incompatible with those rights. In the latter case, a decision by the court to find that a law is incompatible would send the law back to parliament for a second look. With the benefit of hindsight, and perhaps after the initial political debate has cooled, this could provide a crucial second chance to examine the law. This has certainly been the experience in the United Kingdom. Its parliament has in every case moved to fix a human rights problem with a law once it has been identified by a court.

An Australian charter of rights would mark an important shift not only in the law but in approaches to politics and the development of policy as they relate to human rights. The focus would be on ensuring that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy. The charter would recognise that the decisive point in achieving protection for human rights is not in court after a breach has occurred, but in government and parliament in the development of policy and the drafting of law before either come into effect.

This preventative aspect of the charter means that human rights principles will be taken into account not just in courts but throughout government. Indeed, the role of protecting human rights under a charter would be exercised far more frequently by government than the courts. The Australian Federal Police, for example, would have day-to-day responsibility for applying human rights in protecting the community from crime and safeguarding the rights of the accused. In this and other areas, such as mental health, the charter would require that the work of government be undertaken with due regard to our common freedoms.

Of course, governments, parliament and courts already take some account of human rights. The charter would not be inserted into a system in which human rights are ignored. But rights are often only referred in an ad hoc way because there is no obligation in the law for them to be considered; nor are they set out in a clear instrument enacted by parliament. When they are needed most, human rights can simply be absent from the debate. By contrast, a charter would mean our fundamental freedoms are given a higher status and legitimacy within government. Their protection would be approached more seriously and systematically. This would not only produce better regard for human rights principles, it would improve the quality of work of our public institutions. The charter would be based on the idea that government should be transparent in its treatment of principles like human rights and also accountable to the people by operating fairly and without adverse discrimination.

28 See generally Northern Territory of Australia, Office of Crime Prevention, Mandatory Sentencing for Adult Property Offenders the Northern Territory Experience (2003) <http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf> at 23 May 2008.

Like the ACT and Victorian laws, a federal charter enacted as an ordinary Act of parliament ought only be the beginning of a journey to better protect freedoms in the law. It is a first step that will provide valuable insights for government and the community as to how effective the law can be in protecting human rights. It will also show how any law has its limits, and indeed how the law can be ineffective in dealing with some of the most pressing, intractable problems. This will reveal how any strategy for better human rights protection must also pay close attention to political culture and leadership, the media and community attitudes. Without reinforcement from these quarters, the positive impact of the charter will be blunted.

Over time, a federal charter of rights, through education and other means, could contribute to increasing respect and tolerance in the community for others, especially for those who are perceived to be 'different' as a result of their culture or religious beliefs. After all, the most important way that human rights are protected may not be in the law but in how they are respected in the relationships between people in their everyday lives. What some people can find the most hurtful is not how they are treated by government but how they are ill-treated by other members of the community, such as a result of racism. These are problems that no law, by itself, can remedy.



The fleeting history of feminism in the legal academy*

Professor Margaret Thornton†

Introduction

In 2003, Richard Johnstone and Sumitra Vignaendra stated that the influence of feminism on the Australian legal academy had been almost zero.¹ In light of feminism's concern to effect social justice for girls and women, this is a fairly depressing assessment and needs to be investigated, particularly as law is perceived as the central mechanism through which formal justice is attained in our society.

Against the background of the political swing from social liberalism to neoliberalism, this paper considers the discomfiting relationship between feminism and the legal academy. It will trace the trajectory of the liaison: the efforts to be noticed, the brief affair (lukewarm rather than passionate), the parting of the ways, the recriminations, and the cold shoulder.

The Beginning of the Affair

The 1970s were an exciting period in Australian politics. The social liberalism associated with Prime Minister Gough Whitlam marked a new beginning. There was a rejection of the narrow legalism, moral conservatism and the 'British to the bootstraps' ideology of the Menzies years. The Whitlam era involved a dynamic period of law reform – no-fault divorce, anti-discrimination legislation, Aboriginal rights, environmental protection and egalitarian policies associated with the modernisation of the Australian state. Second Wave feminism,² influenced by trends in the United States and elsewhere, emerged at the same time independently.³ Law was seen by feminists as a positive force for change despite the long history of common law in entrenching and legitimating discrimination and injustice against women.

In terms of the agenda for change, the feminist imagination was initially sparked by criminal law because the gender disparities were so egregious. The law pertaining to rape, domestic violence, provocation and self-defence were notable examples of the way the law discriminated against women. In the late 1970s, the Feminist Legal Action Group (FLAG) in Sydney undertook a study of women who killed violent partners to highlight the discriminatory impact inhering in the law of provocation.⁴ Organisations such as the Women's Advisory Council to the Premier of New South Wales played a key role in lobbying to remove gender bias from the criminal law, an initiative that was emulated in other States.

* This paper is based on a presentation made at symposium a hosted by the Gender Studies Program, School of Social and Environmental Enquiry, School of Historical Studies and School of Law, University of Melbourne, 21 November 2007.

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¹ Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report commissioned by the Australian Universities Teaching Committee (AUTC)* (2003) 130.

First Wave Feminism is associated with the struggle by women in the late 19th century to vote and be admitted to universities and the professions. The Second Wave focuses on substantive equality in the conditions of entry.

³ It is not possible in this brief overview to do justice to the complexities and ambiguities besetting the women's movement at the time. See, for example, Marian Sawer, 'Reclaiming Social Liberalism: the Women's Movement and the State' in Renate Howe (ed), *Women and the State: Australian Perspectives* (1993); Marilyn Lake, *Getting Equal: The History of Australian Feminism* (1999); Ann Genovese, 'Madonna and/or Whore?: Feminism(s) and Public Sphere(s)' in Margaret Thornton (ed), *Romancing the Toms: Popular Culture, Law and Feminism* (2002) 147-64.

⁴ Robin Lansdowne and Wendy Bacon, 'Women who kill Husbands: The Battered Wife on Trial', in Carol O'Donnell and Jan Craney (eds), *Family Violence in Australia* (1982) 67-94.

It is notable that legislatures not courts were regarded as the locus of change by feminist activists and other law reformers in Australia.⁵ The heritage of Sir Owen Dixon's commitment to 'strict and complete legalism'⁶ not only inhibited the idea of courts as a site of law reform, but also suggested that adjudication had little to do with justice, other than in a formalistic and procedural sense. The Australian experience at this stage was in sharp contrast with that of the United States where the Warren Court had induced a belief that the courts rather than the legislature was the primary locus of reform.⁷ Few test cases were initiated in Australia, although some important decisions did eventually emerge from socially progressive courts, such as the High Court under Chief Justice Mason,⁸ which included the abolition of the immunity against rape in marriage.⁹

Beginning to be Noticed

The dynamic period of law reform in the mid-70s together with a vibrant women's movement bolstered the idea that a law degree could be utilised to effect social justice for women. At the same time, the growth in the economy created a need for more lawyers and, as a result, discrimination against women in the legal profession became less overt. These factors led to a dramatic increase in the proportion of women students in law schools during the 1970s, which reached the tipping point in some schools within a decade.¹⁰

The few women staff there were tended to be congregated at the bottom of the familiar employment pyramid in junior and untenured positions. The 1980s witnessed a struggle by women in Australian universities to improve the gender profile of the academy by lobbying for the conduct of gender reviews and the appointment of an equal opportunity (EO) officer to act as a facilitator of change.¹¹ Universities were shamed into responding positively and began to claim in their advertising and publicity material that they were EO employers. The flurry of activity within the state more broadly led to the enactment of affirmative action legislation,¹² and the formal acknowledgement of the role of femocrats in public policy.¹³

The changing public discourse influenced the curriculum as well as appointments in the legal academy. Feminist law students played a role in ensuring the inclusion of, first, feminist perspectives in mainstream courses and, secondly, stand-alone optional courses. Women and the Law, Discrimination and the Law, and a swag of courses oriented towards social justice first appeared in the 1970s, with feminist legal theory courses appearing a decade or so later.

The Fickleness of the Relationship

Of course, not everyone accepted the new ways of seeing, and separate courses always suffer from the ubiquitous problems of marginalisation and 'preaching to the converted'. Occasionally, it was possible to do something in compulsory courses. At Macquarie University Law School in the 1980s, for example, I taught a compulsory crime/tort course called Personal Injury, which focused on the theme of violence. It allowed key

⁵ Jude Wallace and John Fiocco, 'Recent Criticisms of Formalism in Legal Theory and Legal Education' (1980-81) 7 *Adelaide Law Review* 309.

⁶ Sir Owen Dixon was on the High Court for more than 30 years, including twelve years as Chief Justice. See the entries on Dixon, the Dixon Court and the Dixon Diaries in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001). For a collection of Dixon's extra-judicial writings and speeches, see Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (collected by Judge Woinarski (1965).

⁷ Lucas A Powe, Jr, *The Warren Court and American Politics* (2000).

⁸ Sir Anthony Mason was Chief Justice 1987-1995. For a discussion of the steps towards substantive justice by the Court, with particular regard to race, see Fiona Wheeler and John Williams, "'Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (2007).

⁹ *R v L* (1991) 103 ALR 577.

¹⁰ In less than 40 years, it is notable that the increase in the proportion of women in law schools has risen from a mere handful to 58% of all students.

¹¹ Margaret Thornton, 'Where are the Women? The Swing from EEO to Diversity in the Academy', Working Paper 22, Gender, Sexuality & Culture Seminar Series, ANU (2008) http://rspas.anu.edu.au/grc/publications/pdfs/WP22_thornton_2008.pdf

¹² *Affirmative Action (Equal Opportunity for Women in the Workplace) Act 1986* (Cth). This Act was repealed and replaced by the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

¹³ Feminist bureaucrats who advised governments and the public service as to the impact of proposed policies on women. See Anna Yeatman, *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State* (1990).

issues that disproportionately impacted on women – sexual assault, domestic violence, provocation and self-defence – to be addressed legitimately from a feminist perspective. In such areas, women were at the centre of the action, not confined to the periphery, as tends to be the case in areas such as property, contract and commercial law.

I interpolate here that a major limitation regarding the inclusion of social justice subjects within the Australian law curriculum is that the law degree is accepted as a prerequisite for admission to practice; there is not a separate Bar exam as in the United States. This means that the admitting authorities have considerable influence over curricular content, including the specification of subjects or areas of knowledge required for admission. As a result, law is far more prescriptive in its curricular requirements than, say, the humanities or the social sciences. Unfortunately, the admitting authorities have shown little interest in including a social justice orientation as a prerequisite for admission to practice. The various State and territory authorities, by means of the Uniform Admission Rules, merely want to certify that applicants have a passable knowledge of the body of rules pertaining to a narrow range of traditional areas of practice. The admitting authorities are also influenced by the dominant philosophy of legal positivism (of which Dixon's 'strict and complete legalism' is a sub-set). This approach privileges the doctrinal and the technocratic, sloughing off context and critique, as well as the significance of justice for the instant case so that law conveys the impression that it is neutral and innocent.¹⁴ While universities may recognise the importance of a liberal legal education for the award of a law degree, law schools feel that they must defer to the legal profession because it employs their graduates.

Despite these constraints, many well intentioned law lecturers made an effort to respond to feminist criticisms of the masculinist domination of law by including:

- Cases that involved women in other than stereotypical situations;
- Hypotheticals that didn't perpetuate stereotypes – such as 'no' means 'yes' in sexual assault cases; and
- Articles by women, as well as men, to dispel the myths that men alone are knowers or creators of knowledge.

The broader approach to the law curriculum was given a boost by a federal Government inquiry into the law discipline (the Pearce Report) in 1987.¹⁵ The Report stressed the importance of a liberal law degree in producing good citizens. Indeed, the popularity of law, the establishment of many law schools and the increasing diversity among schools led the authors of the Pearce Report to describe the law degree as the new generalist degree, or the new Arts degree. The Pearce Report legitimated a more theoretical and critical approach to legal scholarship and the teaching of law. It also encouraged greater diversity in academic scholarly writing, including feminist scholarship.¹⁶ This paved the way for a federal government initiative in the 1990s involving the preparation of gender-sensitive materials for the 'core curriculum' on the themes of citizenship, work, and violence.¹⁷ The aim was that all law students would be sensitised to (or by) feminist perspectives on law.

¹⁴ Peter Fitzpatrick, 'Racism and the Innocence of Law' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (1987). See also, Margaret Thornton, 'Technocentrism in the Law School: Why the Gender and Colour of Law remains the Same' (1998) 36 *Osgoode Hall Law J* 369.

¹⁵ Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) (Pearce Report).

¹⁶ Books include Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990; 2002); Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990); Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives on Law in Australia* (1995); Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995); Pheng Cheah, David Fraser and Judith Grbich, *Thinking through the Body of the Law* (1996); Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996); Ngaire Naffine & Rosemary J Owens (eds) *Sexing the Subject of Law* (1997).

¹⁷ This initiative followed a period of intense media focus on 'gender bias in the judiciary' in 1993. The citizenship materials were prepared by Professor Sandra Berns, Ms Paula Baron and Professor Marcia Neave, and the Work and Violence materials by Professor Regina Graycar and Associate Professor Jenny Morgan. The writer chaired the overseeing committee. See Regina Graycar & Jenny Morgan, 'Legal Categories, Women's Lives and the Law Curriculum OR: Masking Gender Examinable' (1996) 18 *Sydney Law Review* 431.

The Cooling of the Affair

Social change, however, does not progress ever forward in a neat linear fashion. While the Pearce Report was still hot off the press, the Dawkins reforms of higher education were announced.¹⁸ Overnight, Colleges of Advanced Education (CAEs) became universities, all of which soon wanted their own law schools. Not only was law perceived by vice-chancellors to be a prestige discipline that would attract high-calibre students, it was also thought that it could be offered 'on the cheap'.¹⁹ That is, library resources could be accessed electronically and known knowledge could be transmitted by a few lecturers in large lecture theatres. This mode of pedagogy minimised the opportunity to interrogate and critique the knowledge being communicated.

The Dawkins reforms signalled the fact that the chill winds of neoliberalism had begun to blow on the academy. A sharp contraction in government funding occurred and, instead of higher education being free, students now had to pay what was euphemistically called a contribution (HECS). At first, the figure was modest – \$1,800 pa across the board – but it quickly began to be ratcheted up. Soon, law students had to pay a higher proportion of the cost of their degree than other students in the belief that they would generate a substantial income on graduation.²⁰ As a result, they began to see themselves as consumers with the right to determine what should be taught and how it should be taught. 'User pays' induced a preoccupation with credentialism. If the knowledge was not functional in terms of admission to practice, students began to see it as dispensable.

The commodification of higher education exercised a profound effect on the curricular content of the law degree. The new areas of social justice that had so recently emerged in subject offerings across the country, such as poverty law, social welfare, discrimination and the law, sexuality and the law, and feminism and law, were deleteriously affected.²¹ As mentioned, none of the admitting authorities specify knowledge of social justice as a prerequisite for admission. The user-pays principle induced students to adopt a more instrumental approach to their studies and to shed what was not absolutely essential. Thus, the new subjects began to appear spasmodically, if at all.

Most significantly, critical and theoretical perspectives that might have been included in compulsory subjects also began to disappear in favour of applied and technocratic approaches. In interviews that I conducted with academics around the country in the mid-2000s, students said that they no longer wanted the word 'feminist' to appear on their transcript in case it jeopardised their job chances. Feminism did not comport with a competitive market-oriented climate in which social justice for women and Others had quickly become passé. The contraction of feminism within the legal academy is by no means limited to Australia, but is a notable phenomenon internationally.²²

As interest declined in social justice, as well as theory and critique, law schools took the initiative and began to adapt their curricula to the new climate. More business law and international law subjects (particularly international trade law) began to appear, both in response to the demand from students, as well as in the institutional hope of attracting full fee-paying students – domestic, as well as international. Just as students had become consumers and risk takers within the market as they assumed more of the cost of their legal education, the contraction in government funding compelled universities to become serious market players.

¹⁸ Hon J S Dawkins, *Higher Education: A Policy Statement* (White Paper) (1988).

¹⁹ Since 1989, the number of public law schools in Australia has increased from 12 to 32.

²⁰ The user-pays philosophy is based on ideas originally developed by Friedrich von Hayek in *The Constitution of Liberty* (1960), but developed by Milton Friedman with the assistance of Rose D Friedman, *Capitalism and Freedom* (1962).

²¹ I have elaborated elsewhere on the effects of neoliberalism on the legal academy. See, for example, Margaret Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8(1) *International J Legal Profession* 37; Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17(1&2) *Legal Education Review* 1.

²² Eg, VèVè Clark, Shirley Nelson Garner, Margaret Higonnet & Ketu H Katrak (eds) *Antifeminism in the Academy* (1996); Jan Currie, Bev Thiele & Patricia Harris, *Gendered Universities in Globalized Economies* (2002); Rosemary Deem, 'Gender, Organizational Cultures and the Practices of Manager-Academics in UK Universities' (2003) 10 *Gender, Work and Organization* 239; Jill Blackmore & Judyth Sachs, *Performing and Reforming Leaders: Gender, Educational Restructuring, and Organizational Change* (2007); Dorothy E Chunn, Susan B Boyd and Hester Lessard (eds), *Reaction and Resistance: Feminism, Law and Social Change* (2007).

Law schools tended to move away from a laissez-faire approach to curricular content, at least so far as optional subjects were concerned, to an orchestrated business orientation in the belief that this was going to maximise returns for them.

The Struggle to Live Alone

Women now comprise more than 40 per cent of legal academics in Australia. While no longer formally excluded from leadership positions, these positions have become masculinised as a result of corporatisation. The collegiality and cooperation that tends to be associated with the feminine has largely evaporated and been replaced with top-down managerialism. The dean or head of school is now likely to be a line manager answerable to a more senior manager up the line rather than to colleagues. In doing the bidding of senior management, there is comparatively little scope for a pro-feminist style of leadership based on consultation and collaboration. The new style of managerialism tolerates the occasional woman – usually in a manned position, such as a deputy – provided that she does not display feminist sensibilities within managerial spaces and raise issues that disproportionately impact on women, such as sexual harassment or the gender politics of organisations.

It is notable that just as it looked as though the legal academy was becoming feminised, a new criterion for appointment – entrepreneurialism – was added to the traditional criteria of teaching, research and community service. Excellence in these fields needs to be achieved for the most authoritative positions. Academics are now expected to generate money through competitive research schemes, linkages with industry, consultancies and the offering of fee-paying coursework graduate degrees. Entrepreneurialism does not specifically exclude women but competition policy does reflect the masculinist biases of the market.

While feminist legal research has become more diverse, it has also become more fraught and less attractive than it once was. The multiple feminist consciousness that emerged from postmodern and poststructural theory has made engagement with law more difficult because liberal legalism copes best with a unitary subject. It prefers clear lines and precise categorisation. Multiple identity consciousness, which includes race and sexuality, as well as disability and age, has encouraged a focus on the capillaries and a high level of theoretical abstraction, which has discouraged engagement with law. The disappointment on the part of feminist scholars generally, some of whom may have held an unrealistic view of the pitfalls of engaging with law, may also have contributed to the turning away from feminist legal scholarship.

I also need to come back to the institutional factors that are reshaping the very *idea* of the university. This includes competition policy which now affects every aspect of academic life. Nowhere is this evinced more clearly than in the case of research. Legal academics as neoliberal subjects are no longer free to focus on their teaching and engage in a bit of desultory research as the mood takes them. Performativity, as Lyotard shows, is the leitmotif of the neoliberal subject, which requires academics constantly to be seen to be performing.²³ That is, they need to show that they are active and productive. Performativity is effected through auditing mechanisms, which allows for increased surveillance.

Auditing, the means by which the performative is rendered calculable,²⁴ is now the bane of the life of academics everywhere. It can be based on metrics or qualitative indices, where the intrinsic worth of an article or, as is more likely, the status of the journal in which it appears, is rated. Some law schools are understood to be already directing academics down particular publishing paths, most notably requiring them to publish in 'international' rather than Australian law journals in the hope of boosting their university's position on league tables. Early career researchers will be unable to resist such edicts when handed down from above. Rankings and league tables have become the order of the day. Our present gatekeepers, with dollar signs in their eyes,

²³ Jean L Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984).

²⁴ Michael Power, *The Audit Society: Rituals of Verification* (1997).

have little concern for equity or social justice in the current dog-eat-dog environment of perennial competition where they have to ensure the survival of their institutions.

Conclusion

Legal feminism has encountered difficulties in a hostile neoconservative climate, and it may be just a matter of riding it out. After all, when we look to the past, we see the waxing and waning of feminist movements over the last 250 years according to prevailing socio-economic trends and the political mood of the day.

Feminism is a reactive ideology that may need its political edginess to be compelling. The response to the publication of her damning indictment of the status of women caused Mary Wollstonecraft to note the discomfiting role of social critic more than two centuries ago:²⁵

*Those who are bold enough to advance before the age they live in, and to throw off, by the force of their own minds, the prejudices which the maturing reason of the world will in time disavow, must learn to brave censure. We ought not to be too anxious respecting the opinion of others.*²⁶

On its face, this does not appear to bode well for the future of feminism in the legal academy, especially as boldness is an exceptional characteristic in a climate that rewards docility. At the same time, however, feminism, in or out of the legal academy, at the beginning of the 21st century, creates a discursive space in which we can contextualise contemporary representations of women. To this extent, legal feminism may not have been quite as ineffective as Johnstone and Vignaendra suggest.



²⁵

Mary Wollstonecraft, *A Vindication of the Rights of Woman* (ed Carol H Poston) (1792 2nd edn 1988).

²⁶

'Letter to a Friend' in Janet Todd (ed), *A Wollstonecraft Anthology* (1989) 266.

Justice for individuals with mental illnesses

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The concept of justice has been viewed by liberal theorists as being closely linked with the notion of 'fairness', equality of treatment and respect for individual rights.¹ However, certain legal theorists, particularly those writing from feminist viewpoints, have questioned just whose rights are protected under this model of justice and have pointed out that an emphasis on individual rights cannot address structural and group-based discrimination.²

When it comes to individuals with mental illnesses, the international human rights movement has helped provided a framework for laws that at least recognise certain individual rights, but it would seem that justice in terms of equality of treatment, respect and dignity remains elusive.

Since 1993, when the Human Rights and Equal Opportunity Commission conducted its National Inquiry into the Human Rights of People with Mental Illness, there have been a number of inquiries pointing to existing deficiencies in Australia's mental health system. Most recently, the Mental Health Council of Australia, the Brain and Mind Research Institute and the Human Rights and Equal Opportunity Commission as well as the Senate Select Committee on Mental Health have made numerous recommendations for mental health reform.³

The role the law plays in providing justice for individuals with mental illnesses is an important one. Clive Unsworth has made the point that '[l]aw actually constitutes the mental health system, in the sense that it authoritatively constructs, empowers, and regulates the relationship between the agents who perform mental health functions'.⁴

Ensuring that mental health laws protect rights in both theory and practice is an ongoing challenge. This article outlines how the new Convention on the Rights of Persons with Disabilities⁵ may serve to guide domestic legislation relating to individuals with mental illnesses. It looks at ways to ensure justice in relation to involuntary treatment as well as access to treatment in general before providing an overview of alternatives to imprisonment for offenders with mental illnesses.

The International Human Rights Framework

Up until 2008, the main international document dealing specifically with the rights of individuals with mental illnesses was the United Nations *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* which was adopted in 1991. These principles helped guide domestic laws to enable treatment in the community as well as access to information concerning patients' rights and the

¹ See for example Rawls J, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1980); Dworkin R, *Taking Rights Seriously* (London: Duckworth, 1977). For a review of competing conceptions of justice, see Campbell T, *Justice* (Basingstoke: Macmillan, 2001, 2nd ed) and Wojciech S, (ed), *Justice* (Aldershot: Ashgate, 2001).

² See Lacey N, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998), Ch 2.

³ Mental Health Council of Australia, Brain and Mind Research Institute, & Human Rights and Equal Opportunity Commission *Not for Service* (Canberra: Mental Health Council of Australia, 2005); Senate Select Committee on Mental Health, *A National Approach to Mental Health - From Crisis to Community, Final Report* (Canberra, Commonwealth of Australia, April 2006).

⁴ Unsworth C, *The Politics of Mental Health Legislation* (Oxford: Clarendon Press, 1987) p 5.

⁵ The Convention came into force thirty days after twenty countries ratified it. The draft convention was finalised at the Eighth Session (14 - 25 August 2006) and adopted by the General Assembly on December 13th 2006. The convention opened for signature on 30th March 2007.

development of tribunals to review involuntary admissions and treatment.⁶ However, these principles have been criticised as providing only minimum standards concerning capacity to consent to treatment and promoting a paternalistic medical treatment model.⁷

On 3 May 2008, the United Nations Convention on the Rights of Persons with Disabilities (the CRPD) came into force. Australia is a signatory to the Convention and, at the time of writing, is considering ratifying it. While the CRPD does not set out any 'new' rights, it clarifies the obligations on States Parties to promote and ensure the rights of person with disabilities and sets out the steps that should be taken to ensure equality of treatment. It goes into much more detail than previous general human rights conventions concerning what action needs to be taken to prohibit discrimination and it has the potential to guide domestic legislation for individuals with mental illnesses in a less paternalistic way than the 1991 United Nations Principles.⁸

Neither 'disability' or 'persons with disabilities' is defined in the CRPD, but Article 1 states that the latter term includes 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. While Article 1 refers to 'long-term' impairments, the provision is not exhaustive and other impairments may be included.⁹

The rights outlined include the right to life (Article 10), the right to equal recognition before the law (Article 12), the right to liberty and security of the person (Article 14), the right to respect for physical and mental integrity (Article 17), the right to live in the community (Article 19), the right to education (Article 24) and the right to enjoyment of the highest attainable standard of health without discrimination on the basis of disability (Article 25). The CRPD establishes two implementation mechanisms: the Committee on the Rights of Persons with Disabilities which will monitor its implementation and the Conference of State Parties which will consider matters regarding implementation.

The following two sections focus on two of these rights: the right to respect for physical and mental integrity and the right to enjoy the highest attainable standard of health, and what they may mean for legal frameworks relating to the treatment of individuals with mental illnesses.

Respect for Physical and Mental Integrity and Involuntary Treatment

The medical treatment of many individuals with mental illnesses generally corresponds with the medical treatment of other patients in the sense that they can (at least in theory) refuse treatment and if hospitalised, leave hospital at any time and use the same complaints procedures as any other patient. A major problem for such individuals is getting access to treatment and this is dealt with in the next section.

For those considered incapable of consenting to treatment, however, legislation exists in all Australian jurisdictions enabling involuntary detention and treatment. The relevant provisions in Australian Mental Health Acts vary, but in general, they provide that if individuals appear to suffer from a mental illness, if their

⁶ Hunt P and Mesquita J, 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health' (2008) 28 *Human Rights Quarterly* 332.

⁷ Rosenthal E, and Rubenstein LS, 'International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness"' (1993) 16 *International Journal of Law and Psychiatry* 257; Gendreau C, 'The Rights of Psychiatric Patients in the Light of the Principles Announced by the United Nations: A Recognition of the Right to Consent to Treatment?' (1997) 20(2) *International Journal of Law and Psychiatry* 259; Jones M, 'Can International Law Improve Mental Health? Some Thoughts on the Proposed Convention on the Rights of People with Disabilities' (2005) 28 *International Journal of Law and Psychiatry* 183; Dhir A A, 'Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (2005) 41 *Stanford Journal of International Law* 181.

⁸ See further Kämpf A, 'The United Nations Convention on the Rights of Persons with Disabilities and its Consequences for Mental Health Laws in Australia' (2008) *Law in Context* [forthcoming].

⁹ Minkowitz T, "The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free From Nonconsensual Psychiatric Conventions" (2007) 34(2) *Syracuse Journal of International Law and Commerce* 405 at 407.

health or safety is at risk, and if they pose a threat to themselves or others, they may be detained as involuntary patients.

The ability to detain and treat individuals against their will has been justified on the basis of it being in their “best interests”, to prevent deterioration in their condition or to prevent harm to themselves or others. The main ‘physical treatments’ are drug therapy and electroconvulsive therapy (ECT), with the most invasive treatment, psychosurgery, still available in some jurisdictions, but subject to legal safeguards. Procedures that are still used by way of emergency responses include restraint (the use of physical force), sedation and seclusion (confinement usually in a purpose built room).

Tina Minkowitz has argued that all forced psychiatric interventions should be viewed as a violation of human rights.¹⁰ While there have been and continue to be numerous instances of inhuman and degrading treatment of individuals with mental illnesses that support this view, in practice, states will continue to have legislation and programs that enable involuntary treatment. It also needs to be recognised that physical treatments can alleviate certain symptoms of serious mental illnesses, although the medical model of treatment has been criticised for being too dominant.¹¹

Justice for individuals with mental illnesses in relation to involuntary treatment could mean ensuring that any intervention occurs *only* in circumstances where without such intervention, serious harm is likely to result to the person’s health. Such an approach can be drawn from Article 17 of the CPRD which is entitled ‘Protecting the Integrity of the Person’ and which states:

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

While there has been little written on the scope of this right, it can be viewed as aiming to protect the ‘competent’ patient from unwanted treatment and the ‘incompetent’ patient from unbeneficial treatment.¹² From a pragmatic viewpoint, it is probably more beneficial to view Article 17 as developing limitations on certain practices and unbeneficial and overly intrusive treatment rather than viewing it as justifying the complete abolition of laws relating to involuntary treatment. The ability of Article 17 to guide domestic legislation in this regard is one area that needs further exploration.

Access to Treatment and the Highest Attainable Standard of Health

Australian mental health legislation in the civil law field is currently geared toward the involuntary treatment of individuals with low prevalence serious mental illnesses such as schizophrenia and bipolar disorder, but there is an obvious need for laws to ensure proper access to treatment for individuals with the high prevalence mental disorders such as depression and anxiety.

¹⁰ Minkowitz T, “The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free From Nonconsensual Psychiatric Conventions” (2007) 34(2) *Syracuse Journal of International Law and Commerce* 405.

¹¹ See for example, Bartlett P and Sandland R, *Mental Health Law: Policy and Practice* (Oxford: Oxford University Press, 2007, 3rd ed) pp 345-352 and references therein.

¹² See further McSherry B, ‘Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment’ (2008) *Law in Context* [forthcoming].

The *Not for Service* Report prepared by the Mental Health Council of Australia and the Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission identified a number of problems with individuals with mental illnesses getting access to treatment. The report found that there is poor access to psychiatrists outside major metropolitan centres, poor access to psychologists due to a general lack of government or private insurance rebates and limited access to new medications in outpatient settings, partly because of restrictions on the provision of scripts under the Pharmaceutical Benefits Scheme.¹³ It also identified a number of issues relating to state mental health services including the lack of acute care beds, premature discharge from hospitals of unwell persons and difficulties in getting access to professional care during onset and to prevent the deterioration of illness.¹⁴

The report also measured the data collected against the *National Standards for Mental Health Services* which were endorsed by the National Mental Health Working Group in December 1996.¹⁵ Standard 11.1 sets out that the relevant mental health service should be accessible to the defined community. The Report found that standard 11.1.4 which requires that the mental health service should be available on a 24 hour basis and standard 11.1.2 which requires that '[t]he community to be served is defined, its needs regularly identified and services are planned and delivered to meet those needs' are not being met in many Australian states.¹⁶ Instead, because of 'the inability of consumers and carers to access mental health services during times of crisis, police are increasingly being called to assist as they are available 24 hours a day 7 days a week'.¹⁷

A similar picture was presented to the Senate Select Committee on Mental Health. Its First Report found that 'most people with mental illness do not currently have access to an integrated, specialised mental health service that meets their needs'.¹⁸

Again, the CRPD can provide a framework for what needs to be done in this area. Of particular interest is Article 25 of the CRPD which reiterates Article 12(1) of the *International Covenant on Economic Social and Political Rights* that requires States to recognise 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.¹⁹

¹³ Mental Health Council of Australia, Brain and Mind Research Institute, & Human Rights and Equal Opportunity Commission *Not for Service* (Canberra: Mental Health Council of Australia, 2005) p 45.

¹⁴ Mental Health Council of Australia, Brain and Mind Research Institute, & Human Rights and Equal Opportunity Commission *Not for Service* (Canberra: Mental Health Council of Australia, 2005) p 46.

¹⁵ Australian Health Ministers Advisory Council, National Mental Health Working Group, *National Standards for Mental Health Services* (December 1996). Available at <http://www.mhca.org.au/Resources/NoCCS/documents/NationalMentalHealthStandards.pdf> accessed 7 July 2008.

¹⁶ Mental Health Council of Australia, Brain and Mind Research Institute, & Human Rights and Equal Opportunity Commission *Not for Service* (Canberra: Mental Health Council of Australia, 2005) p 498 (dealing with Queensland).

¹⁷ Mental Health Council of Australia, Brain and Mind Research Institute, & Human Rights and Equal Opportunity Commission *Not for Service* (Canberra: Mental Health Council of Australia, 2005) p 499 (dealing with Queensland). See also p 833 for a national overview.

¹⁸ Senate Select Committee on Mental Health, *A National Approach to Mental Health - From Crisis to Community, First Report* (Canberra, Commonwealth of Australia, March 2006) p 148.

¹⁹ *International Covenant on Economic Social and Political Rights* 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976, in accordance with Art 27). This Convention was signed by Australia on 18 December 1972 and the instrument of ratification was deposited by Australia on 10 December 1975 without reservation. It entered into force in Australia on 10 March 1976.

However, Article 25 goes further than Article 12(1) by adding certain obligations:

States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people's own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 25 can be viewed as helping to develop the interpretation of the right to the highest attainable standard of health set out in General Comment No 14 of the United Nations Committee on Economic, Social and Cultural Rights.²⁰ Paragraph 9 of the General Comment states that 'the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health'. Article 25 of the CRPD sets out the steps that should be taken to ensure that these facilities and services are provided.

Already some progress has been made in this area with reforms to the Medicare Benefits Schedule to improve access to psychiatrists, clinical psychologists, general practitioners and other allied health professionals. General practitioners and private psychiatrists can now also refer patients to psychologists and allied health professionals. There has already been Federal government funding assigned to increase the numbers of those participating in the mental health workforce. However, since the majority of individuals with mental illnesses seek treatment on a voluntary basis, there is a need to further explore the law's role in relation to access to medical treatment in this regard.

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United Nations Committee on Economic, Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health* (Art 12 of the International Covenant on Economic, Social and Cultural Rights, *General Comment No 14* (22nd Sess), UN Doc E/C12/2000/4, 11 August 2000.

Alternatives to Imprisonment for Mentally Ill Offenders

Individuals with mental illnesses comprise a disproportionate number of people who are arrested, appear before the courts and who are imprisoned.²¹ There may be a combination of factors as to why this is the case including a lack of access to treatment, increased drug and alcohol use and the limited capacity of community based mental health services to cope with the needs of offenders with mental illnesses.

The Senate's Select Committee on Mental Health found that while '[a]ll jurisdictions make some provision for the care of forensic patients...that provision is inadequate, both for secure facilities and for follow-up care in the community'.²² The Senate Select Committee recommended that 'there be a significant expansion of mental health courts and diversion programs, focused on keeping people with mental illness out of prison'.²³ There is also a need to ensure the provision of adequate services to those individuals with mental illnesses in prisons.

The CRPD does not directly mention prisoners with mental illnesses, but Principle 20 of the earlier *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* stipulates that prisoners are entitled to the best available mental health care, and to all the rights specified in the Principles, 'with only such limited modifications and exceptions as are necessary in the circumstances'. There are certain articles in the CRPD such as Article 12 (equal recognition before the law), Article 13 (access to justice) and Article 14 (liberty and security of the person) that would seem to be relevant to the situation of offenders with mental illnesses.

There has been some attempt to explore alternatives to prison for offenders with mental illnesses. A range of diversionary measures operate in Australian jurisdictions such as the South Australian and Tasmanian magistrate courts' mental health diversion programmes as well as mental health court liaison services and specialised court lists which indirectly target those with mental illnesses.²⁴ However little research has been carried out as to the effectiveness of these diversionary measures and they have tended to develop in an ad hoc manner.

Each Australian criminal law jurisdiction also has provisions for the prosecution and disposition of those with mental illnesses.²⁵ Queensland is the only jurisdiction to have established a Mental Health Court which determines the defences of insanity and diminished responsibility. The effect of certain mental illnesses can also be taken into account during the sentencing process in a number of different ways. Certain mental illnesses can be relevant to reducing an offender's moral responsibility, as well as assessing the kind of sentence that should be imposed, whether general and specific deterrence are relevant principles and whether the sentence or imprisonment will weigh more heavily on the offender than a person in good health.²⁶

²¹ Wallace C, Mullen P, Burgess O, Palmer S, Ruschena D, and Browne C, 'Serious Criminal Offending and Mental Disorder: Case Linkage Study' (1998) 172 *British Journal of Psychiatry* 47; Ogloff J, 'Identifying the Needs of Mentally Ill People in Goals and Prisons' (2002) 9(1) *Psychiatry, Psychology and Law* 1; Butler T, and Allnutt S, *Mental Illness Among New South Wales Prisoners* (New South Wales: Corrections Health Service, 2003).

²² Senate Select Committee on Mental Health, *A National Approach to Mental Health - From Crisis to Community, First Report* (Canberra, Commonwealth of Australia, March 2006) p 344.

²³ Senate Select Committee on Mental Health, *A National Approach to Mental Health - From Crisis to Community, Final Report* (Canberra, Commonwealth of Australia, April 2006) p 20.

²⁴ See in general Richardson E, 'Mental Health Courts and Diversion Programs for Mentally Ill Offenders: the Australian Context' Paper delivered at the presented at the 8th Annual International Association of Forensic Mental Health Services Conference, Vienna, Austria 14-16 July 2008.

²⁵ Bronitt S and McSherry B, *Principles of Criminal Law* (Sydney: Thomson Lawbook Co, 2005, 2nd ed) Ch 4.

²⁶ *R v Verdins, R v Buckley, R v Vo* (2007) 16 VR 269 at 277.

At the Federal level and in Victoria and Tasmania, judges and magistrates are empowered to make hospital orders in lieu of a sentence so that mentally ill offenders cross from the criminal justice system to the civil mental health system, but, for a variety of reasons, these orders are rarely used.²⁷

At present, there is a level of complexity in the relevant legislation that may cause confusion among magistrates and judges as to what options are available. The very fact that individuals with mental illnesses comprise a disproportionate number of those who come before the criminal justice system shows that there is still a need to explore the law's role in relation to alternatives to imprisonment and providing access to treatment within the prison environment.

Conclusion

This article has outlined some of the areas that are in need of attention to ensure justice for individuals with mental illnesses. Such areas include further legal safeguards for the treatment of involuntary patients, enabling proper access to medical treatment and the development of effective and workable alternatives to imprisonment for mentally ill offenders.

While it remains the case that legal provisions alone do not lead to the development of new services,²⁸ any endeavour to support justice for individuals with mental illnesses will only work if there are appropriate laws in existence shaping the way in which individuals with mental illnesses can gain access to the highest attainable standard of mental health care. This applies across both civil and criminal justice systems.

Ultimately, justice will only be achieved for those with mental illnesses not only through rethinking mental health laws but also through raising awareness of discrimination and curbing indifference and neglect. As Sir William Deane has pointed out, 'the ultimate test of our worth as individuals and as a nation is how we treat the most disadvantaged and vulnerable of our fellow human beings'.²⁹



²⁷ See in general McSherry B, 'Hospital Orders for Mentally Ill Offenders in Australia: An Appropriate Diversionary Option?' Paper delivered at the presented at the 8th Annual International Association of Forensic Mental Health Services Conference, Vienna, Austria 14-16 July 2008.

²⁸ McSherry B, 'Human Rights and Mental Illness: The Legal Framework' (1994) 1 *Journal of Law and Medicine* 205.

²⁹ Sir William Deane, 'Address on the Occasion of the Jesuit Refugee Service Dinner, Sydney, 19th June 2004 available at http://jrs.org.au/component/option,com_docman/task,doc_view/gid,25/Itemid,47/ accessed 7 July 2008.

The connection between law and justice: the utilisation of therapeutic justice in family law.

David Morrison and Clare Cappa ¹

Introduction

Ever wondered what the difference between 'law' and 'justice' is? Thought about how it is that one offender 'gets off' more easily than another person committing a lesser crime? Misunderstood the purpose (and application) of learning jurisprudence as part of your law degree? Welcome to the confusion.

Most students discover that law does not equal justice and that the law does not always deliver just outcomes, if not while at Uni then certainly shortly after! On the question of offenders we also know that 'each case depends upon its own unique facts and circumstances' and therefore judicial discretion allows for many combinations of case outcomes that perhaps might not seem consistent with the matter being heard, nor indeed with the various cases on similar legal points. Even our study of the theory of law (jurisprudence), our take on Kelsen or Hayek is at best formed in something of a vacuum, and rightly so since it is often necessary to understand the abstract before properly appreciating its practical application.

Traditional doctrine suggests that the golden thread of the common law ensures the 'right' outcome and Law School history (along with more than a few determined TC Beirne scholars) ensure that students get a good dose of jurisprudence as part of the necessary requirements for an LLB. However it does us good to think about justice and questions about consistency from time to time. Hence the temptation to ask whether there is another way to make sense of the law, perhaps by using a different framework or lens to view the law and the law's potential to enhance policy that is more humanistic in its interpretation and application of legal outcomes.

This short paper seeks to introduce you to the concept of therapeutic jurisprudence, a concept that encourages us to examine and understand how the law can be used as a 'therapeutic agent' to promote the well being of the people it affects.

Therapeutic Jurisprudence

Therapeutic jurisprudence examines the effect of legal processes on the wellbeing of those involved in them, including litigants, witnesses, victims of crime, juries, judicial officers, lawyers, clients and court staff. It explores the healing power of the law. Though commonly associated with problem solving court programs such as drug, family violence and mental health courts and alternative sentencing regimes, its scope is as broad as the law itself, embracing such areas as workers compensation law, family law, child welfare law, native title law, circle sentencing courts, international law, coronial practice, civil litigation, appeal proceedings, judging, legal practice, court administration and legal education.

The idea of therapeutic jurisprudence was first made popular by two researchers in the United States of America as a means of determining a lens through which one might examine mental health issues and related legal outcomes.² Therapeutic jurisprudence has generated such interest that it is now considered to have applicability for all areas of law, civil and criminal. Further and not surprisingly, given the origin of therapeutic jurisprudence's close association with mental health and associated medical issues, it is also widely accepted as having interdisciplinary relevance. Wexler and Winick define therapeutic jurisprudence as 'the study of the role of law as a therapeutic agent' focusing on the law's impact on emotional life and psychological well-

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² For a more recent update of their work see; Wexler DB and Winick BJ *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* xvii (1996)

being.³ The idea is that therapeutic jurisprudence allows for ways to humanise the law or alternatively to understand the application of law in the context of human behaviour and consequence such that law might be viewed as a social thing rather than purely 'legal' in form.

Such a view of the law allows for a connection to be made between our knowledge of the law and our understanding of social (or anti-social) behaviour – disciplines that are often seen as separate, for example the Law School is located in a separate faculty from Social Science at The University of Queensland. Thus the connection provided by therapeutic jurisprudence allows for a way of looking at the impact of legal process upon people. The legacy of therapeutic jurisprudence is that the formalistic application of the law is de-emphasised and instead greater attention is paid to the social consequences of legal decisions and procedures. Accordingly, therapeutic jurisprudence requires judges and legal practitioners to make policy decisions based on empirical evidence gleaned from examining the 'potential effects of proposed legal arrangements on therapeutic outcomes.'⁴

Family Law

An example of how therapeutic jurisprudence makes sense of the apparent disconnect between legal process and social outcomes might be to examine the impact of the law relating to family relationships, which can involve a mix of civil and criminal issues. Domestic violence is the common term ascribed to violence that occurs within family or family-like relationships. When it comes to the family unit, an understanding of the impact of abuse (and violence) is critical to understand from as productive a perspective as possible. A civil law example might be how therapeutic jurisprudence understands the law's impact on a parent's behaviour when separated from their children in a custody dispute.

One of the interesting dilemmas that exist around domestic violence within the family unit is that family law per se is a federally-based set of rules however the laws with respect to violence are primarily state-based. This leads to compounded difficulty in terms of ensuring consistent delivery of the law to identical circumstances across jurisdiction.

A further dilemma is that there is a marked reluctance to prosecute violent perpetrators for their actions where the offence occurs within the home. Whether that is a function of the reluctance of the injured party to take the matter further, the reluctance of legal enforcement officers to enter a domestic scene or whether a combination of both is not perfectly clear, although the latter seems most likely.⁵

It seems therefore that civil remedy of the protection order is the most likely replacement where some form of protection is sought within family dispute. Utilising civil means of dealing with threatening circumstances lies in the perception that the offending behaviour within family settings is not seen to be as serious as external threats and / or that the civil means of remedy is more readily accessible and therefore more convenient to use including less disruption to one's life than with pursuing an assault charge. On the other hand there are issues with the civil orders being used to prevent access to children in disharmonious relationships.

So what does therapeutic jurisprudence offer in the context of domestic violence? One insight may well be that it is important to try to understand violence outside the traditional classifications accorded to the behaviour by the law. In a sense the law does not work well in a domestic violence situation because it seeks to penalise only the outward manifestation of the criminal behavior, such as the violence, without adequate consideration of the underlying causes, such as frustration and anger. The law therefore points the applicant in the direction of either a family jurisdiction or a criminal court. Neither of these provides an adequate

³ Wexler DB and Winick BJ *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* xvii (1996)

⁴ Peggy Fulton Hora, William G Schma and John Terrence A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439, 445

⁵ There are relatively few convictions for assault within families, see Renata Alexander, *Domestic Violence in Australia: The Legal Response* (2002, 3rd ed) Federation Press, Annandale, 31 ff.

solution in many circumstances. A therapeutic initiative, on the other hand, broadens the focus from the micro-analytical impact on the individual to the macro-analytic therapeutic impact on society as a whole.

One consideration of viewing the law as a social force, rather than just a set of complex rules, allows us to understand the importance of behaviour and the consequences of behaviour, and then to consider how therapeutic jurisprudence might assist the law. Therapeutic jurisprudence, without seeking to change the legal rules or paradigm, allows legal system participants to do a more humane (or 'better') job by emphasising that in doing their job they understand the values of the legal system as well as its inherent legal rules. Whether the therapeutic jurisprudence initiative allows the individual to feel more in control, improves their self-esteem and has a positive effect on their mental or psychological health is secondary to whether the initiative results in a diminution of the offending behavior and is cost-effective for society as a whole.

Instead of the legal rules, legal procedures and the roles of legal actors being used as a weapon against the offender in an atmosphere of hostility, the application of therapeutic jurisprudence 'explores ways in which, consistent with principles of justice, the knowledge, theories and insights of mental health and associated disciplines can improve the process and outcome of the law.'⁶ It is in this context that specialist domestic violence courts, which are concerned with both the psychological as well as physical well being of their participants, show a strong synergy with therapeutic jurisprudence. This is reflected in the way that court processes, the role of the magistrate and the treatment of the participants in the domestic violence court are geared toward the objective of treatment rather than punishment, of therapeutic outcomes instead of damage.⁷

In a recent annual report, the Chief Magistrate, in referring to the Specialist Domestic Violence Court initiative suggested that "a long term integrated response be adopted to the issue [of domestic violence] by establishing a specialist domestic and family violence jurisdiction with a problem-solving or therapeutic jurisprudence approach."⁸ This approach would deal with all the various permutations of criminal matters which arise from domestic violence - breaches of orders, common assault, stalking, deprivation of liberty, child abuse, willful damage – as well as addressing the key issue of why participants have chosen, or continue to choose, to use both physical and emotional violence to address their problems.

Some of the initiatives already undertaken include an appreciation that domestic and family violence proceedings are emotional and in some cases, potentially volatile so that the incorporation of domestic violence waiting lounges, with en suite facilities and direct access to court rooms without the need to enter public areas, which avoid unnecessary trauma and distress from open confrontation between the parties; the provision of a separate play room for children separated by a glass wall which reduces children's exposure to pre-court discussion; and the availability of counselling from professionally trained Court Assistance workers from the Women's Domestic Violence Court Assistance Service of Women's Legal Aid.

In other jurisdictions⁹ the court provides assistance workers to explain the court processes and procedures to the client, carry out risk assessments, develop safety plans for those in fear and ensure there are timely referrals made to outside agencies with respect to housing, finances, employment and ongoing counselling

⁶ Ian Freckelton, 'Therapeutic Jurisprudence and Tribunals' (Paper presented at the 5th Annual AIJA Tribunals Conference: Developing a Best Practice, Melbourne, 6-7 June 2002).

⁷ This echoes the theoretical frameworks of other examples of specialist courts, such as drug courts, where the use of therapeutic jurisprudence is well recognised – see Peggy Fulton Hora, 'The Synergy Between Therapeutic Jurisprudence & Problem-Solving Courts' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7-9 June 2006); Costanzo, John et al, 'Workshop No 1 - Therapeutic Jurisprudence and the Role of the Judicial Officer in a Therapeutic Court' (Paper presented at the Drugs, Rehabilitation and the Criminal Justice System Conference, Sydney, 28 February - 1 March 2002); Furedi, Frank, 'Drug Control and the Ascendancy of Britain's Therapeutic Culture' in James L Nolan Jr (ed), *Drug Courts in Theory and in Practice* (2002) 215.

⁸ Queensland Magistrates Court *Annual Report 2005-2006* 29.

⁹ Victoria has established a Family Violence Division of the Magistrates' Court.

and support. The courts also have power to order respondents/defendants subject to an intervention order, to attend counselling to address their violent behaviour.

The use of civil protection orders, known by various names including 'restraining orders', were instigated as a legislative response for the protection of women by violence and abuse within the family unit. Being civil in nature, they allow for the complainant's case to be pleaded on the balance of probabilities. The order granted may be tailored to allow for the particular circumstances of the perceived threat. Protection of the child arises from an order to prohibit a respondent from entering the family property. Where an allegation of child abuse is made, some jurisdictions have experimented with new ideas in case management to help ensure that the best interests of the child are considered, in part by attempting to reduce parental conflict. Both the Family Court of Australia and the Family Court of Western Australia have embraced these initiatives that have come about by separate projects developed by each of them.

All of these mechanisms accord with the understanding, engendered by proponents of therapeutic jurisprudence, that the legal process can have therapeutic as well as justice outcomes. Soundly based on a belief in the value of individualised justice coupled with individual accountability, and the idea that violence is learned behaviour which can be unlearned through rehabilitation, these initiatives will go much of the way towards stopping the revolving door of anger and loss of self-control which characterises many domestic violence situations.

Conclusion

There are some challenges confronting therapeutic jurisprudence which may preclude it from becoming accepted as an established element in the criminal justice system¹⁰. First of all, is therapeutic jurisprudence distinguishable from other jurisprudences that share its goal of using the law to improve the well-being of others? Secondly, can the term therapeutic be defined in a meaningful way? Thirdly, will the vagaries of empirical research, on which therapeutic jurisprudence heavily relies, plague its proposals? Fourthly, is there tension between the rule of law and therapeutic jurisprudence, based on the emphasis of the former on equality and of the latter on discretionary decision making, so that therapeutic jurisprudence benefits only a subgroup of those it affects? Lastly, there is the question of balance - when and how should a therapeutic jurisprudence proposal be balanced against countervailing legal and social policies?



¹⁰

Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1(1) *Psychology, Public Policy and Law* 193.

'Unpacking the aporias of security': an ethical instruction for lawyers attempting to negotiate the 'war on terror'

Sanmati Verma

*Sept. 11th events were described as an attack on freedom, an attack on democracy! Whose freedom and whose definition of democracy?... You do not have to commit murder you see... to be a murderer. You have built a cage around us, not realising that you have locked yourself out.*²

*The ethical interrupts imperfectly, to listen to the other as if it were a self, neither to punish nor to acquit.*³

Introduction

This essay addresses itself to the ethical underpinnings of the current 'war on terror.' Specifically, I want to address the utilitarian calculus that asks us to 'balance' human rights considerations in the name of 'security.' This calculus rests on a construction of the 'war on terror' as a disjunctive turn in history, a 'moment of exception' with no historical antecedent. Lawyers play a crucial role in policing this discourse: by prosecuting individual cases and suspending human rights for fear of upsetting the 'security balance.'⁴ The aim of this essay is therefore to recuperate an ethical position from which lawyers may speak back to the normalising discourse of security.

In Part I, I seek to uncover the racialised logics of Self and Other that underlie our discourses of 'security' and metaphors of 'balance.' Implicitly, I suggest, our 'security' is built on the back of the insecurity and suffering of the Other. In Part II, I examine the failed criminal prosecution of Izhar ul Haque as an example of the everyday insecurities that are visited upon Australia's Muslim communities through our 'anti-terror' arrangements. In the final section, I offer an alternative vision of security found in the other-oriented ethics of Emmanuel Levinas. Levinas pictures identity in terms of ethics and connection, and envisions the self/other relationship in terms of responsibility. As ethical actors, there is a role for lawyers in questioning the imperialistic self/other dynamics of 'security' and so setting the conditions for an alternative mode of community and national belonging.

'Security'

Terrorism and exception:

The ethical dynamics of the war on terror are conditioned by a penetrating discourse of exceptionalism. 9/11 is figured in the popular imagination as a singular and exceptional moment in history which allows no ethical comparison.⁵ Former Attorney General of Australia, Phillip Ruddock, assures us that 'the war on terror is like no other war in living memory... this is a war which may have no obvious conclusion, no armistice, no treaty.'⁶ The discourse of exceptionalism has taken hold to such an extent that former Chief Justice Gerard Brennan recently 'warned' lawyers against 'knee-jerk' responses to anti-terror laws:

¹ I borrow the term 'aporia' from Burke's usage. An 'aporia,' as Burke explains, 'is an event that prevents a metaphysical discourse from fulfilling its promised unity—an untotalisable problem at the heart of the concept': Burke, Anthony, 'Aporias of security' (2002) 27 *Alternatives* 1: 5.

² Sukkarieh, Omeima and Zahra, Mia, 'Silence that Speaks and Dreams that Cry' (2002) 1(1) *Borderlands E-Journal* 1.

³ Spivak, Gayatri Chakravorty, 'Terror: a Speech after 911' (2004) 31(2) *boundary* 2 81.

⁴ Parker, Christine and Evans, Adrian, *Inside Lawyers' Ethics* (2007): 98.

⁵ Consider the following comments of Rudy Giuliani, rejecting the suggestion that September 11 may be linked to the suffering of Palestinians in the Occupied Territories; "Not only are those statements wrong, they are part of the problem. There is no moral equivalent to this attack. There is no justification for it"; Giuliani in Jenkins, Fiona, 'Dialogue in the Aftermath: On good, evil and responsibility after September 11' (2004) 3(1) *Borderlands E-Journal* 1.

⁶ Ruddock, Philip, 'National Security and Human Rights,' Deakin Law School Oration, delivered 19 August 2004, Melbourne.

*While the defence of basic rights is ingrained in all lawyers, Brennan has highlighted the uncomfortable reality that basic freedoms in this country can legitimately be wound back by governments. He goes further and recognises that this might even be essential when it comes to counter-terrorism methods.*⁷

The 'exceptional' evil of terrorism is held to justify, in turn, the 'exceptional' suspension of law and rights. In this climate, a particular docility is demanded from civil libertarians and human rights lawyers. Ethical interpellations appear, at best, smugly self-interested and at worst dangerous or even seditious.⁸

However, as Paula Abood pointedly remarks, in whose version of historiography does 9/11 come as a 'shock to history' and a moment of ethical 'exception'?⁹ Do we imagine that those observing the scene from the cities of post-Cold War Iraq, the West Bank or other imperilled zones are similarly beguiled by this moment of 'shock'?¹⁰ Those confronted with the daily realities of colonial domination, exclusion and dispossession already recognise the 'monstrous capacity of the sovereign for exception.'¹¹ Lee Godden argues that Australia's anti-terror laws purporting to suspend rights and civil liberties bear historical comparison to colonial doctrines of exception such as *terra nullius* which suspended Aboriginal legal personality.¹² For indigenous communities, the propensity of the sovereign to constitute itself by reference to the 'monstrous,' the 'exceptional' and 'outside' comes as old news. For criminal lawyers, Bronniti explains, the language of exceptionalism deployed in the 'war on terror' should be redolent of the recent 'war on drugs.'¹³ The 'war on crime,' the moral panics engendered around immigrants, forced migration and 'boat people' are all contemporary examples of states of exception that have justified the progressive erosion of the rule of law and the expansion of the state's coercive capacities.¹⁴ The exceptionalist discourse of terrorism must be placed within these historical movements. The 'monster,' the 'bandit,' the 'outsider' and the 'terrorist' are all regulatory constructs of Western modernity.¹⁵

Security, Self and Sovereignty:

If exceptionalism and 'security' are not accepted uncritically as something states *must do* in response to terrorism, but are rather considered strategic choices that perpetuate an ongoing discourse of terror, then we should ask ourselves what options are *not* being pursued. Specifically, we should question the discourse of 'security' that seeks to 'depoliticise and marginalise constructive conflict in the name of risk control.'¹⁶ What vision of ourselves might be hidden behind the naturalised suggestion that our 'security' should be purchased at the expense of rights, and what ethical alternatives might there be to this suggestion?

⁷ Merrit, Chris, 'Brennan is right on rights' *The Australian* (Sydney) 7 September 2007.

⁸ Andrew Byrnes speaks of the demonisation of lawyer and 'chattering classes' in the war on terror context as 'elitists who consider themselves morally superior to ordinary Australians, who articulate concerns which are of no real concern to ordinary people and who are pursuing their own self-interest'; Byrnes, Andrew, 'Law, Lawyers and Lattes: The (Ir)relevance of the Chattering Classes in a Time of Insecurity,' Law Week Lecture, delivered 29 March 2006, Melbourne. See also Parker and Evans, above n 4, 99.

⁹ "...I speak back to a politics that demands we must react as we are told to September 11. As an Arab feminist living in the West, I refuse to be co-opted into this act of white solidarity at the expense of all other political concerns and events"; Abood, Paula, 'The Day the World did not change' (2003) 29(2) *Signs* 576: 576.

¹⁰ Ibid.

¹¹ Godden, Lee, 'Terrorism: Reinvoking the Barbarian to Secure the Space of Civilisation' (2006) 24 *Australian Feminist Law Journal* 69.

¹² Ibid.

¹³ Bronniti, Simon, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism' (2003) 14 *Public Law Review* 76: 78.

¹⁴ Jude McCulloch, University of Technology Sydney, 'Public Forum: Manufacturing Fear—Who's afraid in the war on terror?' http://international.activism.hss.uts.edu.au/conferences/pdf/Manf_Fear_Booklet.pdf accessed 12 November 2007.

¹⁵ Writing on the regulatory power of racial profiling and the turban, Rai and Puar comment: 'Within this fetish of the visible, the turban acquired the force of a tool of the panopticon. As part of the visibility of the terrorist, the turban impels the disciplinary apparatus of the panopticon: the patriot is ensured.' Puar, Jasbir and Rai, Amit, 'The Remaking of a Model Minority: Perverse Projectiles Under the Spectre of (Counter)Terrorism' (2004) 22(3) *Social Text* 75: 82.

¹⁶ Jayasuriya, Kanishka, 'September 11 and the new 'anti-politics' of security,' Australian Review of Public Affairs, <http://www.ssrc.org/sept11/essays/jayasuriya.htm> accessed 4 February 2008.

Burke argues that our ideas of 'security' find their roots in the 'fear-soaked colonial ontologies' of modernist writers such as Thomas Hobbes.¹⁷ In *Leviathan*, Hobbes envisions citizenship as a 'trade-off,' wherein the individual 'trades' certain freedoms for the guarantee of 'security' against hostile aggressors situated outside the state. Through this exchange, the state and the individual are soldered together as a single existential figure, secured against outside aggressors: 'the state and the citizen [became] linked formations of subjectivity secured by security.'¹⁸ In this vision, we can read the clear modernist assumption of the Self as a sovereign entity, separate and ontologically distinct from Others who threaten its identity. The 'secure' modern subject is imagined as 'endangered, as primarily estranged from the Other of the criminal, the socialist, the Aboriginal or the ethnic minority.'¹⁹

In its current deployment in the war on terror, the concept of 'security' implies an assumption about subject position—'about who is under threat, and whether or not that matters.'²⁰ The very intensity of the reaction to 9/11 suggests that certain subjects have become able to identify themselves 'as those for whom insecurity is a characteristic of *other people*.'²¹ Would we be able to accept a 'security' based on the liquidation of rights and freedoms, if we thought that we ourselves or others who we valued as unique and precious human beings would be subject to those abuses?²² As Jude McCulloch suggests, when people in liberal democracies speak brazenly about 'balancing security and rights,' it is never their own rights that are being 'balanced.'²³ Resting on a repressive dialectic of Self/Other, our 'security' always implies the insecurity and exclusion of an Other. The normalisation of security politics in Australia following 9/11 has led to the 'uncritical acceptance that a lack of human empathy when dealing with others is critical to our security.'²⁴ The politics of security is thus primarily 'self-referential', based on a modernist ontology of the Self that views difference as threat and eschews ethical responsibility towards Others.

In the current security setup, the figure of the Other is liquidated through a series of linguistic negations (such as 'illegal non-combatant,' 'non-citizen,' non-criminal criminal, non-Australian Australian).²⁵ This language, Burke suggests, seeks to name these subjects 'illegal' before they are human.²⁶ In this way, the Other as a 'non'-entity may be denied a cognisable juridical identity. Kampmark notes that the category of 'terrorist suspect' does not exist before the eyes of the law; 'he is already in a pre-assigned category of the 'illegal'... the niche of guilt has been readied for him.'²⁷

¹⁷ Burke, Anthony, 'The Perverse Perseverance of Sovereignty' (2002) 1(2) *Borderlands E-Journal* 1.

¹⁸ Ibid 5.

¹⁹ Ibid.

²⁰ Szorenyi, Anna and Rogers, Juliette, 'Congealed by Law: Terrorism, Torture and the Possibilities of Critique' (2006) 24 *Australian Feminist Law Journal* 1: 12.

²¹ Ibid 7.

²² McCulloch, above n 14.

²³ Ibid.

²⁴ Kampmark, Binoy, 'David Hicks, Mamdouh Habib and the limits of Australian Citizenship' (2003) 2(3) *Borderlands E-Journal* 1.

²⁵ Giorgio Agamben's writing offers a complex account of the exceptional figures that accompany civilisation. Agamben argues that the disciplinary formations of modernity require the figure of the 'bandit'; 'The bandit/*homo sacer* is 'he who can be killed without committing homicide' and who thus stands in constant relation to the 'unconditioned threat of death.' See Jenkins, above n 5.

²⁶ Burke, Anthony, 'Borderphobias: the politics of insecurity post-911' (2002) 1(1) *borderlands e-journal* 1.

²⁷ Kampmark, above n 24, 3.

Izhar Ul Haque:

In the following section, I turn to consider who is rendered insecure within Australia's security regime. I consider the aborted criminal prosecution of Izhar ul Haque, not as an exceptional case study, but as a banal example of the everyday implications of our security practices.²⁸ In the concluding section of the paper, I will look to the writing of postmodern ethicist Emmanuel Levinas as a basis for lawyers to radically rethink the interactions of Self/Other in the current climate.

Backdrop:

Since 2001, Australia has enacted a staggering array of over 40 new pieces of anti-terror legislation.²⁹ This legislative 'suite' has four key planks—it inaugurates broad 'terrorism and related offences';³⁰ empowers the Executive to proscribe 'terrorist organisations';³¹ expands the investigative powers of the Australian Security and Intelligence Organisation (ASIO)³² and extends military call-out powers in relation to 'emergency' situations.³³ These laws significantly infract upon civil liberties and enlarge unaccountable Executive power, and have been described by eminent commentators as 'some of the most draconian laws to appear before parliament.'³⁴

Although the anti-terror regime ensures that 'many of us may end up in prison sooner rather than later,'³⁵ the brute reality is that the Muslim community has borne the preponderant force of the laws. The great majority of people charged under the laws have been Muslim³⁶ — the exceptions being Arumugam Rajeevan and Aruran Vinayagamorthy, two Tamil men charged in 2007 with supplying funds to the Liberation Tigers of the Tamil Elam.³⁷ Although many organisations meet the vague proscription criteria contained in the *Criminal*

²⁸ 'Sydney lawyer Stephen Hopper said that he was *not surprised* by what happened to Ul Haque, saying that "it is the norm, rather than the exception." Hopper said that several of his clients had been inappropriately interviewed by ASIO officers when their houses were raided, without being advised of their rights or given the opportunity to call a lawyer' (emphasis mine): See Mitchell, Colin, 'LeftWrites: Ul Haque trial dismissal and the need to control ASIO' accessed <http://www.leftwrites.net/2007/11/19/ul-haque-trial-dismissal-and-the-need-to-control-asio/> 19th January 2008.

²⁹ A comprehensive list of the post 911 'legislative suite' can be found at the government's 'National Security' website: <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>. Note that these pieces of legislation operate in tandem with mirroring State legislation, which is significantly more permissive as it operates in absence of the Constitutional limitations found at the Federal level.

³⁰ *Security Legislation Amendment (Terrorism) Act 2002* (Cth), inserted 'Division 101: Terrorism' into the *Criminal Code* 1995 (Cth) (Hereafter *Criminal Code*).

³¹ *Criminal Code* Div 102.1(2), inserted by the *Criminal Code Amendment (Terrorist Organisations) Act 2004*, empowers the Governor General to proscribe a 'terrorist organisation,' if satisfied that the organisation:

- (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

A series of criminal offences are attendant upon supporting or affiliating with a proscribed organization, carrying a maximum penalty of 25 years imprisonment: see *Criminal Code* Div 102.2-102.8.

³² The controversial *ASIO Legislation Amendment Act 2003* (Cth) vested Australia's intelligence authority with powers of arrest and detention traditionally held by law enforcement agencies. ASIO is now empowered detain non-suspects over the age of 16 years, who may have 'information' related to 'terrorism offences': see *ASIO Act* s 34B. Controversially, the *ASIO Amendment Act* inserted a series of 'disclosure offences,' creating an offence liable to five years imprisonment for disclosing a questioning order in force: see *ASIO Act* s34ZS.

³³ The *Defence Legislation (Aid to Civilian Authorities) Amendment Act 2006* (Cth) enables the expedited callout of defence personnel to protect 'critical infrastructure' (s 51IB) or guard against an 'aviation incident' (s 51AB).

³⁴ Specifically in response to the *ASIO Amendment Act*, eminent Constitutional commentator George Williams remarked that the law 'would not be out of place in former dictatorships, such as Pinochet's Chile'; See Golder, Ben and Williams, George, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis* 43. Michael Head has consistently argued that the *ASIO* laws in particular 'are the kinds that may identify a police state'; See Head, Michael, 'Detention and the Anti-terrorism legislation' (2005) *University of Western Sydney Law Review* 1.

³⁵ Guy Rundle, quoted in Hoh, Ben, 'We Are All Barbarians: Racism, Civility and the "War on Terror"' (2002) 1(1) *Borderlands E-Journal* 1.

³⁶ See <http://www.nationalsecurity.gov.au/> for a full list of terror prosecutions conducted to date.

³⁷ See TamilNet, 'Australia's terror Prosecutions' <http://www.tamilnet.com/art.html?catid=79&artid=22802> accessed 20 November 2007.

Code, thus far all proscribed organisations claim some Muslim affiliation.³⁸ Directly following the enactment of the first anti-terror laws, ASIO conducted widely-publicised raids in the Muslim-dominated Sydney suburbs of Lakemba and Bankstown. Several of the families whose homes were raided claimed that ASIO brought the media with them, and the next morning pictures of the raids appeared in Sydney papers accompanied by the heading ‘Bin Laden in the Suburbs.’³⁹ The raids did not produce any arrests, leading to the inescapable inference that the families were targeted for their religious affiliations:⁴⁰ ‘the raids were clearly meant to be a public gesture...designed to intimidate.’⁴¹ The Muslim community, Agnes Chong explains, experiences these laws as ‘the creation of a parallel legal system.’⁴² Chong cites the example of Mark John Avery who in 2004 detonated a bomb near Rooty Hill mosque, and was subsequently sentenced to 220 hours community service — ‘if your name was Mohammad Yusuf Islam, then you might find yourself in a very different situation. You might find yourself being accused of training for terrorist activities, or preparing for an unspecified act.’⁴³ Every Muslim picked up in a similar situation would be tried presumptively under terrorism laws, carrying far harsher penalties. The perception that Muslims are being ‘100% targeted by these laws’ forces them to ‘experience civic space and citizenship differently.’⁴⁴ ‘Muslims must appear [in the public sphere] as a negation of the dominant concept,’ Waleed Aly notes, ‘and I’m profoundly tired of that.’⁴⁵

R v Ul Haque:

Izhar ul Haque was a twenty year old medical student when he decided, in 2003, to fly to Pakistan and visit the training camp of Lashkar-e-Taiba (LeT).⁴⁶ At the time of his visit, LeT was not yet a proscribed organisation in Australia, and was responsible for conducting spiritual instruction as well as insurrectionary activity in the disputed territory of Kashmir. After 20 days at a ‘preparatory camp’, Izhar returned to Australia disillusioned with his spiritual instruction. At the airport, customs confiscated his diaries as well as several LeT instruction booklets, though he was not detained.⁴⁷

Izhar heard nothing further in relation to the training until in 2004 — an election year⁴⁸ — he was approached informally by two ASIO officers in a carpark. Instructing Izhar to leave his younger brother behind, ASIO officers ‘B14’ and ‘B15’ ushered him into a car. Without indicating the specific purpose of the encounter, the officers obliquely informed Izhar he was ‘in a lot of trouble,’ that ‘there is an easy way or a hard way to do things.’⁴⁹

³⁸ Other organisations that meet the proscription criteria though have not been listed include: Mujahideen-e-Khalq (MeK), Liberation Tigers of the Tamil Elam (LTTE), Sendero Luminoso (Shining Path), Euskadi Ta Askatasuna (ETA), Babbar Khalsa International, International Sikh Youth Federation and (al-)Gama’a al-Islamiyya—Commonwealth of Australia, *The Politics of Proscription*, Parliamentary Research Note No. 63 (2004) available online at <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn63.htm> accessed 19th January 2008.

³⁹ Poynting, Scott, ‘Bin Laden in the Suburbs’: Attacks on Arab and Muslim Australians before and after 11 September’ (2002) 14(1) *Current Issues in Criminal Justice* 43.

⁴⁰ Consider the following statement by Mark Burgess, Police Federation Chief Executive— “Look, what we’re concerned about is that intelligence generally will identify the type of person who might be under suspicion for a terrorist attack...Unfortunately, more often than not, the profile will be young men of Middle Eastern appearance...It’s inevitable that there will be unintended consequences of this legislation, and we just want to make sure that there is some protection for police officers”; Police Federation Chief Executive Mark Burgess, ABC Radio, ‘Police Say New Laws Will Lead to Racial Profiling,’ *The World Today* Program <http://www.abc.net.au/worldtoday/content/2005/s1469360.htm> accessed 20 August 2007.

⁴¹ Poynting, above n 39, 58.

⁴² Chong, Agnes, ‘Anti-terrorism laws and the Muslim Community: Where does terror end and security begin?’ (2006) 5(1) *Borderlands E-Journal* 1.

⁴³ Ibid.

⁴⁴ Kampmark, above n 24, 5.

⁴⁵ Aly, Waleed, ‘Islam, Rebellion and Terrorism,’ Speech delivered at the University of Melbourne Law School, Melbourne, 10 October 2007.

⁴⁶ The facts outlined here are set out in detail in the Justice Adams’ judgment: *R v Ul-Haque* [2007] NSWSC 1251 [1]-[56] (Hereafter ‘Ul Haque’).

⁴⁷ Amongst the confiscated materials, ASIO claimed that certain unsent letters written by Izhar to his family were ‘particularly inculcating.’ Part of those letters read: “I do not want to live in Australia and would not want to go back there again. I’m fed up with Westerners and their animal-type lifestyle. The Western patients in the hospital look at me as if I am a frog. I do not want to speak English with them.” Australian Broadcasting Corporation (ABC) Net, ‘Court grants bail to Izhar ul Haque’ accessed <http://www.abc.net.au/pm/content/2004/s1117499.htm> 25th January 2008.

⁴⁸ Head, Mike, ‘World Socialist Website: Australia’s first ‘terrorist’ charges timed for Howard’s election campaign’ <http://www.wsws.org/articles/2004/may2004/aust-m04.shtml> accessed 4 February 2008.

⁴⁹ Ul Haque [32].

Izhar was placed under the impression that he was under compulsion to answer questions — told ‘we now require...your full cooperation with ASIO in resolving the matter by being honest with us’⁵⁰ — even though the officers had a warrant only for the inspection of his property. After being questioned about his training for 45 minutes in a nearby park, Izhar was told that the questioning had been ‘unsatisfactory’ and would be continued at his home: ‘the officers said ‘Look, you're not being honest with us. We already have a lot of information about you and if you don't co-operate, things will get worse for you.’⁵¹ Returning to his family home, Izhar discovered some twenty-five ASIO personnel executing a search subject to a warrant. Certain officers were questioning his mother and brother in separate rooms. Izhar ‘was shocked at the immense nature of the operation.’⁵²

Under colour of the warrant, officers B14 and B15 continued to question Izhar in a separate room. Izhar was not informed of his right to counsel or other legal rights during questioning.⁵³ As Izhar relayed his account of the training in Pakistan and his connection with one Faheem Lodhi,⁵⁴ officers B14 and B15 continually interjected to correct or repudiate his version of events. At a certain point, Izhar merely ‘coalesced’ in their version of the truth; ‘ASIO officers told him when they thought he was not telling the truth and told him, or suggested, what the truth was.’⁵⁵

In the following days, the enquiry was handed over to the Australian Federal Police (AFP). Although AFP officer Agent Pegg issued a caution and offered Izhar access to security-cleared counsel, Izhar maintained the impression that ASIO and the AFP ‘were part of one bigger operation against [him].’⁵⁶ ASIO’s interactions with Izhar continued in an ‘unbroken stream’ of coercion, in which the initial impressions were never reversed. At one stage, ASIO officers approached Izhar insisting that he ‘wear a wire’ and participate in intelligence operations against the Musallah at Lakemba mosque.⁵⁷ Izhar informed officers he would not undertake operations against his local community unless obliged under warrant or court order to do so. A short time later, Izhar was charged with ‘training’ or ‘providing support’ to a terrorist organisation. Although the Crown prosecutor admitted that Izhar posed no danger to Australian society, his initial application for bail was denied.⁵⁸ He was held for six weeks in solitary confinement in a three-by-three metre cell at Golburn jail, before being released on bail.⁵⁹

During the pre-trial hearing, Izhar voiced the ‘trauma’ and ‘anxiety’ occasioned by his year-long dealings with ASIO:

*I believed that unless I kept talking and kept answering their questions that they will use the hard way and the hard way to me meant a lot of things. It meant, for example, that I could either be deported, I could be arrested, I could be taken to a secret location for interrogation and also my family could also be immensely affected...*⁶⁰

⁵⁰ UI Haque [35] (emphasis mine).

⁵¹ UI Haque [28]

⁵² UI Haque [40].

⁵³ ‘[N]either the actual powers of the officers nor the legal rights of the accused were conveyed. It is inescapable that this was deliberate’; UI Haque [34].

⁵⁴ Faheem Lodhi was an acquaintance of the UI Haque family. In one of the earliest terror prosecutions in the country, Lodhi was sentenced to 20 years imprisonment in 2002 for soliciting recruits for Lashkar-e-Taiba; UI Haque [55].

⁵⁵ UI Haque [46]

⁵⁶ ‘Well, my state of mind was that these are police formalities and procedures. My real concern was that if I did not tell the police all the information they ask me that I will be in more serious trouble...’; UI Haque [70].

⁵⁷ UI Haque [110].

⁵⁸ *R v UI-Haque* NSWSC 071878/04 (bail judgment).

⁵⁹ Australian Broadcasting Corporation (ABC) Net, ‘Court grants bail to Izhar ul Haque’ accessed <http://www.abc.net.au/pm/content/2004/s1117499.htm> 25th January 2008.

⁶⁰ UI Haque [71].

During the time of the investigation, Izhar's father remained in Pakistan and at one stage Izhar began to fear that his father might be rendered to foreign authorities as a 'pressure tactic'.⁶¹ Recordings of interviews show Izhar cowed, eyes averted, supinely answering questions with 'yes... yes'.⁶² Confused as to the nature of the case against him, Izhar remained 'at a loss' as to how to co-operate with authorities demanding more information: 'I felt I had to be sort of obedient, and I also sometimes think like that I don't know what the answer is, sorry.'⁶³

Justice Adams of the New South Wales Supreme Court disposed of all charges against Izhar in 2007, finding that information against him had been coloured through threat and coercion. Though no physical threat had been leveled, Justice Adams found that the conduct of ASIO was 'specifically designed not to set [Izhar] at ease.'⁶⁴ The very mode and tempo of the questioning was 'calculated to instill fear' and to elicit only those responses 'that the questioner wants to hear.'

Particularly the conduct of officers B14 and B15 was 'reminiscent of Kafka,' and involved 'significant moral turpitude.' In compulsorily questioning Izhar without authority of warrant, Justice Adams found that the officers had committed the common law offence of kidnapping. So far as the conduct at Izhar's home was concerned, the officers had committed trespass as their activities exceeded what was specified in the search warrant. The entire conduct of the investigation constituted 'a gross interference by the agents of the state with the accused's legal rights as a citizen, rights which he still has whether he be suspected of criminal conduct or not and whether he is a Muslim or not.'⁶⁵

The Fallout:

The decision in *Ul Haque* has been lauded as an enlightened turn in the adjudication of terror cases. The decision has been received as an indication of the 'judicial angst' welling against heavy-handed, politicised terror investigations.⁶⁶ Emboldened by the decision, a number of families raided by ASIO in 2002-2003 made contact with the Inspector General of Intelligence and Security seeking redress. Subsequently, the Inspector General of his own motion has initiated a review into the conduct of all terror investigations conducted by ASIO and the AFP, from 2002 onwards.⁶⁷

Our enthusiasm for the *Ul Haque* decision, however, should be tempered by the realisation that the coercive apparatus of the state continues to operate unchecked. It should be remembered that the Inspector General of Intelligence and Security has no formal powers to alter security practices, nor to discipline individual officers for misconduct.⁶⁸ Further, though Justice Adams found that ASIO officers had engaged in 'conduct involving significant moral turpitude,' there was no suggestion that this conduct was outside the ambit of the formal powers granted to them under statute.⁶⁹ There is currently no suggestion that officers 'B14' and 'B15' will be dismissed for their conduct. We should be particularly unnerved by the following comments of AFP agent Lam Paktsun, offered during the pre-trial hearing:

At the time, we were directed, we were informed to lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation. So regardless of the assistance that Mr Ul Haque could give, he was going to be

⁶¹ Ul Haque [65].

⁶² Ul Haque [73].

⁶³ Ul Haque [72].

⁶⁴ Ul Haque [73].

⁶⁵ Ul Haque [95].

⁶⁶ Henderson, Gerard, 'Keelty not getting a fair hearing' *Sydney Morning Herald* (Sydney) 5 February 2008.

⁶⁷ Inspector General of Intelligence and Security, 'Commencement of inquiry into ASIO' accessed http://www.igis.gov.au/ASIO_inquiry.cfm 28th January 2008.

⁶⁸ Mitchell, above n 28.

⁶⁹ See Ul Haque [110]: 'The impropriety of B15 and B16 was intentional and calculated to produce the very admissions that were made. It was grave. *However, there is no suggestion that the officers acted contrary to ASIO protocols and good reason for thinking that they did not*' (emphasis mine).

*prosecuted, charged, because we wanted to test the legislation and lay new charges, in our eagerness to use the legislation.*⁷⁰

In a 2007 report to the federal Senate, ASIO Director-General Dennis Richardson indicated that the organisation continues to expand, both in functions and in operational capacity.⁷¹ We should be troubled by the 'perverse perseverance'⁷² of discourses of security, that are capable of assimilating cases like *UI Haque* as 'collateral damage' or 'one-offs.'

An alternative 'security'

*Pushing beyond security requires tactics that...empower individuals to recognise the larger social, cultural and economic implications of the everyday forms of subjection and discipline they encounter, to challenge and rewrite them...*⁷³

'Security' is an immense political technology— a discourse that has conditioned our political subjectivities, our vision of relationships, political, social and economic order.⁷⁴ However, in the visible everyday aporias opened in the discourse of security, there lies the potential for imagining new ethical relationships. The aporias of Australia's security discourse — indicated by an abject string of failed terror prosecutions⁷⁵ including *UI Haque* — should empower lawyers to question the repressive ontologies of security/threat that they are being required to police.

In this section, I examine some thoughts of postmodern ethicist Emmanuel Levinas as a critique of the rigid and repressive forms of identity that 'security' has heretofore offered us. Levinas offers us a new mode of belonging, which is no longer premised upon fear and revulsion towards the other but on their welfare. In Levinas' writing, our 'security' and subjectivity is bound up with the security of the other. I suggest that the Levinasian concept of 'justice' as 'openness toward the suffering of the other' offers lawyers a language with which to speak back to the deadening 'war on terror' rhetoric.

Levinas and sovereignty:

The writings of Emmanuel Levinas seek to correct the order of Western philosophy by 'placing the other first.'⁷⁶ In *Ethics as First Philosophy*, Levinas argues: 'Modern man persists in his being as a sovereign who is merely concerned to maintain the powers of his sovereignty...a miracle of modern Western freedom unhindered by any memory or remorse'.⁷⁷ For Levinas, the 'first principle' of philosophy is responsibility rather than autonomy—ethics precedes ontology or any attempt to 'know' the other. Our self is always already preceded by the existence of an Other, against whom our identity is set off. As such, the other 'calls myself into being',⁷⁸ and calls into question my ideas of sovereignty and self-containment. As the other logically

⁷⁰ Neighbour, Sally, 'Charge Suspects to Test Antiterror Laws' *The Australian* (Sydney) 13 November 2007.

⁷¹ 'The National Counter-Terrorism Plan states that Australia relies upon a strong, intelligence-led prevention and preparedness regime to support its counter-terrorism strategy... The resources available to ASIO to meet this responsibility continue to grow in line with the decisions by the government in 2005'; Australian Security and Intelligence Agency, 'Director-General's Opening Statement to Senate Standing Committee of Legal and Constitutional Affairs' accessed http://www.asio.gov.au/Media/Contents/senate_standing_committee.html 20th January 2008.

⁷² Burke, above n 17, 3.

⁷³ Ibid 22.

⁷⁴ Burke, above n 1, 6.

⁷⁵ In March 2005, Sydney man Zak Mallah was acquitted on terrorism charges after a trial in which police were found to have acted illegally and improperly in obtaining evidence against him. He pleaded guilty to a lesser charge of threatening to kill Commonwealth officers and served two years in jail; In 2006, 'Jihad' Jack Thomas had his conviction on terrorism charges overturned in the Victorian Court of Appeal, after it found that his AFP interview had not been voluntary and was unfair and contrary to public policy; and in July 2007, Gold Coast doctor Mohamed Haneef was charged with terrorism-related offences in a highly politically charged case, which was later withdrawn for lack of evidence. See Mike Head, 'Australian governt's 'terrorist' case against Dr Haneef unravels' <http://www.wsws.org/articles/2007/jul2007/hane-j20.shtml> accessed 4 February 2008.

⁷⁶ Tan, See Seng, 'Whither *societas civilis* in the Asia-Pacific after 11 September: ideological absolutism and ethics is an age of terror' (2007) 61(2) *Australian Journal of Inetrnational Affairs* 232.

⁷⁷ Levinas in Burke, above n 17.

⁷⁸ Bird, Greta, 'An Unlawful non-citizen is being detained or (white) citizens are saving the nation from (non-white) non citizens' (2005) 5 *University of Western Sydney Law Review* 5.

precedes the Self, there is an ever-present indebtedness and responsibility to the other 'that marks our very own identity and subjectivity.'⁷⁹ Hence, if our subjectivity is grounded in obligation vis-à-vis the other, then any attempt to demolish the subjectivity of the other would in turn destroy the conditions of our own subjectivity.⁸⁰

For Levinas, responsive ethics is based on the recognition of the 'absolute proximity of the most alien.'⁸¹ Our responsibility towards the other cannot be reduced to paternalism or a subsumption of the other into the Self/Same. We must resist the urge to annihilate, narrate, or make the other comprehensible on our own terms — an imperialist urge that is so embedded in our philosophy. 'Ethical intimacy' demands a response to the 'radical alterity of the other,' the other's uniqueness and absolute difference:

*A calling into question of the same — which cannot occur within the egoist spontaneity of the same — is brought about by the other... The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as calling into question of my spontaneity, as ethics.*⁸²

Ethical responsiveness to the absolute other therefore sets the conditions for human freedom and conviviality, by opening the space for a mutual expression of uniqueness. It is the utter strangeness of the other that compels us to act, and compels our protection. Levinas' vision enables us to escape a rigid ontological system which is incapable of conceptualising difference 'other than as threat.' In this vision, the other is not something which threatens or challenges our subjectivity, but is the *very condition* for our subjectivity and our Selves. The ethical relationship between subjects is conceptualised as 'the subject, facing or standing beside another subject, respecting this other subject's right to construe and articulate the world, and willing to listen to it'.⁸³

Responsive ethics and lawyering in the 'war on terror':

The image of Australia being enacted by the 'war on terror' is of 'a unified self, held to itself, severed from others, and thereby deprived of the means of expressing its own finitude and uniqueness in community.'⁸⁴ Lawyers play a crucial role in reifying this identity. By drafting laws to police 'illegals' and colluding in a stultified public debate about the 'limits of rights in times of emergency',⁸⁵ lawyers have a role in policing the boundaries of security/insecurity, inclusion/exclusion, Self/Other.

I want to suggest that the place of lawyers in the current climate is not the guard the exclusionary boundaries of 'security,' nor even to limit themselves to human rights-based critiques of the current regime. Rights critiques are of course critically important, though, as Hoh explains, they continue to fetishise 'our' institutions 'as everything gets worse around us'.⁸⁶ In short, such critiques return us to a valorisation of ourselves and evade a more radical Other-oriented code of ethics to which we must attend.

The 'war on terror' and the logic of security 'make it impossible to respond to a particular set of others — either ethically or politically'.⁸⁷ However, as Levinas suggests, 'today... we are not free to refuse responsibility to the other'.⁸⁸ I suggest that the role of lawyers in the current context is to interrupt the depersonalising

⁷⁹ Tan, above n 76, 239.

⁸⁰ Ibid 241.

⁸¹ Bird, above n 78, 7.

⁸² Adar Avsar, Servan, 'Responsive Ethics and the War Against Terrorism: A Levinasian Perspective' (2007) 3(3) *Journal of Global Ethics* 317: 325

⁸³ Datta, Nandana, 'The Face of the Other: Terror and the Return of Binarism' (2004) 6(3) *interventions* 431: 449.

⁸⁴ Diprose, Rosalyn, 'Responsibility in a place and time of terror' (2004) 3(1) *Borderlands E-Journal* 1.

⁸⁵ This appears to be the underlying theme of many of recent speeches and symposia held at the University of Melbourne Law School, the latest of which is 'Finding Security in Terrorism's Shadow: the Importance of the Rule of Law' presented by Rt Hon Malcolm Fraser <http://www.law.unimelb.edu.au/index.cfm?objectid=4B1D1CB1-B0D0-AB80-E28E8C05438EC230&DiaryID=3401> accessed 4 February 2008.

⁸⁶ Hoh, above n 35.

⁸⁷ Avsar, above n 82, 323.

⁸⁸ Levinas in Ibid 327.

discourse of security by offering up examples of its human costs. In the name of a more responsive, democratic politics, lawyers are called to a radical sympathy with the Other as the true condition of security. 'Justice,' according to Levinas, demands an ethical response to the singularity of each person.⁸⁹ The role of the lawyer in the current context is to respond to the other as an ethical agent, and so 'to recognise the proximity of the most alien.'⁹⁰ By thus humanising 'security,' lawyers may be able to challenge the Self/Other, Self/Enemy schemas that animate the current system.

Conclusion

The 'war on terror' attempts to suspend ethical argument by creating an abstract space of 'exception.' We are asked to recognise that our normative or ethical judgments are 'hopelessly September 10th,⁹¹ and ineffectual in dealing with the 'new threat' of terror. However, as I have suggested, 'terrorism' is constituted as an exceptional and disjunctive turn in history precisely through the erasure of racialised histories of violence and suffering. The discourse of 'security' draws from exclusionary Self/Other dynamics that have always operated with a particular, racialised specificity. Using the example of Izhar Ul Haque, I have suggested that our 'security' implies the profound insecurity and suffering of the Other. Drawing from the writings of Emmanuel Levinas, I have called for a radical politics of empathy that views our security as inseparable from the security of the other. As ethical actors, it is the role of lawyers to open a dialogue with those excluded and liminalised in the name of our security. Such an ethical stance, I have suggested, may create the conditions for ethical peace and diffuse a politics dominated by aversion, threat and fear.



⁸⁹ Bird, above n 78.

⁹⁰ Avsar, above n 82, 328.

⁹¹ Head, Michael, 'Detention and the Anti-terrorism legislation' (2005) *University of Western Sydney Law Review* 1.



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Nothing but paper protection? An evaluation of domestic violence protection orders in Queensland

Anita Clifford

Anita Clifford undertook the JATL Magistrates' Work Experience Program in the Magistrates Court with Magistrate Joan White. Her essay was the winning entry in the JATL Magistrates' Work Experience Program student essay competition.

For close to twenty years, Queensland has endeavoured to respond to the complex issue of domestic violence with the making of civil protection orders pursuant to the *Domestic Violence (Family Protection) Act 1989* (Qld). For victims of domestic violence in Queensland, obtaining a civil protection order is presented by police, lawyers, policymakers and domestic violence workers alike as the first step towards achieving justice and ultimately, safety. Whether protection orders succeed in protecting victims of domestic violence, however, is debatable. In light of this, this paper evaluates strengths and shortcomings of protection orders specifically in relation to intimate partner violence in Queensland and ultimately contends that protection orders do not adequately assist victims in achieving justice. In demonstrating this, this paper will be broken into three parts. First, the issue of domestic violence and the process and effect of obtaining a protection order in Queensland will be touched upon in order to understand how protection orders operate and how they relate to criminal law. Second, strengths of protection orders will be highlighted to demonstrate that although improvements must occur, protection orders are not without merit. Bearing this in mind, however, significant barriers to the effective operation of protection orders in Queensland will be discussed in detail in the third section. More precisely, reasons why the criminal law may be better suited to addressing domestic violence will be canvassed. The need for weightier consequences for protection order breaches, greater police willingness to prosecute breaches and for Magistrates to attach tougher conditions to protection orders will also be explored to shed light on how Queensland's efforts to assist victims of domestic violence may be strengthened in the future.

By its very nature, domestic violence is a complex issue hidden within the home¹. Although domestic violence extends beyond intimate partner violence and can be exhibited in a variety of forms including sexual, physical and emotional abuse as well as economic deprivation and threats of violence², few instances of domestic violence are reported.³ As such, statistics on the prevalence of domestic violence in Australia are unreliable. In the vast majority of cases, however, victims of domestic violence are female⁴ and perpetrators are male thereby highlighting that domestic violence is a gendered problem⁵. Since 1989, civil legislation in Queensland has aimed to protect victims of domestic violence from further harm with the provision of protection orders. Issued by a Magistrate, a protection order is a civil order usually for a period of two years or less made against the domestic violence aggressor upon application by the police, the aggrieved or other authorised person⁶. For an order to be issued, the Magistrate must be satisfied that on the balance of probabilities, a domestic relationship exists between the respondent and the aggrieved, the respondent committed or threatened domestic violence against the aggrieved and that the respondent is likely to do so again⁷. Usually a protection

¹ Queensland Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 15.

² Kerry Carrington and Janet Phillips, *Domestic Violence in Australia - An Overview of the Issues* (2003) Parliament of Australia Parliamentary Library <http://www.aph.gov.au/library/intguide/SP/Dom_violence.htm> at 30 June 2008.

³ Queensland Crime and Misconduct Commission, above n 1, 15.

⁴ Carrington and Phillips, above n 2.

⁵ Heather Douglas and Lee Godden, 'Intimate Partner Violence: Transforming Harm into a Crime' *E Law – Murdoch University Electronic Journal of Law* (2003) 10(2).

⁶ Queensland Government Department of Communities, *Legislation: The Domestic and Family Violence Protection Act 1989* (2005) 7-11.

⁷ *Domestic Violence (Family Protection) Act 1989* (Qld) s 33; Queensland Crime and Misconduct Commission, above n 1, 14.

order is not contested by the respondent and is granted without any hearing of facts. If it is contested, a hearing will occur before the Magistrate makes a determination⁸. Standard conditions attaching to a protection order require the respondent to act in good behaviour towards the aggrieved and any other person named in the order⁹. The Magistrate may impose further constraints on the respondent to meet specific circumstances. A crucial aspect of a protection order is that although being subject to one is not a criminal offence, breach of a protection order or a condition thereof is a summary criminal offence which attracts a maximum penalty of two years imprisonment¹⁰.

It is important to note that Queensland's civil domestic violence regime is designed to complement criminal law and not displace its operation¹¹. From the outset, the civil regime was intended to bolster the protection of victims of domestic violence and, in partnership with the offences available under criminal law, was aimed at ensuring justice and safety for victims of domestic violence¹². Despite this, today protection orders are relied on as the principal means of legal redress for victims of domestic violence in Queensland¹³ and criminal prosecution of intimate partner violence tends to only occur, if at all, in cases involving serious physical violence¹⁴. Reasons behind the failure to prosecute the bulk of domestic violence incidents are manifold. Arguably, victims' fear of and unfamiliarity with the criminal process has led to many domestic violence aggressors escaping criminal accountability¹⁵. Many victims also wrongly believe that they must make a choice between actions available under civil and criminal legislation¹⁶. Furthermore, police prioritisation of matters of public order above seemingly private 'family' matters¹⁷ as well as scepticism of the reliability of domestic violence witnesses and the ability of evidence to meet the high criminal standard of proof has arguably also caused few domestic violence matters to be the subject of criminal proceedings¹⁸. Criminal law is rarely engaged in relation to domestic violence and the vast majority of criminal prosecutions are pursued only in the event there is breach of a protection order¹⁹. It is thus not surprising that this has attracted much criticism by legal scholars, domestic violence workers and feminist activists who contend that the use of civil legislation to combat domestic violence trivialises what is essentially "criminal assault in the home"²⁰. Indeed, although Queensland's civil domestic violence legislation does not preclude the use of criminal law in a domestic violence context, in practice civil protection orders are often thought of by victims of domestic violence as

⁸ Linda Debenham, 'Addressing Domestic Violence in Family Law' (Paper presented at the Conference on Women, Feminism and the Law, Brisbane, October 2004), 6; Queensland Government Department of Communities, above n 6, 7-11.

⁹ Queensland Government Department of Communities, above n 6, 6.

¹⁰ Australian Institute of Criminology, Domestic Violence Order Offenders (2006) Australian Institute of Criminology <<http://www.aic.gov.au/publications/cfi/cfi136.pdf>> at 14 July 2008; *Domestic Violence (Family Protection) Act 1989* (Qld) s 80.

¹¹ Queensland Crime and Misconduct Commission, above n 1, 10; Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Possibilities for Reform' (Paper presented at the Expanding Our Horizons Conference, Sydney 18-22 February 2002) 3; Heather Nancarrow, *Preventing Domestic Violence: An Analysis of the Application of Four Crime Prevention Strategies* (2004) Mackay Centre for Research on Community and Children's Services [5] <http://www.croccs.org.au/downloads/2004_conf_papers/160704PaperHeatherNancarrowPUBLISH5%5B1%5D.doc.pdf> at 7 July 2008.

¹² Heather Douglas and Lee Godden, 'The Decriminalization of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 34; Queensland Crime and Misconduct Commission, above n 1, x; Lesley Laing, 'Progress, Trends and Challenges in Australian Responses to Domestic Violence: A Background Paper to the Issues Paper Series' (Issues Paper No 1, Australian Domestic Violence and Family Violence Clearinghouse, 2000) 4; Debenham, above n 8, 3.

¹³ Douglas and Godden, 'Intimate Partner Violence: Transforming Harm into a Crime', above n 5.

¹⁴ Ibid.

¹⁵ Douglas and Godden, 'The Decriminalization of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence', above n 12, 33; Robyn Holder and Nicole Mayo, 'What do Women Want? Prosecuting Family Violence in the ACT' (2003) 15(1) *Current Issues in Criminal Justice* 15.

¹⁶ Douglas and Godden, 'The Decriminalisation of Domestic Violence: Possibilities for Reform', above n 11, 11.

¹⁷ Douglas and Godden, 'Intimate Partner Violence: Transforming Harm into a Crime', above n 5; Queensland Crime and Misconduct Commission, above n 1, 77; Eve Buzawa, Thomas L Austin and Carl G Buzawa, 'Responding to Crimes of Violence Against Women: Gender Differences Versus Organisational Imperatives' 1995 41(4) *Crime and Delinquency* 446.

¹⁸ Queensland Crime and Misconduct Commission, above n 1, 13; Buzawa, Austin and Buzawa, above n 17, 445.

¹⁹ Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 220.

²⁰ Queensland, *Parliamentary Debates*, House of Representatives, 11 April 1989, 4418 (Anne Warner, Minister for Family Services and Aboriginal and Islander Affairs).

their only legal recourse. In light of this, assessing whether protection orders are effective in assisting victims in the achievement of justice is of particular importance.

At first glance, the advantages of obtaining a civil protection order cannot be denied. Without doubt, engaging legal assistance to put an end to a situation of domestic violence is a frightening and uncertain decision for any victim. Accordingly, seeking protection under the civil regime may be viewed by victims of domestic violence as a less intimidating process than the pressing of criminal charges²¹. In contrast to turning to criminal law, persons seeking protection via the civil regime are required to meet the civil standard of proof rather than the more onerous criminal standard. This lower burden of proof often means that obtaining a civil protection order is a relatively straightforward process²². More importantly, it also means that at least some form of protection from domestic violence is readily accessible to victims of domestic violence even where there is insufficient evidence to arrest the aggressor or the victim wishes to seek protection at an early stage of the violence²³. Further, for a victim wanting the perpetrator to avoid criminal sanctions, for example if the victim wishes to preserve a relationship with the perpetrator, if children are involved or perhaps more commonly, where the victim fears that criminal prosecution may trigger retaliation²⁴, a protection order may be an appropriate legal response to domestic violence.

It thus follows that a key strength of protection orders are that Magistrates can impose specific conditions in order to accommodate particular situations and meet the individual needs of victims. It is further asserted by supporters of the civil regime that obtaining a protection order is a source of empowerment for victims of domestic violence, more so than engaging in criminal prosecution. Indeed, when a victim of domestic violence decides to apply for a protection order, this sends an important message to the perpetrator that she has had enough and will not be abused any longer²⁵. In applying for a civil order, victims feel that they are confronting the situation of abuse and perhaps in contrast to state-run criminal prosecutions, are able to assert full control over holding the perpetrator accountable for his actions²⁶. In turn, at first glance, the relative ease with which protection orders can be accessed coupled with their ability to accommodate the needs of a particular situation of abuse and empower victims suggests that protection orders offer valuable legal protection to those confronted with domestic violence.

Despite these clear benefits, it is nonetheless questionable whether on their own, protection orders offer the best legal redress for victims of domestic violence. Indeed, the strongest criticism of protection orders is that criminal law, rather than civil legislation, should be the primary means of responding to domestic violence. Arguably, frequent engagement of criminal law in situations of domestic violence sends a symbolic message to both perpetrators of domestic violence and the community that, although domestic violence may occur in the privacy of one's home, it is a serious criminal act and is condemned by the state²⁷. It is also asserted that the threat of criminal sanctions is a more robust deterrent against domestic violence than the threat of being held subject to a civil protection order as there is greater public disapproval of persons who commit criminal offences as well as weightier legal consequences. Similarly, another key reason why criminal law may be better suited to responding to domestic violence than civil legislation is that criminal intervention in domestic

²¹ Matthew J Carlson, Susan D Harris and George W Holden, 'Protective Orders and Domestic Violence: Risk Factors for Re-Abuse' (1999) 14(2) *Journal of Family Violence* 206.

²² Laing, above n 12, 4; Julie Stewart, 'Specialist Domestic / Family Violence Courts within the Australian Context' (Issues Paper No 10, Australian Domestic Violence and Family Violence Clearinghouse, 2006) 3.
²³ Nancarrow, n 11.

²⁴ Douglas and Godden, 'The Decriminalisation of Domestic Violence: Possibilities for Reform', above n 11, 12.

²⁵ Karla Fischer and Mary Rose, 'When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection' (1995) 41 *Crime Delinquency* 424.

²⁶ Ruth Lewis, Rebecca E Dobash, Russell P Dobash and Kate Cavanagh, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10(1) *Social and Legal Studies* 107.

²⁷ Douglas and Godden, 'The Decriminalization of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence', above n 12, 33; Queensland Crime and Misconduct Commission, above n 1, 10.

violence situations places the burden of proof on the state²⁸. This in turn is advantageous to victims of domestic violence who prefer minimal involvement in legal intervention and on another level, also ensures that the state is unable to ignore its responsibility to victims²⁹. It therefore follows that relying principally on civil rather than criminal legislation to assist victims of domestic violence, such as in Queensland, can be viewed as a weak response to domestic violence. Although it has been always intended that the criminal law operate in conjunction with civil legislation, as previously touched upon, it is infrequently engaged in domestic violence situations. A major consequence of this is that perpetrators of domestic violence are not held being held criminally accountable for assaults occurring in the home thus suggesting to the community that domestic violence is not serious enough to fall within the scope of criminal law in Queensland³⁰.

Accordingly, it is arguable that protection orders do not adequately assist victims of domestic violence in achieving justice. The most common criticism of Queensland's civil domestic violence regime is the need for more appropriate penalties for breaches of protection orders. As discussed previously, breach of a protection order is a summary criminal offence attracting a maximum penalty of 2 years imprisonment³¹. In practice, usually convictions are not recorded and the most common penalty is a fine which may be as minimal as \$200³². In turn, it is perhaps clear why penalties for breach of protection orders have been heavily criticised. For example, although breach of a protection order may indeed amount to assault, which if perpetrated against a stranger could potentially attract a maximum penalty of 7 years imprisonment³³, a first-time breach attracts only a maximum of 1 year imprisonment³⁴ and is regarded as a summary offence. Whilst summary offences are included in a person's criminal history³⁵, it is unquestionable that they are regarded as one of the least serious criminal offences in Queensland.

In turn, the insignificant consequences for breach of a protection order do not reflect the serious nature of domestic violence³⁶ and arguably, do not serve to bring justice to victims of domestic violence. It is therefore uncertain as to whether the penalties for breach of a protection order serve to deter respondents from committing future acts of domestic violence³⁷. Although there is limited and inconclusive data as to how effective civil protection orders are in ending domestic violence³⁸, a study of young Australian female facing domestic violence found that seeking a protection order rarely made the situation of violence worse³⁹. Despite this, however, there is Queensland research demonstrating that in some instances, being subject to a protection order may have little impact on perpetrators of domestic violence. This is perhaps attributable to the fact that breach of a protection order does not attract serious penalty. In one way, this is evidenced by a study of 602 Queensland men subject to domestic violence protection orders which highlighted that 30 men had multiple protection orders issued against them by different women⁴⁰. Whilst admittedly this finding is dated, it illustrates that being subject to a protection order may not be enough to deter aggressors from engaging in domestic violence. This contention is more recently supported by the findings of a 2005 Queensland Crime and Misconduct Commission study. In this study, approximately half of domestic violence victims surveyed who had police attend their last domestic violence incident stated that there was a current

²⁸ Lewis, Dobash, Dobash and Cavanagh, above n 26, 108.

²⁹ Ibid, 108.

³⁰ Douglas and Godden, 'Intimate Partner Violence: Transforming Harm into a Crime', above n 5.

³¹ *Domestic Violence (Family Protection) Act 1989* (Qld) s 80.

³² Douglas and Godden, 'The Decriminalisation of Domestic Violence: Possibilities for Reform', above n 11, 14.

³³ *Criminal Code 1995* (Qld) s 114.

³⁴ *Domestic Violence (Family Protection) Act 1989* (Qld) s 80.

³⁵ Douglas and Godden, 'The Decriminalization of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence', above n 12, 34.

³⁶ Douglas and Godden, 'Intimate Partner Violence: Transforming Harm into a Crime', above n 5.

³⁷ Douglas, above n 19, 223.

³⁸ Margrette Young, Julie Byles and Annette Dobson, *The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australian Women* (2000) Australian Institute of Criminology [2] <<http://www.aic.gov.au/publications/tandi/ti148.pdf>> at 5 July 2008.

³⁹ Ibid.

⁴⁰ C Bulbeck, L Kwitko, A Steward and J Dower, *Characteristics of Parties Involved in Domestic Violence Protection Orders: An Analysis of Court and Police Data* (1997) referred to in Nancarrow, above n 11, [7].

protection order against the aggressor⁴¹. In turn, whether protection orders serve as a deterrent from domestic violence is debatable owing to the weak penalties for breach. No doubt until stronger penalties are imposed for breaches of protection orders, aggressors will continue to feel as though they are able to re-offend with relatively little consequences. In turn, protection orders serve as only a weak safeguard from future violence⁴².

On another level, protection orders have also been criticised on the basis that very few contain ouster conditions despite Magistrates being able to impose such conditions⁴³. Ouster clauses seek to undermine any legal or equitable interest that the domestic violence aggressor may have in property by requiring the aggressor to vacate the home shared with the domestic violence victim⁴⁴. Although controversial, the failure to incorporate more ouster clauses into protection orders can be seen as sign that protection orders are not adequately meeting the needs of victims of domestic violence. Indeed, without an ouster clause, the aggrieved is forced to either continue residing with her aggressor or make the decision to leave her own home and find refuge elsewhere. Ouster clauses thus enable the aggrieved to maintain normalcy during a traumatic period. In a 2003 study of the attitudes of Queensland Magistrates, however, 21% of Magistrates surveyed expressed discomfort with attaching ouster conditions to protection orders. A key finding was also that the majority of Magistrates who responded viewed ouster conditions as an absolute last resort only to be used where the domestic violence was severe and physical⁴⁵. It is argued however that by expressing a preference for imposing ouster clauses in situations of extreme violence, Magistrates are failing to recognise the detrimental effects of non-physical domestic violence by not requiring the perpetrator to leave the family home. In such instances, it is the victim's responsibility to uproot herself and where applicable, her children, and relocate if she wishes to cease ties with aggressor. Accordingly, where protection orders are issued without ouster conditions, it is questionable as to how effective they truly are in assisting and supporting victims in building a life free from fear and violence.

Finally, the failure to prosecute breaches of protection orders serves as another key barrier to the effectiveness of protection orders in Queensland. Arguably, protection orders are not always investigated or prosecuted by police. Although over 13000 protection orders are issued in Queensland, approximately 1200 breaches are prosecuted⁴⁶. Whilst such figures may suggest that there are few breaches of protection orders in Queensland, it is conversely likely that the majority of breaches are simply disregarded and not prosecuted. As breach of a protection order is a criminal offence⁴⁷, a higher burden of proof must be discharged. In many instances, however, breaches are difficult to prove as, apart from the aggrieved, there are usually no witnesses. Accordingly, if a police officer believes that there is insufficient evidence to substantiate a criminal charge or perhaps expects that the aggrieved will be unwilling to cooperate with the future police investigation, a breach of a protection order will be ignored⁴⁸. This is particularly apparent where non-violent or non-threatening breaches have occurred⁴⁹. Non-violent breaches, such as the respondent contacting the aggrieved or passing by the home of the aggrieved despite being prohibited from doing so, are at times disregarded by police officers who feel their limited resources should be directed towards pursuing more serious offences⁵⁰. Police reluctance to prosecute breaches, albeit non-violent or threatening, of protection

⁴¹ Queensland Crime and Misconduct Commission, above n 1, 74.

⁴² Ibid, 66.

⁴³ *Domestic Violence (Family Protection) Act 1989* (Qld) s 25(3)(b).

⁴⁴ Rachel Field and Belinda Carpenter, 'Issues Relating to Queensland Magistrates Understandings of Domestic Violence' (Paper presented at the Domestic Violence Court Assistance Network Conference, Brisbane, 17-19 June 2003) 15.

⁴⁵ Ibid, 4.

⁴⁶ Nancarrow, above n 11, [7].

⁴⁷ *Domestic Violence (Family Protection) Act 1989* (Qld) s 80.

⁴⁸ Queensland Crime and Misconduct Commission, above n 1, 66.

⁴⁹ Queensland Government, *Report of the Task Force on Women and the Criminal Code* (2000) <<http://www.women.qld.gov.au/resources/criminal-code/documents/women-and-the-criminal-code.pdf> Queensland Govt> at 1 July 2008.

⁵⁰ Queensland Crime and Misconduct Commission, n 1, 66.

orders thus casts doubt over whether protection orders actually afford victims of domestic violence any protection. Although a breach of a protection order may not manifest itself in physical harm to the aggrieved, failure to prosecute breaches erodes the aggrieved's confidence in the legal system and more importantly, does little to assist the aggrieved in feeling safe from her aggressor.

In sum, although the *Domestic Violence (Family Protection) Act 1989* (Qld) was never intended to displace the use of the criminal law in responding to domestic violence, in practice domestic violence has become an issue primarily addressed by civil legislation. Possibly, the underlying message from this is that in Queensland, domestic violence is not an issue of sufficient importance or seriousness to warrant the engagement of criminal law. Whilst admittedly obtaining a protection order may viewed as a less intimidating and straightforward process than instigating criminal proceedings, whether protection orders truly serve the needs of the aggrieved is debatable. The weak penalties for breach, police failure to prosecute breaches and the reluctance of Magistrates to require that the aggressor vacate the home shared with the aggrieved suggests that protection orders may be more desirable on paper than in practice. As such, greater engagement of the criminal law is needed in situations where domestic violence corresponds to a criminal offence. Without doubt, the overriding purpose of the protection order is to ensure the victim's safety. However, until penalties are raised and breaches are consistently prosecuted by police to reflect the serious nature of domestic violence, on their own protection orders will provide little comfort to victims of domestic violence.



Evaluating the appropriateness of handling domestic and family violence matters in the Murri Court

Rachel Docker

Rachel Docker undertook the JATL Magistrates' work experience program in the Murri Court with Magistrates Jim Herlihy and Walter Ehrich and her essay was the runner-up in the JATL Magistrates' work experience program student essay competition.

Introduction

By their own admission, Indigenous Australians are the

*most researched, the most investigated group of people on earth, and still our situation continues.*¹

It is well known on an anecdotal basis that Indigenous Australians are the most marginalised societal grouping in Australia. It is even more shocking when statistics reveal that while indigenous Australians constitute approximately 3.5% of Queensland's population, nearly 27% of all adult prisoners and 60% of all juveniles in detention identify as Indigenous or Torres Strait Islander.²

The Murri Court is an indigenous sentencing court which deals with indigenous offenders who plead guilty to summary offences which are usually dealt with in the Magistrates Court. The Murri Court was established to address the over-representation of indigenous offenders in jail and reduce recidivism. The Murri Court does not apply Indigenous law, but the Indigenous community plays a role in the judicial process with the participation of the Elders.³ The majority of offences involve common assault, break and enters, breach of bail, dishonesty and stealing, public nuisance, unlawful use of vehicle charges and traffic offences and fraud against the Commonwealth which includes social security fraud. The court also handles breach of domestic violence orders and domestic violence disputes.

The Murri Court is no panacea, it is just one small step towards a fairer and more equitable outcome for Indigenous Australians, but it is at the "effect" point of the cycle rather than the underlying "cause". In the words of Carol Willie, offenders facing the Murri Court are the product of a history of dispossession and the stolen generation but the Murri Court gives offenders

*a chance to be heard..... to have a say.....and it's been a long time coming.*⁴

This essay cannot hope to address the myriad underlying issues leading to the social and legal problems experienced by Indigenous communities across Australia today. The intention of this essay is to address the concern of some Murri Court case workers that the court, using its current processes, is not the appropriate forum for hearing domestic and family violence matters. Some Indigenous sentencing courts have excluded domestic violence, along with other sexual and violent crimes, from the jurisdiction because they are too complex for sentencing courts, but Queensland has not.⁵

¹ *Aboriginal and Torres Strait Islander Women's Task Force on Violence* [2000] AILR 7

² Report on the Review of the Murri Court 2006 at <http://www.justice.qld.gov.au/files/Services/MurriCourtReport.pdf>

³ Marchetti E and Daly K, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' [2007] 29 *Sydney Law Review* 415.

⁴ Conversation with Carol Willie, Case Co-ordinator, Murri Court Rockhampton on 28 July 2008.

⁵ Above at n 3 p 421

Murri Court background

Under the leadership of the then Chief Magistrate, Di Fingleton, the first Murri Court, based on the Nunga courts in South Australia, was set up in 2002, at the Brisbane Central Magistrates Court. It was a court innovation that was a result of the political activism of Indigenous people.

The fact that Indigenous people and organisations played a significant role in establishing Indigenous sentencing courts had the effect of influencing the aims and practices of the courts, despite the fact that the justice process remained within the scope of the mainstream non-indigenous legal system.⁶

Since then Murri Courts have opened across Queensland in Murri Courts are located in the Magistrates and Children's Courts in Brisbane, Cleveland, Ipswich, Caboolture, Caloundra, Cherbourg, Rockhampton, Mount Isa and Townsville. The latest Murri Court was opened in St George in June 2008.⁷

Murri Court aims

As mentioned above, the chief aims of the Murri Court are to reduce the over representation of indigenous offenders in Australia's jails and decrease recidivism. Marchetti and Daly⁸ emphasise that of equal importance is the Court's aim to make the court processes more culturally appropriate, create an environment in which trust is developed between indigenous communities and court staff, and improve the flow of information leading to enhanced understanding between the relevant participants. It is concluded from the observation period, that the court has set out to provide a counselling role and seek a holistic solution. The Magistrate⁹ himself counselled offenders, in particular on the use of drugs and alcohol.

The Murri Court is a step towards educating the non-Indigenous community about the realities of life as an Aboriginal person. It also works towards strengthening the relationship between Indigenous people and the judicial system.¹⁰

How the Murri Court sets out to achieve its aims

Modifications have been made to the mainstream magistrate's court process to be culturally appropriate. In the Brisbane Murri Court, the magistrate does not robe and sits with two Elders, one male and the other female, at a round table with the offender rather than elevated at the bench, the offender's legal representative, the police prosecutor and a representative from the Department of Corrections. If the offender elects, a support person such as a partner, family member or other suitable person will sit beside them. The Murri Court sits once a week in Court 32 which is decorated with Indigenous artwork.

At the Murri Court in Rockhampton, it was decided that the magistrate would robe and sit at the bench to maintain the traditional authority of the court. The Elders sit with the Magistrate at the bench or behind the offender if they feel more comfortable.

One of the key distinctions is the manner in which the Magistrate speaks directly with the offender; the role of the legal representative is more muted than in traditional proceedings. The nature of the discussion between the offender and the Magistrate usually goes beyond the actual offence, to explore the offender's background, prior criminal history, and problems with alcohol and/or drugs.

Murri Court Offender Profile

An offender must be referred to the Murri Court. To be considered as a candidate, the offender must be indigenous and plead guilty to summary offences, and there must be a likelihood that a sentence of imprisonment would be applied.¹¹ Approximately 85 per cent have already spent some time in jail. Offenders

⁶ Above at n 3 p 441

⁷ Murri Court News, Edition 3, July 2008 at http://www.courts.qld.gov.au/Factsheets/Murri_Court_Newsletter-20080701.pdf

⁸ Ibid at 439.

⁹ Magistrate Jim Herlihy

¹⁰ Above at n 2

¹¹ Above at n 2 p 24

most suited to appear in the Murri Court are those who have issues that can be addressed through intervention and treatment.¹²

A Soft Option?

Under the over-arching aims of seeking alternatives to jail time, the Murri Court has developed a reputation as a soft option; or more quaintly, the “Cuddles Court.” Hennessy and Willie¹³ argue that the Murri Court should not be viewed as a soft option because the sentences are similar to those imposed in the mainstream Magistrate’s Court, and in participating in the Court process, the offender has endured a greater level of attention from the Elders, and greater pressure to rehabilitate than in the mainstream court.

Elders and the importance of their participation in the court process

One of the key findings of the Murri Court Review in 2006 was that the Elders and respected persons involvement assists the offender developing trust in the court.¹⁴ The involvement of the Elders has been described as the key element of its success.¹⁵ They are the interface between ‘white justice’ and Indigenous offenders. Their role is to help offenders to understand the court process, to counsel and to provide advice in regards to suitable services. Advice includes recommending offenders join a men’s support group as well as drug and alcohol rehabilitation programmes. The Elders have the discretion to decline to assist because of a conflict of interest, threatening behaviour or they question the offender’s bona fides.

Generally speaking the Elders had little patience for offender’s behaviour. Comments such as: “You didn’t get enough kick up the bunty when you were little” and “You’re an idiot, aren’t you?” were not uncommon. In the cases of domestic violence Elder George Bostock remonstrated angrily with an offender stating that it was not in Aboriginal culture to strike a woman. This is the equivalent of the traditional method of shaming being acted out.

Community Justice Groups

Community Justice Groups have operated since 1993 as a result of recommendations from the landmark Royal Commission into Aboriginal Deaths in Custody.¹⁶ The recommendations stressed the importance of resolving problems in ways developed and implemented by the community. The CJG have an active role in the Murri Court process. After receiving a summary of the allegations and criminal history of the offender, the CJG interview the offender and the offender’s family or support people, write a pre-sentence report suggesting an appropriate sentence and/or service to assist in rehabilitation.

The groups derive authority from the status and position of its members as respected members of the community. Members are either invited or nominated to the Group. The Group can also operate in an informal way. Wright describes some of the strategies used by CJG such as ‘time-out’ which is consistent with the traditional punishment of banishment.¹⁷ Ordering an offender to take ‘time-out’ is an informal process which requires to the offender to remove themselves to an outstation. This option is not as suited to those offenders in urban settings. Another method of dealing with family violence is ‘shaming’. This process is very powerful as the offender is brought to account by the community for the harm they have caused as well as reinforcing the authority of the CJG and encouraging respect for self, others and the community at large.

¹² Hennessy A and Willie C, ‘Sentencing Indigenous Offenders in Domestic and Family Violence Matters: a Queensland Experience, ANZDOC Conference paper 2006 at <http://www.anzsoc.org/conferences/2006>

¹³ Above at n 12

¹⁴ Above at n 2

¹⁵ Response to domestic and family violence: new directions at http://www.archive.scqld.org.au/judgepub/Irwin_11105.pdf

¹⁶ Wright H, ‘Hand in hand to a safer future: Indigenous Family Violence and Community Justice Groups’ [2004] *Indigenous Law Bulletin* 26

¹⁷ Above n 16

According to Peena Geia, the Chairperson of the Palm Island Community Justice Group:

*It sure has an impact because they know its a share thing with our people. Many of our people know they can misuse the white man's law, but they know they can't do it against their own. They know Murri law is stronger, it always was and always will be.*¹⁸

Domestic and/or family violence matters

Domestic violence is one of the most significant areas of work in the mainstream magistrate's court. There has been an increase in applications for protection orders of 42.2 per cent in a 4 year period to 2006 and an increase of 49.10 per cent in orders granted by the court. Associated with the increase in orders is the increase in the breach of those orders.¹⁹

Wright argues that the increase in awareness of and the subsequent development of our legislation on domestic violence was essentially born of the women's movement in the 1970s and that domestic violence services available are generally based on non-indigenous feminist principles. These principles are inconsistent with indigenous women's core values of inclusiveness and the paramount importance of the family unit. In non-indigenous Australia, women are counselled to leave and separate from an abusive partner. The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report²⁰ made it clear that:

All we want is for the violence to stop. We don't want our men to go to jail. But by the same token we as a community have to try to address the issues of alcohol, drugs and violence.

Dr Jackie Huggins has argued strongly for an Indigenous perspective to the problem:

*The continued imposition of white feminist politics on Aboriginal women is most certainly an attempt at intellectual colonisation.*²¹

In the observation period, there was three domestic violence or breach of domestic violence orders (DVO). It is noted that preferred terminology is 'family violence'. Family violence is a broader term than domestic violence. It refers to violence within the family, including inter-generational violence. The cases before the court all involved violence between partners and, therefore, would be classified as domestic violence. Regardless, as Willie commented, domestic violence is usually a product of inter-generational family violence; the two are inextricably linked in most cases.²²

One of the difficulties has been that prisoners are not entitled rehabilitation or counselling services if the sentence is under 12 months and often sentences for domestic or family violence are under this period. The result of these short periods of prison with no access rehabilitation programmes, is that the risk of reoffending may, in fact, be heightened. Issues arising out of the further institutionalisation of the offender, sexual jealousy (real or imagined), with the original problems remaining may lead to the violence reoccurring.

Family violence case example

One particular case in April highlighted the sometimes inability of the Murri Court to deal with complex domestic violence matters. The offender had already been in custody 40 days before appearing in court and had two previous breaches of domestic violence, each incurring a 4 month sentence. He had spent lengthy periods away from the family up north earning good money which he was sending home to his family. According to the offender, his wife was struggling to cope with the four children, one of whom had Leukaemia

¹⁸ Above at n 16
¹⁹ Above at n 12
²⁰ Above at n 1
²¹ Above at n 16
²² Above at n 4

and the eldest daughter, aged 12 years, was 'running amok'. His wife asked him to come home which breached the domestic violence order against him. The alleged violence had occurred between the offender and his eldest daughter.

It is an example of the complexity with which the court is dealing with. After a lengthy interaction with the offender, who appeared to be a visibly angry and threatening man, the Magistrate released him almost immediately.

The advantage for the offender is that he was able to give the judge his version of events in his own words. He was most convincing, but the complainant was not given the same opportunity. There was no family representative at the court or a statement from them, nor was there any independent assessment of the man and his suitability to be released back to his family.

How can the current court processes be improved?

The *Aboriginal and Torres Strait Islander Women's Task Force on Violence*²³ recommended that:

Family violence offenders must undertake mandatory accredited family violence perpetrator programs whether serving a custodial sentence or non-custodial sentence. The preference is for programs to be developed and run by Indigenous people with Elder's input.

Hennessy and Willie opine that access to services is a crucial element in managing this issue as:

*inequity in the availability of appropriate programs to Indigenous people is the single greatest factor holding this area back.*²⁴

Recent years have seen the development of specialist courts to handle specific issues. An example is the Drug Court which began with trials South East Queensland in 2000 with specialist magistrate's courts in Beenleigh, Southport and Ipswich and by 2002 in Cairns and Townsville. Legislation passed in 2006 has secured the Drug Court a permanent position in the Queensland court system.²⁵

It has been suggested that a specialist court be set up for domestic violence matters, and despite some reservations about specialist courts, it appears to be gaining some support. Chief Magistrate Judge Irwin²⁶ advocated for a separate family and domestic violence jurisdiction that is a one stop shop adopting a 'problem solving' or 'therapeutic jurisprudential' approach based on promoting safety for women and children, to increase the accountability of offenders for the harm caused both emotionally and physically, and finally, through court directed programs, to encourage long term behavioural change.

Willie also supported a specialist court, viewing it as another way to reduce the over representation of Indigenous males in the jails.²⁷ While the court would not be indigenous, ideally it would offer the benefits of the Murri Court's holistic, problem solving approach and dedicated indigenous court assistance officers. In addition, rehabilitation programmes should be offered automatically regardless of the length of time of the sentence. As Hennessy and Willie point out:

*It is only through real rehabilitation that offenders can move from recidivism to worthwhile members of the community.*²⁸

²³ Above at n 1

²⁴ Above at n 12

²⁵ <http://www.courts.qld.gov.au/Factsheets/M-DC-FS-DrugCrt.pdf>

²⁶ <http://archive/scqld.org.au/judgepub/irwin111105.pdf>

²⁷ Above n 3

²⁸ Above at n 12

In support of this assertion, Hennessy and Willie have trialled specifically designed programs aimed at males at risk of going to jail. The programme content was focussed on empowering the males through forging a reconnection with their heritage and identity and early indications showed a 60 per cent success rate of jail diversion.²⁹

The Murri Court at Mt Isa also presents a suitable model. Its processes are based on the traditional way of dealing with issues in the community. Elders discipline, assist and impart knowledge in a same sex setting prior to sentencing the defendant. The aim is for each party to discuss the issues and receive counselling from the Elders, without the presence of court staff.³⁰

Conclusion

While the Murri Court is a welcome addition to the Queensland judicial system, it needs to be evaluated for its effectiveness. The handling of most summary offences appear to be handled in this problem oriented court in a culturally appropriate way, taking into consideration the exacerbating factors underlying the offence and guided by the over-arching aims of the court. However, problems do emerge when the complexity of the case goes beyond its capabilities as was observed in the domestic violence case in April. To ensure a fairer outcome for all concerned, the decision needs to be informed by an independent assessor such as a CJG, case co-ordinator or social worker. A specialist court appears to be the preferred outcome from individuals working in the field provided that is resourced with dedicated indigenous court assistance workers, developed along the same problem solving orientation, and with access to rehabilitation programmes regardless of the period of the sentence.



²⁹ Indigenous Family Violence Prevention Forum Report held by the Queensland Centre for Domestic and Family Violence Research at <http://www.noviolence.com.au/public/papers/2006/forumreport.pdf>

³⁰ Murri Court News Edition 1 07 http://www.justice.qld.gov.au/files/services/Murri_Court_Newsletter1.pdf

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The College of Law
Queensland

Criminal law and the reasonable woman

Nora Götzmann

Nora Götzmann was selected as a finalist in the Australian Legal Philosophy Students Association (ALSPA) annual student essay competition for her paper, 'Criminal law and the reasonable woman'.

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Regardless of why, the lived experience of women differs from that of men (...)

Thus, when courts apply the purportedly neutral reasonable person standard where the male experience defines neutrality (...) the law systematically excludes women's experiences (...) In these areas of systematic disadvantage and exclusion, women need a 'law of their own'.¹

Introduction

Feminists have long criticised the law's use of the reasonable person standard. It is argued, that underneath the guise of neutrality and objectivity this abstract standard in fact contains male biases that operate to systematically marginalise women. Consequently, the application of the reasonable person standard in practice continually fails to adequately accommodate the realities and needs of women. Nevertheless, it is also acknowledged that some form of standard against which to measure a defendant's conduct is necessary to ensure individual autonomy, procedural fairness and judicial certainty. What then are the alternatives to current (male) defined notions of reasonableness and the hypothetical reasonable person?

Originating in the area of tort law, some commentators have proposed the adoption of a reasonable woman standard (RWS) to be applied in those areas of legal discourse where men's and women's lived experiences and perceptions differ significantly, for example, in relation to sex and violence. By making gender explicit the RWS is aimed at ensuring greater understanding and respect for women's experiences, thus showing that the

¹ Forell, Caroline A. and Donna M. Matthews *A Law of her Own* (New York University Press, NY, 2000) 14.

law takes women seriously. Whilst an overtly gendered standard is considered highly desirable by some, the RWS has also been criticised as sexist, prone to negative stereotyping of women and essentialism.

In this essay I will firstly, reflect upon the feminist critique of reason and the reasonable person with particular reference to criminal law and secondly, examine the reasonable woman standard. I will argue that the feminist critique of the reasonable person standard is well justified considering its continual and fundamental inability to adequately accommodate women's perspectives and needs within the criminal law discourse. In response, the RWS presents a valuable departure point from the problematic expounded by traditional constructions of reason and the reasonable person. By making gender explicit, the RWS not only highlights that the 'objective' reasonable person is in fact underpinned by gendered biases but also directly improves the law's ability to accommodate women's realities. Despite criticisms I will thus argue that the reasonable woman standard should be considered a valuable doctrinal revision that is highly desirable from a feminist perspective that seeks substantive gender equality within legal discourse.

The essay will comprise two parts. Part one will explore the theoretical critique of the reasonable person through an examination of the traditional exclusion of women from ideologies of reason and reasonableness. I will then draw on two examples from the criminal law, domestic homicide and rape, to show the practical dimensions of this critique. Part two of the essay will examine the RWS, critiques and arguments in favour of an explicitly gendered standard.

Part One: The feminist critique of the reasonable person

1.1 Reason and the reasonable person: the (theoretical) marginalisation of women in the (male) sphere of reason

Legal discourse prides itself on purported rationality, neutrality and objectivity. Reason and reasonableness of conduct are two key notions linked to this ideology of objectivity which have been used as central concepts to determine when and to what extent an individual should be held legally accountable for his or her actions.² Consequently, the law's arbitrator, the hypothetical reasonable person, is constructed as a rational, neutral and autonomous individual.³

Feminists have challenged these constructions of reason and the reasonable person on several accounts. Firstly, through the dichotomies of male/female, reason/emotion, rationality/irrationality women have been historically excluded from the sphere of reason.⁴ Secondly, or rather consequently, the law's concept of a reasonable person is a distinctly gendered construct which does not adequately reflect women's concerns or lived experiences.⁵ As Bernstein notes, "legal scholars agree that the reasonable person began life as the reasonable man and retains some of his masculine aspects."⁶

The exclusionary operation of the reason/male and emotion/female dichotomy has been well documented in various social science disciplines, not just that of the law.⁷ As reason is associated with the male, women are

² Forell/Matthews, above n 1, 6-7; Unikel, Robert " 'Reasonable' Doubts: A critique of the reasonable woman standard in American Jurisprudence" (1992) 87 Nw. U. L. Rev. 326, 327.

³ Duncan, Sheila "The Mirror Tells Its Tale: constructions of gender in criminal law" in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing, London/UK, 1996) 176; Lee, Cynthia *Murder and the Reasonable Man: passion and fear in the criminal courtroom* (New York University Press, NY, 2003) 204; Nicolson, Donald and Lois Bibbings (eds) *Feminist Perspectives on Criminal Law* (Cavendish Publishing, London, 2000) 13.

⁴ See eg, Bernstein, Anita "Treating Sexual Harassment with Respect" (1997) 111 Harv. L. Rev. 445, 456-7; Kerns, Leslie M. "A Feminist Perspective: why feminists should give the reasonable woman standard another chance" (2001) 10 Colum. J. Gender & L. 195, 211.

⁵ On the gendered construction of the reasonable person see eg, Bernstein, above n 4, 465; Forell/Matthews above n 1, 4, 6; Kerns, above n 4, 211; Lee, above n 3, 206; Nicolson/Bibbings, above n 3, 11-12.

⁶ Bernstein, above n 4, 466.

⁷ Consider for example the writings of Luce Irigaray, Helene Cixous, Jaques Derrida and Michael Foucault.

effectively excluded from the capabilities of reason and rationality as they are constructed as man's irrational, emotional and hysterical 'Other'.⁸ Consequently, women's autonomy and agency as legal subjects is often severely limited and in many instances effaced by underlying male biases.

Furthermore, as the dichotomies operate on a hierarchical level emotion, intuition and physicality, associated with the female, are attributed a lesser status when pitted against rationality and objectivity which are associated with the male.⁹ Through these dichotomies women are not only excluded from the sphere of reason but incidentally, those elements of human conduct which may be particularly relevant to areas of law where sex and gender play key roles are constructed as inherently unreasonable and inferior.

Critics have challenged these dichotomies for two main reasons. Firstly, it has been argued that the relationship between two binary oppositions is relational rather than hierarchical.¹⁰ Thus, a clear-cut division between male/female where each binary is presented as inherently equated with reason/emotion presents a false dichotomy. Secondly, through noting the constructed, rather than pre-determined nature of the binary oppositions the legal subject, the reasonable person, is also revealed to be a relative and gendered construction.¹¹

Despite these persuasive critiques of traditional perceptions of reason, the reasonable person standard as applied in legal discourse continues to exhibit the problematic expounded by these constructions and underpinning ideologies. As reason and the reasonable person continue to pervade male biases women continue to be constructed as inherently less rational and their conduct is often measured against male understandings of reason and rationality. The practical implications of this will be addressed presently through a discussion of two areas of criminal law, namely, domestic homicide and rape. These examples will be used to illustrate how women's lived experiences continue to be marginalised in a legal discourse that pervades gendered notions of reasonableness and subjectivity.

In theory, the reasonable person standard is flawed as it fails to accommodate a gendered legal subject. On a practical level the standard can be criticised on the basis that it continually fails to comprehend women's lived subject position and consequently dismisses women's experiences. Through the guise of objectivity the reasonable person and its embedded notions of reason thus also inhibit the promotion of a more nuanced and contextualised understanding of the legal subject which would allow a framework for judicial decision making that is sensitive to the gendered nature of legal discourse and social context. In denying the existence of gendered social circumstances and accompanying power relations I would argue that the reasonable person no more presents a neutral arbitrator than it presents a legal fiction.

1.2 Two examples from the criminal law: the (lived) marginalisation of women through gendered conceptions of reason and the reasonable person

Example one: domestic homicide, provocation¹² and self-defence:¹³

It is well documented that men's and women's subject positions in relation to domestic homicide are vastly different. Firstly, in cases of domestic homicide women are primarily the victims not the perpetrators. Secondly, men and women kill their intimates for different reasons.¹⁴ Whilst men may kill their partners for infidelity (actual or suspected) or leaving the relationship (actual or proposed) women do so primarily out of fear, often having been subject to long standing physical and/or psychological abuse.¹⁵

Duncan, above n 3, 173; Nicolson/Bibbings, above n 3, 11-12, 25.

See eg, Bernstein, above n 4, 446-7; Duncan, above n 3, 174; Kerns, above n 4, 212.

¹⁰ See eg, Foucault, cited in Duncan, above n 3, 175.

¹¹ Duncan, above n 3, 175.

¹² See s169 Crimes Act 1961 (NZ).

¹³ See s48 Crimes Act 1961 (NZ).

¹⁴ This has been noted by several studies. See eg, Morgan, Jenny *Who Kills Whom and Why: Looking Beyond Legal Categories* (Victorian Law Reform Commission, Australia, 2002) 25-30.

¹⁵ Ibid.

Despite these differences in subject position the homicide defences of self-defence and provocation remain constructed within a framework of reason and 'objectivity' which do not take into account these differences.¹⁶ Provocation for example, applies an objective test to establish whether the provocation was such that a hypothetical ordinary person would have been deprived of the power of self-control.¹⁷ In New Zealand (NZ) the first limb of the provocation defence, which deals with the reasonableness of loss of self-control, is said to constitute a hybrid of both objective and subjective elements.¹⁸ However, certain subjective characteristics of the defendant may only be taken into consideration when assessing the offender's particular susceptibility to lose self-control, not her/his *actual* power of self-control which continues to be measured against the hypothetical ordinary person with 'normal' self-control.¹⁹ Furthermore, gender has been explicitly excluded as a characteristic of the defendant which may be taken into account when making an assessment of the gravity of provocation.²⁰

Similarly, self-defence continues to use objective assessments to determine the formal requirements that constitute the defence; necessity, proportionality, and the presence of an imminent threat.²¹ Thus, in assessing whether the lethal force used justifiably constitutes self-defence it must be objectively "necessary and proportionate". That is, a reasonable person in the accused's position must have considered that the injury inflicted in avoiding the threat was proportionate.²² As such, this 'objective' determination of proportionality presents the same problematic as that posed by the provocation defence.

It is perhaps sadly ironic that often in domestic homicide cases women commit killings which seem rational and calculated rather than irrational and hot blooded.²³ Clearly requirements of 'objective' proportionality assessed in terms of an imminent threat may not cater for women's particular subject position in domestic homicide cases where often a defendant's (re)action will be the result of long term and cumulative factors. In the absence of such wider circumstantial considerations and a resulting inability to fit her actions within the traditional requirements of these two defences her conduct will thus be viewed by the law as disproportionate, unreasonable and/or irrational.²⁴ Whilst battered woman syndrome has gone some way to mitigating the law's incapability of accommodating women's subject position I would argue that it should be treated with caution. In many ways battered woman syndrome relies on a quasi-medicalised construction and legitimisation of the female subject rather than accepting that a woman's reaction in these cases may be a rational and 'reasonable' response to harsh personal circumstances.²⁵

¹⁶ See generally, Lee above n 3, 277; Nicolson/Bibblings, above n 3, 12. For specific reference to the gendered nature of provocation see eg, Forell, Caroline "Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia" (2006) 14 Am. U. J. Gender Soc. Pol'y & L. 27, 31-33. For self-defence see eg, Bradfield, Rebecca "Is Near Enough Good Enough? Why Isn't Self-defence Appropriate for the Battered Woman?" (1998) 5 Psychiatry, Psychology & L. 71, 76-77.

¹⁷ Simester, AP and WJ Brookbanks *Principles of Criminal Law* (2nd ed, Brookers Ltd, Wellington, 2002) 525, 531.

¹⁸ Ibid 535-6.

¹⁹ See eg, *R v Rongonui* [2000] 2 NZLR 385. In this case the majority held that s169(2)(a) was to be construed so that personal characteristics are relevant only to an assessment of the gravity of the provocation and may *not* be regarded as reducing the general power of self-control of the hypothetical ordinary person. Notably the minority disagreed, criticising this distinction as artificial and leading to unjust results.

²⁰ Simester/Brookbanks, above n 17, 541.

²¹ Ibid 489.

²² Simester/Brookbanks, above n 17, 489.

²³ See eg, Stubbs, Julie and Julia Tolmie, "Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome" (1999) 23 Melb. U. L. Rev. 709, 733. Noting the likelihood of abused women to defend themselves by means of pre-emptive strikes rather than hand-to-hand combat.

²⁴ See n 16 above.

²⁵ For reference to the problematic medicalisation of women in the criminal law see eg, Nicolson/Bibblings, above n 3, 17.

Example two: rape and the construction of consent²⁶

Current constructions of consent in rape law remain problematic for many reasons two of which are: the basic understanding of what does and does not constitute consent and the mens rea (mental) element of the offence. Both of these areas continue to be defined by perceptions of what constitutes 'reasonable' female and male behaviour which are framed by gender biased understandings of reasonableness that marginalise and silence women's experiences.

Conceptions of what constitutes consent, or rather lack thereof, continue to be underpinned by social understandings of appropriate (or reasonable) female behaviour which are distinctly gendered.²⁷ Whilst according to statute traditional indicators of absence of consent, such as physical resistance, have been abandoned in practice case law continues to rely on such indicators finding it easier to determine lack of consent in scenarios where the victim either demonstrated obvious physical resistance or the force or duress exercised towards her was of an immediate nature.²⁸ Considering that the wrong of rape is the violation of a person's autonomy and physical integrity this continual reliance on surrounding circumstantial factors rather than the woman's perception of the experience is arguably somewhat misplaced. Contrary to popular belief it is well established that most rape cases are not violent street crimes but violations that occur between social or familial relations in which power dynamics may be such that traditional resistance factors are not present.²⁹

The biases exhibited in the overall construction of consent are exemplified further through the mens rea element which has long been one sphere in which the subjective male (defendant) view has been consistently legitimated to render woman's lack of consent irrelevant.³⁰ Although the case of *R v Morgan*,³¹ which effectively allowed consent to be measured in terms of the subjective perception of the defendant, has now been replaced with the statutory requirement of a "reasonable belief in consent" it is strongly arguable that mens rea as it is currently construed continues to severely marginalise women's perspectives.³²

Currently NZ law requires that the offender acted either with recklessness as to the existence of consent or "without believing on reasonable grounds" that the other person consented.³³ Whilst this 'objective' test is no doubt preferable to the previous allowance of the subjective view of the defendant it remains distinctly problematic.³⁴ The central issue I would argue remains that this 'objective' assessment focuses on the reasonableness of the man's belief in consent rather than on the woman's account and experience. Effectively, this denies the woman rape victim an active subject position and discredits her experience as her account simply becomes the measurement against which the reasonableness of the male defendant's conduct is assessed. Surely instead, the focus should be on the wrongdoing of *his* conduct measured against *her* reality. The lived experience of sex and consent is one area of life where men's and women's perceptions frequently differ. Therefore, if the law is to respect women's experiences of what is, and is not, consent the legal standard

²⁶ See s128(2), Crimes Act 1961 (NZ); s128A Crimes Act 1961 (NZ). For purposes of this essay my discussion will be limited to non-consensual sexual intercourse between an adult man and woman.

²⁷ See eg, Duncan, above n 3, 176; Nicolson/Bibbings, above n 3, 18.

²⁸ For NZ case law to this effect see eg, Simester/Brookbanks, above n 17, 625-627.

²⁹ See eg, *R v Tawera* (1996) 14 CRNZ 290 (CA). This case concerned sexual intercourse between a sixteen year old girl and her live in guardian. The court held that the sexual intercourse did not constitute rape on the basis that the victim proffered no physical or verbal resistance.

³⁰ See eg, Duncan, above n 3, 176; Nicolson/Bibbings, above n 3, 18.

³¹ [1976] AC 182 (HL).

³² See eg, *R v Clarke* [1992] 1 NZLR 147 (CA). This case confirmed that *Morgan* no longer represents the law in NZ.

³³ See s128(2) Crimes Act 1961 (NZ).

³⁴ See eg, Young, Alison "The Waste Land of the Law, the Wordless song of the Rape Victim" (1998) 22 Melb. U. L. Rev. 442, 444-445. Noting that it has become a commonplace observation of research on rape trials that these trials focus on the victim rather the accused and effectively re-enact much of the violence which has led to the victim's presence in court.

used in making this assessment arguably needs to make the next step in progression, moving from a subjective male view, to the current objective (male) view to a woman based standard.

Part Two: The reasonable woman standard

*This woman-based standard incorporates the core values of respect for women's bodily integrity, human dignity, personal agency, and autonomy. If the law, in determining the reasonableness of sexual and aggressive conduct, took these values seriously, women would become men's equals on their own terms.*³⁵

2.1 The reasonable woman standard

In response to the problematic posed by the hypothetical reasonable person standard feminist critics have advocated the adoption of a reasonable woman standard to be used in those cases where men and women's experiences and perceptions of sex and violence differ and where women are overwhelmingly the injured parties.³⁶ Rather than focussing on the origin of these gendered differences in perception the reasonable woman standard focuses on the reality of differential subject positioning thereby serving to acknowledge that *such differences exist in women's lived experiences* and that the law fails to recognise and respect this due to its guise of objective neutrality.³⁷ By making the reasonableness standard overtly gendered it is argued that the RWS would increase empathy for women's experiences in society and legal decision making through emphasising that women's perspectives ought to be considered and that the law take women and their experiences seriously.³⁸ The RWS focuses on increasing respect for women's bodily integrity, agency and autonomy.³⁹ By challenging current male biases and holding both men and women accountable to a woman's standard the RWS also shifts the baseline for legally accepted conduct in those areas where women are predominantly the injured parties. As such, the standard comprises legal reform as well as having wider social educative functions.⁴⁰

Given the above discussion on reason, reasonableness and the criminal law I would argue that a RWS is highly desirable as it would overtly require legal decision making to take note of the gendered nature of legal discourse and social context. An explicitly gendered standard presents a direct and very necessary critique of the way that the law continues to dismiss women's perceptions and experiences as well as presenting a point of departure from such systematic marginalisation. In the words of Forell: the reasonable woman standard "would enhance decision-maker empathy, require judges and juries to treat women with respect, and subvert the inherent bias in the law."⁴¹

2.2 Critique of the reasonable woman standard: sexism, stereotyping and essentialism

As any feminist law reform the reasonable woman standard has been met on both theoretical and practical levels with considerable scepticism and critique. In this part of the paper I will address the two most persuasive of such criticisms, relating to sexism and essentialism. Whilst a critique of the reasonable woman standard reveals that certain aspects of the standard need no doubt be further developed I will nevertheless argue that overall the RWS presents a valuable step towards substantive gender equality within legal discourse and should therefore be adopted in practice. Furthermore, I will argue that a gender specific standard is preferable to a contextualised reasonable person standard, which has been posed as a second alternative to the current reasonable person standard.

³⁵ Forell/Matthews, above n 1, 12.

³⁶ Ibid xvii. See also, Kerns, above n 4, 209.

³⁷ Forell/Matthews, above n 1, xix, 14.

³⁸ Ibid xix. See also, Forell, Caroline "Essentialism, Empathy, and the Reasonable Woman" (1994) U.Ill. L. Rev. 769, 806, 816.

³⁹ Forell/Matthews, above n 1, 9.

⁴⁰ Ibid xix, 18-19; Forell, above n 38, 769.

⁴¹ Forell/Matthews, above n 1, xix. See also, Forell, above n 38, 816.

Sexism and negative stereotyping:

The charge that the reasonable woman standard is unduly sexist has been made in two realms, the first focussing on male stereotypes the second on female stereotypes. I will address these in turn.

For some critics the reasonable woman standard is based on “destructive and unfounded male stereotypes”.⁴² In essence, such arguments rely on linking the explicitly gendered nature of the standard inextricably to a correlative negative view of men and male conduct in general. Johnson for example, vehemently identifies the RWS as being based on anti-male stereotypes which according to him are unfounded and sexist.⁴³ Furthermore, it has been argued that the RWS excludes men from decision making and is unfair as it holds men accountable to a woman’s point of view.⁴⁴ Such arguments have to be considered flawed for several reasons.

Firstly, the reasonable woman standard is not an anti-male, but a pro-woman standard.⁴⁵ In my view it is unfounded to interpret the RWS as presenting an attack on men and male conduct per se. More exactly, the standard highlights male biases in a particular area of legal discourse, in a particular set of cases, in which such underlying biases operate to systematically marginalise women. As such, the standard focuses on creating a more nuanced subject position for women, rather than constituting an attack on men.

The suggestion that the RWS implies that men can not understand a woman’s point of view or judge from a female perspective is flawed for similar reasons. As Shoenfelt notes, “simply being a man does not limit one to thinking only like a man.”⁴⁶ Similarly Kerns argues:⁴⁷

Male judges per se are not the problem. The problem is that male judges apply a legal standard from a male perspective- feminists do not demand that male judges step down but that they DO purposefully step outside the perspective of the male aggressor and consider the perspective of the female victim.

The RWS does not suggest that men can not understand a woman’s point of view but highlights that through the operation of male biases legal decision making can systematically avoid taking women’s perspectives seriously. Through the rejection of objectivity, incidentally exposing these biases, the RWS offers an opportunity for both men and women to more accurately understand and respect women’s realities and thus generate meaningful equality within legal discourse.

The second tenet of the sexism argument is that the RWS is patronizing to women and encourages the enforcement of negative female stereotypes by implying their perspective is not capable of being objectively reasonable.⁴⁸ In using an explicitly gendered standard it is argued that the standard enforces a view of women as irrational, hysterical and incapable of reason.⁴⁹

Advocates of the RWS have argued that despite the risks of possible stereotyping an explicitly gendered standard is necessary due to the different lived experiences of men and women.⁵⁰ The RWS intentionally

⁴² Johnson, Paul B. “The Reasonable Woman in sexual harassment law: progress or illusion?” (1993) 28 Wake Forest L. Rev. 619, 622.

⁴³ Ibid 621, 631.

⁴⁴ See eg, Unikel, above n 2, 367, 369. But see, Bernstein, above n 4, 474, Kerns, above n 4, 228.

⁴⁵ Forell, above n 38, 805.

⁴⁶ Shoenfelt, Elizabeth L. and Allison E. Maue “Reasonable Person versus Reasonable Woman: Does it Matter?” (2002) 10 Am. U. J. Gender Soc. Pol’y & L. 633, 651.

⁴⁷ Kerns, above n 4, 210.

⁴⁸ See eg, Johnson, above n 40, 622, 634-5; Unikel, above n 2, 372. But see, Bernstein above n 4, 475, 477; Kerns, above n 4, 228.

⁴⁹ See eg, Johnson, above n 42, 622.

⁵⁰ Forell, above n 38, 804, 806; Forell/Matthews, above n 1, 7, 9, 14-15.

highlights difference not to suggest that women need a particular standard of subjectivity to have their voices heard but rather, to highlight the necessity of exposing and overcoming the male biases which currently operate in legal discourse.

Ultimately, the RWS does confront the fact that women may find some behaviour offensive, threatening and/or hurtful that men do not. I would argue however, that prioritising women's points of view in these instances does not equate to being sexist, nor does it lead to promoting negative or patronizing stereotypes of women as irrational. Instead, the RWS may be considered a positive and valuable recognition of women's experiences and perceptions.⁵¹ In my view, arguing that the gender specificity of the standard trivialises issues such as sexual misconduct is an argument based on retaining a male viewpoint as the norm against which women's differing perceptions are measured and trivialised. This type of reasoning is precisely what the RWS attempts to avoid by highlighting that legal discourse and social reality is not objective but gendered. As Forell argues, the RWS "does not favour women or provide them with special treatment but instead, levels the playing field and assures them equal opportunity."⁵²

Essentialism:

The second, and arguably more compelling critique of the RWS is that relating to essentialism.⁵³ Intersectional and post modern critiques, particularly those put forward by women of colour, have noted that often standards specific to 'women' as a group relate more to certain groups of women than others if the multiplicity of identity is ignored.⁵⁴ Crenshaw and Grillo for example, note that in the case of discrimination against black women a simplistic summative account of discrimination (ie. race plus gender) is inadequate as some instances of discrimination may be specific to the identity of the *black woman*.⁵⁵ I would argue that by and large current advocates of the RWS whilst recognising this critique do not appear to be able to offer a satisfactory solution to this issue. Forell for example, despite noting the inadequacy of doing so, pertains to a largely summative interpretation of identity factors.⁵⁶ In relation to harassment she thus argues black women should have the choice to bring a claim either based on race or gender *or* a claim assessed from the standard of a reasonable African-American woman.⁵⁷ However, she subsequently rejects using the reasonable African-American woman standard on the basis that this is too complex.⁵⁸ I would argue that this is a concession to the fact that the RWS as it has been developed thus far is incapable of adequately dealing with intersectional identity issues. Nevertheless, to the extent that the standard fundamentally undermines the false objectivity presented by the reasonable person standard and offers an avenue for developing a more nuanced understanding of the female legal subject the RWS is in principle not opposed to adopting a more intersectional approach.⁵⁹ Suggestions by some authors that the RWS is not static or fixed does indeed suggest that the standard is capable of developing a non-essentialist conception of the reasonable woman.

2.3 A reasonable woman standard or a contextualised reasonable person standard? The argument in favour of an explicitly gendered standard

Objections to the reasonable woman standard have not been synonymous with an unquestioned acceptance of the current reasonable person standard. Other alternatives that have been posed include: a purely

⁵¹ Kerns, above n 4, 228.

⁵² Forell, above n 38, 805.

⁵³ On feminism, intersectionality and essentialism see generally, Crenshaw, Kimberle "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stanford L. Rev. 1241-1299; Grillo, Trina "Anti-Essentialism and Intersectionality: Tools to Dismantle the Masters House" (1995) Berkley Women's L. J. 16-30. On essentialism and the RWS see, Bernstein, above n 4, 472; Forell, above n 38, 804; Kerns, above n 4, 196.

⁵⁴ See eg, Crenshaw, above n 53, 1242-1245; Grillo, above n 53, 18-19.

⁵⁵ See eg, Crenshaw, above n 53, 1242; Grillo, above n 53, 19.

⁵⁶ Forell, above n 38, 807.

⁵⁷ Ibid 809.

⁵⁸ Ibid 810.

⁵⁹ Kerns, above n 4, 197.

subjective standard,⁶⁰ the respectful person,⁶¹ the reasonable victim⁶² or a reasonable person standard that allows for the incorporation of certain contextual factors, such as gender.⁶³ For the purposes of this essay I will deal only with the contextualised reasonable person standard as this is arguably the most compelling alternative.

In essence the contextualised reasonable person standard maintains the guise of objectivity through a surface gender neutrality whilst allowing certain characteristics of the defendant to be considered by the jury in their assessment of conduct.⁶⁴ Whilst this reasonableness standard would thus allow gender to be a consideration this would not be overtly stated in the standard itself. Instead, gender would become one identity factor of many to be taken into consideration.

It has been argued by several authors that the contextual reasonable person standard should be preferred to an overtly gendered standard. Unikel for example, argues that the explicit reference to gender presented by the RWS is judicially impractical whilst a contextual consideration of gender would not be.⁶⁵ Other authors who favour the contextualised reasonable person standard similarly reject the gender specificity of the RWS as counter-productive in terms of positive practical outcomes for women.⁶⁶ Nicolson and Carlson for example, prefer the contextual construction arguing that it is better to develop doctrinal alternatives that bypass the equality/difference debate. They advocate instead, developing principles that ensure justice for women by allowing consideration of their particular circumstances without framing such principles in gender specific terms.⁶⁷

Whilst a contextualised reasonable person standard would go some way towards creating a more attuned consideration of the female legal subject I would nevertheless argue that there are several reasons for an overtly gendered standard to be preferred.

Firstly, the distinction relating to difficulty of implementation drawn out by commentators such as Unikel are simply incorrect as in essence the contextualised reasonable person standard harbours the same complexities in application as does the RWS. This is conceded by Unikel and is as re-iterated by other commentators such as Forell.⁶⁸ In essence, both standards require legal decision making to incorporate gender and thus move away from traditional notions of objectivity.

Secondly, by making gender explicit the RWS encourages an overt and fundamental change in legal decision making processes and attitudes. An explicit reference to gender in jury instruction necessitates a consideration of women's points of view and thus encourages more attuned legal decision making. As such, the RWS recognises that confining the consideration of gender to be merely one factor of many is inadequate.⁶⁹

Thirdly, and I would argue most importantly, it must be remembered that the distinction between a reasonable woman standard and a contextualised reasonable person standard is in part a political enterprise. Making the reasonableness standard explicitly female rejects the traditional exclusion of women from the sphere of reason as well as directly acknowledging women's experiences as rational and valid.⁷⁰ As has been shown on both theoretical and practical levels throughout this essay such an open and unambiguous

⁶⁰ For comment and critique regarding a subjective standard see eg, Forell, above n 38, 798; Lee, above n 3, 209-210.

⁶¹ See eg, Bernstein, above n 4, 482.

⁶² Ibid.

⁶³ See eg, Lee, above n 3, 214-16; Unikel, above n 2, 367-9.

⁶⁴ Ibid.

⁶⁵ Unikel, above n 2, 367-9, 372.

⁶⁶ See eg, Johnson, above n 42, 622; Nicolson/Bibblings, above n 3, 20; Unikel, above n 2, 367, 369. But see, Bernstein, above n 4, 474, Forell, above n 38, 804, 806; Forell/Matthews, above n 1, 7, 9, 14-15; Kerns, above n 4, 228.

⁶⁷ Nicolson and Carlson, cited in Nicolson/Bibblings, above n 3, 20.

⁶⁸ Forell, above n 38, 811.

⁶⁹ See text at n 36-41 above.

⁷⁰ Forell, above n 38, 813.

affirmation of women's perceptions as rational and reasonable is deeply necessary in legal discourse. As Kerns poignantly notes, the aim of gender neutrality, which is presented by both the reasonable person standard as well as the contextualised reasonable person standard, is plainly absurd in cases premised on the very lack of gender neutrality.⁷¹ This has been illustrated clearly in the examples I have used from the criminal law both of which show that women (and men) do not occupy gender neutral subject positions. Thus, I would argue that the RWS is to be preferred to the contextualised reasonable person standard as it is a standard premised precisely on an acknowledgment of the absence of gender neutrality. In my view it is only through such an open and explicit acknowledgment of gender that it becomes possible to review women's subject position and encourage substantive gender equality within the law.

Conclusion

In this essay I have sought to argue that the reasonable woman standard is a valuable and effective legal reform which would more adequately accommodate and respect women's experiences than the current reasonable person standard. Through the traditional exclusion of women from the realm of reason the law continues to marginalise women's actions and experiences through gendered standards of reasonableness. As has been demonstrated the underlying ideologies embedded in current conceptions of reason operate indirectly through the reasonable person standard making it prone to male biases on both theoretical and practical levels. The implications that this has for women can be seen particularly clearly in those areas of the law where women occupy a unique subject position, for example cases of domestic homicide and rape. I have argued that the current conception of the reasonable person standard continually undermines, misreads and discredits women's realities thus failing to offer them the respect, autonomy and protection they deserve. In contrast, the explicitly gendered reasonable woman standard presents an open acknowledgment of the law's biases thus allowing a more nuanced incorporation of women's lived experiences into legal discourse. Most importantly, the standard addresses those particular areas where women are especially vulnerable ensuring them a position as a legal subject who's experiences are recognised as valid, rational and reasonable. I would thus conclude that the reasonable woman standard presents a sound theoretical revision of legal principle as well as a practical avenue to encourage substantive gender equality within the law.



⁷¹ Kerns, above n 4, 196-7.

Afterword

The Editors would like to thank everybody involved in the production of *Pandora's Box 2008*.

In particular, a peer reviewing process requires peer reviewers. Many thanks to those members of the judiciary and the University of Queensland Law Faculty who generously and anonymously donated their time to review and report on all of this year's academic submissions.

Heartfelt thanks also go out to the judges of the Magistrates' Work Experience Program student paper competition, for selecting our winners.

We would also like to recognise the Executive Committee of the Australian Legal Philosophy Students Society (ALPSA) for their work in running their annual student essay competition. This competition is an excellent opportunity for students to research and engage with areas of law and legal theory a little off the standard curriculum. We are delighted to include one of the winning papers from 2007 in this issue of *Pandora's Box*.

Finally, thank you to the Executive Committee and members of the Justice and the Law Society, as well as the TC Beirne School of Law, for continuing to support our beloved publication.

Pandora's Box 2008 Editors
Laura Hogarth and Eleanor Proust.

Justice and the Law Society

The Justice and The Law Society (JATL) is a productive and vital student organisation that operates under the auspices of the University of Queensland's T.C. Beirne School of Law. JATL enjoys the patronage of the Honourable Justice Debra Mullins of the Supreme Court of Queensland. Membership includes students, legal professionals and academics.

JATL's aims and objectives include:

- Investigating, publicising and providing information about social justice issues affecting the community;
- Increasing awareness of social implications of laws and policies and ensuring that legal education is situated within a social context; and
- Fostering networks among members, students, the legal profession and existing professional associations.

We welcome anyone with an interest in law and justice, and also those who'd just like to find out more. Broadly our activities come under three categories:

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The Annual Professional Breakfast provides an opportunity for members of the legal profession and judiciary, legal academics and students to discuss pertinent issues affecting the community. The Breakfast has been widely attended in the past, particularly by lawyers from corporate firms and members of the judiciary. In 2007, 120 guests attended the Breakfast at Customs House in Brisbane's CBD.

For any enquiries about membership or submitting an article for publication in the next edition of *Pandora's Box*, please contact us at:

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