

Pandora's Box

ADVANCE AUSTRALIA FAIR



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THE UNIVERSITY OF QUEENSLAND

Pandora's Box

ADVANCE AUSTRALIA FAIR 2009



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Editorial

Welcome to the 2009 edition of *Pandora's Box*.

The theme selected for each edition of *Pandora's Box* is usually devised to encourage submissions that consider not only contemporary legal issues, but also their broader implications in terms of social justice.

The themes of past editions include: '*In the Service of Justice*' (2008); '*Never Bend Your Head, Always Hold it High, Look the World Straight in the Eye*' (2007); and '*Women and Peace*' (2006).

This year's theme, '*Advance Australia Fair*', was chosen in recognition of the current pressures our nation faces, and the general need for inquiring legal minds to lead the charge on the path to Australia's bright future. We invited articles for this edition that examined a wide range of social, political and legal reforms in the face of climate change, rapid population growth, the worldwide economic crisis and community pressure for change.

Little did we know just how much the current global financial climate would affect the submissions to *Pandora's Box 2009*. The economy's impact on the legal and academic professions has resulted in lower levels of job security and greater pressure to perform in the workplace. As a result, we received fewer submissions from academics and legal professionals than in previous years. We are, however, very pleased to include in this edition two very topical and thought-provoking papers from legal professionals.

This year we have also taken the opportunity to focus on high-quality student submissions. To that end, we are pleased to present the top three papers from JATL's Magistrates Work Experience Program essay competition 2009. We also include a paper by Nicole Choolun, who was a runner-up in the 2008 competition and whose paper remains relevant today.

We are also pleased to present the top two papers from the Australian Legal Philosophy Students Association's (ALPSA) national student essay competition. This year shortlisted essays were judged by an eminent panel consisting of The Honourable Justice PA Keane (Queensland Court of Appeal), Professor Wojciech Sadurski (Sydney Law School, The University of Sydney) and Professor Emeritus Wilfrid Prest (The University of Adelaide Law School).

We believe it is important to encourage law students to engage with issues of law and justice outside of the law school curriculum. We highly value the contribution that the student papers have made to this year's edition because we recognise that today's law students are tomorrow's legal professionals.

We hope you enjoy *Pandora's Box 2009*.

Laura Hogarth and Yii Fen Tan



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, and 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, reflective pieces 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.

In 2008, JATL forged a new professional relationship with The Australian Legal Philosophy Students' Society (ALPSA), with the publication of one of their winning essays from their annual student essay competition. ALPSA is dedicated to the promotion and discussion of legal philosophy through the seminars, debates, functions and competitions it hosts each year. Unique within their calendar is their annual essay competition, which attracts high-quality jurisprudential papers from every state of Australia. We are proud to continue our professional relationship with ALPSA this year.

Approximately 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 State Library of Queensland, the National Library of Australia 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.



The Lost Issues of *Pandora's Box*

In 2008, when *Pandora's Box* finally received its very own ISSN, it occurred to the Editors that copies of each issue should be sent to the State Library of Queensland and the National Library of Australia. A stocktake of our back issues revealed that we did not have copies of all of our issues back to 1994.

The 'lost issues' of 1995, 1996 and 1997 are not currently held in the JATL office and have never been sighted by the current Executive Committee. Their very existence came into question when we could find no record of them in our files. It seemed so strange that after carefully preserving the last remaining copies of our inaugural edition from 1994, we failed to preserve any copies at all of 1995, 1996 and 1997 for our own records.

Then, in a curious turn of events, we received a package from the Supreme Court Library of Queensland just days before going to print. The package contained a bundle of historical publications and a letter apologising for the late return of publications loaned to the Library for the 'Women in the Law in Queensland' exhibition in November of 2000. The publications had been uncovered during the course of clearing out their storage space. The package contained the elusive *Pandora's Box 1994* and one of the lost issues – *Pandora's Box 1996*.

Pandora's Box 1996, 'The Box', was produced long before the Women and the Law Society changed its name to the Justice and the Law Society. Four of the five articles had a strong focus on women, critiquing legal concepts and social stereotypes of women.

The fifth article, by The Honourable Catherine A Fraser, Chief Justice of Alberta, advocated the importance of awareness training for the judiciary on social context issues including gender and racial equality. Her Honour stressed the importance of identifying and overcoming inequality, bias and discrimination in the justice system, arguing that 'law is just as much about choosing values as choosing precedents'.

We have since sighted a copy of *Pandora's Box 1995* in The University of Queensland's Law Library and hope to uncover the last lost issue – *Pandora's Box 1997* – in the near future. We value our heritage as a women's law society and our future as the Justice and the Law Society. We therefore hope to preserve not only these journals but also the values they represent.



Foreword

In keeping with the *Pandora's Box 2009* theme, '*Advance Australia Fair*', contributors were invited to submit papers examining a wide range of social, political and legal reforms in the face of climate change, rapid population growth, the worldwide economic crisis and community pressure for change.

Stephen Keim's paper on Justice Keane's 'In Celebration of the Constitution' speech explores ideas of governance and national identity. He examines the nature and purpose of a written constitution and discusses the prevailing arguments for and against a Bill of Rights entrenched in the *Australian Constitution*.

Heather Douglas and Tamara Walsh have contributed a précis on their conversations with community workers who work with immigrant and refugee women, and their experiences dealing with child protection authorities. Due to the highly personal nature of these issues, their work is presented as a reflective piece and not a traditional academic paper.

The four papers selected from our Magistrates Work Experience Program discuss various issues of social justice, law reform and court procedure in the areas of domestic and family violence, juvenile justice, substance abuse and court interpreting.

The top two papers in ALPSA's student essay competition have a basis in legal theory and philosophy. Nicholas Elias explores ethics in legal practice, in the political context of anti-terrorism and torture. Thomas Graham discusses China's recent developments in the area of corporate governance and minority shareholder protection – in contrast to past institutional scepticism about the recognition and enforcement of private rights through the People's courts.

We are delighted to present *Pandora's Box 2009*.



Justice Keane's *In Celebration of the Constitution* Speech: Some Fragmentary Observations¹

Stephen Keim SC

The United Nations Youth Association has a Conference every year for selected high school students from around Australia to raise their awareness of issues important from an international law and humanitarian perspective. In 2009, the Conference was in Brisbane. The stage was set for a great debate on a Human Rights Act for Australia in that Professor James Allan and Stephen Keim (who had already gone toe to toe on the subject in the legal affairs pages of the Australian newspaper) were grouped in the same session. It didn't quite work out as expected. James Allan was sick with the flu and had to leave before question time. Stephen Keim chose to look both back and ahead to challenge Justice Patrick Keane's expressed views decrying the prospect of an entrenched Bill of Rights for Australia.

An Introduction

Justice Patrick Keane, after stellar performances as a student including a Bachelor of Civil Law with Honours at Oxford, has had a distinguished career as a lawyer in Queensland, having established an enviable practice, having taken silk early, having served as Solicitor-General, and having been a universally lauded appointee to the Appeal Division of the Supreme Court of Queensland on 21 February 2005.

Since his elevation, Justice Keane has, if possible, added to the respect in which he is held. His Honour has become well known for the respectful but incisive questioning of Counsel during oral argument and the learned, well-constructed and well reasoned nature of his written judgments.

On 12 June 2008, Justice Keane delivered an address to the National Archives Commission concerning the *Australian Constitution*.² That speech has been as well received as His Honour's professional and judicial work.

It is with some trepidation then that I have chosen to reflect upon that speech. My reflections should not be perceived as opposing what His Honour said. Rather, I have been inspired by His Honour's thoughts to reflections of my own, which I share with you today.

Justice Keane's Thesis

Justice Keane's paper starts with the observation that Australians do not show the same pride in their *Constitution* as do citizens of the United States (US). The most important difference between the *Australian Constitution* and the *American Constitution* identified by Justice Keane is the absence of a Bill of Rights in the Australian document.

Justice Keane points out that it was a deliberate choice by the framers of the *Australian Constitution* not to include a Bill of Rights. A choice was made to entrust the protection of the rights of individuals in the processes of responsible government. This choice was influenced by the different historical experience of Australians at that time. They had not fought a revolutionary war to free themselves from the yoke of the British.

¹ Notes for a talk delivered to the United Nations Youth Association Conference at Brisbane on 6 July 2009.

² The PDF file is accessible from <<http://www.sclqld.org.au/qjudiciary/profiles/pakeane/publications/>>.

Justice Keane expresses the view that excluding a Bill of Rights from the *Constitution* was a fortunate one for Australia. In support of this view, Justice Keane states the view that a Bill of Rights would have entrenched the White Australia policy in the *Constitution*. He also quotes Justice Learned Hand's famous proposition that 'liberty lies in the hearts of men and women' and that such values are more important to the preserving of liberty than the adopted forms of governance, including written constitutions.

Justice Keane goes on to state that the broad language of a constitutional Bill of Rights makes politicians of judges. The process of balancing the limits where one right impinges on another tends to politicise judges and make it more difficult for them to maintain public confidence. The spectacle of nominees for judicial office facing questioning by Congressional Committees is part of this process of diminishing public confidence in the judiciary.

Justice Keane seems to express the view that the presence of an entrenched *Bill of Rights* in the *US Constitution* has led to inordinate influence of the religious right in the appointment of Federal judges and in US politics, generally.

Justice Keane also argues that a further result of the *Bill of Rights* in the *US Constitution* is that, in mediating the language of the *Bill of Rights*, judges tend to use poetic language. He criticises a sentence from the plurality judgment of Justice David Souter, Justice Sandra Day O'Connor and Justice Anthony Kennedy in *Planned Parenthood of South-eastern Pennsylvania v Casey*³. The sentence reads as follows:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.⁴

From this sentence, Justice Keane drew the conclusion that the justices who wrote that paragraph were able to impose their view of the universe on their fellow citizens.

Justice Keane also draws support from the use of the highways and byways parable of the New Testament by St Augustine and the Catholic Church generally as a justification for forced conversions. St Augustine had used the phrase 'compel them to come in' from the parable to justify forcing unwilling heathens (even at the cost of torture and death) to become Christians.

Justice Keane also criticises the approach of Justice Scalia of seeking to interpret the *Constitution* by reference to the historical context and intentions of its original authors. His point is that there is less difficulty in interpreting and applying the *Australian Constitution* than in attempting to apply the political values expressed in the *US Bill of Rights*.

Justice Keane expresses the view that judges are no more suited to giving content to the values enshrined in a Bill of Rights than are ordinary citizens and, more particularly, the political processes expressed through the legislature. Justice Keane then selects aspects of the history of decisions in the United States to support this point. He quotes a British Labour politician, Lord McCluskey, who said that the US Supreme Court had, on the one hand, struck down legislation intended to improve the rights of workers, women, children and immigrants but had failed to protect slaves or the interned Japanese Americans during the Second World War.

Justice Keane also draws upon a 1976 decision of the Court, *Buckley v Valeo*,⁵ in which legislative restrictions on campaign financing were struck down as being in breach of the free speech protection. Justice Keane states that questions such as whether the death penalty is a cruel and unusual punishment and whether laws against

³ 505 US 833 (1992).

⁴ Ibid 851.

⁵ 424 US 1 (1976).

flag burning unacceptably infringe free speech are matters on which judges are no more suited to provide answers than are ordinary citizens.

Justice Keane concludes by pointing to achievements of the Australian political process of which he approves and attributes these to the modest (no Bill of Rights) *Australian Constitution*. These achievements include the abolition of the death penalty and extending the franchise to women. Terminations of pregnancy are regulated by legislation without huge political controversy. These achievements include: a lack of disputation about the relationship between religion and the State; fewer mass shootings; and elections less dominated by powerful financial interests.

Justice Keane concedes that problems exist within the Australian society but takes pride in the fact that there is a responsibility on Australians to solve their problems through political processes.

Values and Structures

Arguments about constitutions (whether they work well or otherwise) and Charters of Rights (whether we should have them or not and whether they should be constitutionally entrenched) are about governance.

Arguments about governance are bound to be frustrating. The subject is fraught with complexity. Statements made are generally shorn of much of this complexity and sound radical to the ear. However, when qualifications are restored and associated context is taken into account, differences become matters only of degree and areas of agreement are seen to exist between even quite opposed positions.

The United Kingdom is virtually alone among nation states in not having a written constitution (or having its written constitution spread across many documents).⁶ Despite civil war, revolution, regicide and enforced changes of dynasty, the British have assumed continuity in the presence of disruption and granted the imprimatur of the law to the results of the exercise of de facto power.

Most nation states have a written constitution in which the principles and structures of governance are provided for in varying levels of detail. Every written constitution reflects the values of its authors. In most cases, the values reflected are a product of the social and historical context in which the constitution is prepared and adopted. As Justice Keane has pointed out, the *United States Constitution* was adopted after a successful revolutionary war of independence against an oppressive and geographically distant regime. The *Australian Constitution* was written in a different context by colonial politicians seeking to create a form of centralised but still colonial Commonwealth within which the former colonies would continue to operate under the now anomalous designation as 'States'. A written constitution involves a compromise between two fundamentally opposed objectives: continuity and change. The constitution seeks to incorporate the values of its founders. The institutions provided for in the constitution, whether a Bill of Rights or a Parliament made up of two Houses and a monarch, reflect those values. As Justice Keane points out, one of the values which underpin the *Australian Constitution* is the concept of representative government.

A written constitution must provide for a method of government. In doing so, it provides for change. Through the structures created by the constitution, laws may be created and power may be exercised. In this way, other and often new values are expressed, including values not thought of by, or even alien to, those of the founders of the constitution.

⁶ The *Magna Carta*; the *Petition of Right*; the *Bill of Rights* (1689); the *Act of Settlement* (1702); to mention but a few. See a discussion of the United Kingdom Constitution in G Sartori, *Constitutionalism: A Preliminary Discussion* (1962) 56 *American Political Science Review* 853, extracted in Blackshield and Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), 2.

Judging the success or otherwise of a constitution in achieving an appropriate compromise between continuity and change, except in the extreme case of civil collapse or the adoption of totalitarianism, is a difficult and controversial process. There will always be aspects in which the past can be seen to be a drag on the values of the present generations. There will be also aspects in which the dreams of the founders will be seen to have been, tragically, undermined or subverted. Some observers' successes will be others' laments.

Perhaps the most important way in which a written constitution reflects the values of those who adopted it concerns the way in which power is distributed and exercised within the new polity. Louis XIV of France had an extreme view of the distribution of power within a political unit. The Sun King's famous quote, 'L'état: c'est moi', involves a less even distribution of power than is attempted by most constitutions. Executives, parliaments, the courts and the populace interact under most constitutions. How they do so will vary, however, from one constitution to another. This will influence the way in which new values gain a primacy and old values are abandoned to the scrap heap of old books. Change will occur, however, and power will be exercised in ways not envisaged by the original founders without, necessarily, any formal changes to the written document.

Liberal Democracy: Not as Simple as it Sounds

Most debates in Australia about constitutions and more general governance questions take place against the background circumstance that the values of liberal democracy are shared by the parties to the debate. The present debate about a statutory Bill of Rights is no exception. Liberal democracy does not mean, however, as is sometimes assumed that 'the people' obtain their own way in an exercise in instant gratification. Lynch mobs are based on this principle but lynch mobs are not the institutional cornerstone of liberal democracy.⁷

The support of the populace for the government of the day is a basic tenet of liberal democracy. The concept envisages that elections will be held and that governments will be formed by those who command the support of the people expressed through the electoral process. Hopefully, on most occasions, a majority of the electors voting will have supported the government which is formed. In this way, the values of the majority of the population will find expression through the structures of government provided by the constitution.

However, a constitution based on liberal democratic principles will contain a number of elements aimed at preventing the government supported by the majority of the populace from exercising unfettered power even if that is what that same majority desires. These checking elements are based on the idea, inherent in liberal democracy, that there are things more important than that which the majority desires at any point in time. Liberal democracy places value on individuals being able to live their lives in their own way provided that they do not harm others. Liberal democracy places value on respect for the views of groups in the community who may hold very different views from the mainstream. Liberal democracy places emphasis on being able to plan one's life without basic ground rules being changed without warning. Liberal democracy places value on the ability to participate in the democratic process even when one's views are unpopular and well outside the mainstream. Liberal democracy places value upon power being exercised in a non-discriminatory way: the red haired and the blue eyed can rest secure in most liberal democracies knowing that they are unlikely to be sentenced to death tomorrow (at least, not for that attribute alone.)

To achieve these principles, constitutions written with liberal democratic values in mind use different methods to promote and protect those values. These methods include having more than one house of parliament and having the houses elected using different methods and at different times. The executive is dependent upon parliament to pass laws to exercise many of its powers. The requirement that power must be exercised according to law is an essential restricting principle in a liberal democracy as is the principle that the

⁷ The origins of the word is disputed but possibly the true source is Charles Lynch, a Virginia planter and American Revolutionary. His targets were 'Tory' supporters of the British. See <<http://en.wikipedia.org/wiki/Lynching>>.

government itself is subject to law.⁸ The separation of powers between parliament and the executive on one hand and an independent court system on the other restricts the unfettered exercise of power at the behest of the majority. Geographical separation of power between a central and regional government is a way in which federations achieve liberal democratic values. Bills of rights, whether constitutionally entrenched or not, preserve liberal democratic values from the unfettered power of an elected government. In common law jurisdictions, the principle of the common law that longstanding and important rights may only be removed by use of the clearest language is an important obstacle to democratically elected governments infringing upon the principles of liberal democracy.

It may be noted that I have mentioned a constitutionally entrenched Bill of Rights as one way in which the principles of liberal democracy may be protected by a written constitution. It is important, I think, in deciding whether a Bill of Rights of that kind is desirable for a particular country at a particular time to consider it in that important context. That is, a constitutionally entrenched Bill of Rights is but one way in which a constitution may seek to preserve the principles of liberal democracy in a liberal democracy. This may be seen as an argument both for and against a constitutionally entrenched Bill of Rights.

The Values Inherent in the Constitution of the Commonwealth of Australia

Responsible Government

Justice Keane correctly pointed out that responsible and representative government is an important aspect of the values on which the *Australian Constitution* is based. Responsible government embodies the principle that the Executive is responsible to the Parliament which is itself 'directly chosen by the people'.⁹ Chapter II provides for executive power to be vested in the Queen represented by the Governor-General.¹⁰ Ministers of State are required to be a senators or a member of the House of Representatives.¹¹ Legislative power is vested in the Parliament¹² composed of the Queen, the Senate and the House of Representatives.¹³

Responsible government is not the only value in which the authors of the *Constitution* placed their faith. Most of the founders were male colonial politicians. They may have retained some suspicion that the new Commonwealth they were creating might become the new Leviathan but they had no such fears about the colonial governments in which they had played significant roles. Federalism thus became an important principle in the *Constitution*.

Federalism

The principles of federalism are expressed in different aspects of the *Constitution*. The Parliament includes the Senate. The Senate exists as a States' house with each of the original States having at least six seats and having the same number of seats.¹⁴ The number of members of the House of Representatives is restricted to 'as nearly as practicable, twice the number of senators'.¹⁵

The values of federalism can also be seen in the way power was bestowed on the Parliament of the Commonwealth. Section 51 is noticeable in that it imposes only certain heads of power on the Commonwealth. While, in the area of the Commonwealth's legislative competence, Commonwealth laws were

⁸ This principle is made very clear for the *Australian Constitution* by s 5.

⁹ *Australian Constitution* s 7 (Senate) and s 24 (House of Representatives).

¹⁰ See especially *Australian Constitution* s 61.

¹¹ *Australian Constitution* s 64.

¹² *Australian Constitution* ss 1 and 51.

¹³ *Australian Constitution* s 1.

¹⁴ *Australian Constitution* s 7.

¹⁵ *Australian Constitution* s 24.

to prevail,¹⁶ it was the States which retained plenary powers subject, of course, to the *Constitution*.¹⁷ In this way, the people of the Commonwealth were protected from an overbearing Commonwealth Executive by the fact that the powers of the Commonwealth, in any event, would be limited.

Separation of Powers

The founders also placed their faith in the principle of separation of powers. Legislative authority was split between two houses of Parliament. The two houses were elected by different methods.¹⁸ Senators retained their seats for six years.¹⁹ Half would face re-election after three years and the other half would face the people of their State again after another three years.²⁰ In this way, the risk of rampant majorities in the House of Representatives would be controlled by the fact that half the Senate would be an election behind and, thereby, influenced by how the electors had thought about their senatorial candidates some three years earlier.

Even the Queen as the third component (in fact, the first mentioned) of the Federal Parliament²¹ was intended as a brake on the power of rampant elected majorities. The Governor-General was given an express power to withhold assent and/or to reserve any Bill for the pleasure of the monarch.²²

An Independent Judiciary²³

The element of the governance structure in respect of which the founders of the Commonwealth took particular care was in providing for an independent judiciary. An option that was available was to simply allow the Commonwealth Parliament to provide for such judges as it saw fit. The *Constitution* provides for 'a Federal Supreme Court, to be called the High Court of Australia'. The High Court must consist of at least three judges.²⁴ Importantly, High Court judges were to be appointed for life.²⁵ The independence of the judges of the High Court was ensured by a provision that the judges could not be removed 'except by the Governor-General in Council on an address from both Houses of the Parliament, praying for such removal on the ground of proved misbehaviour or incapacity'.²⁶

The High Court was made the apex of the whole Australian legal system with federal courts, courts exercising federal jurisdiction, and State Supreme Courts all being subject to appeals to the High Court such that 'the judgment of the High Court in all such cases shall be final and conclusive'.²⁷

Section 75 bestowed original jurisdiction on the High Court in a number of matters. One of the most effective checks, as it turned out, on the power of Commonwealth government power is contained in s 75(v) which

¹⁶ *Australian Constitution* s 109.

¹⁷ See *Commonwealth of Australia Constitution Act 1900* (Imperial) s 5 and *Australian Constitution* ss 105-107.

¹⁸ *Australian Constitution* ss 7 and 24-27.

¹⁹ *Australian Constitution* s 7.

²⁰ *Australian Constitution* s 13.

²¹ *Australian Constitution* s 1.

²² *Australian Constitution* ss 58-60.

²³ An independent judiciary, while important enough to be considered as an important aspect of the *Constitution* in its own right, is also an element of the concept of separation of powers.

²⁴ *Australian Constitution* s 71.

²⁵ This was the effect of s 72 of the *Australian Constitution* prior to the addition of several paragraphs providing for retirement at age 70. The amendment was pursuant to the *Constitution Alteration (Retirement of Judges) 1977* (Cth).

²⁶ *Australian Constitution* s 72.

²⁷ *Australian Constitution* s 73.

provided for such original jurisdiction 'in all matters in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.²⁸

Chapter III of the *Australian Constitution*, 'The Judicature', is the direct result of the faith and trust placed in an independent judiciary by the founders of the *Constitution*. It has had a number of unexpected results. In many respects Chapter III has proved an important bastion against the excesses of government power.

Protecting Rights Directly

Despite the rejection by the authors of the *Constitution* of a United States style Bill of Rights, the authors thought a number of rights were worth protecting. Scattered through the *Constitution* are the sections which seek to protect basic rights.

Section 41 of the *Australian Constitution* is an attempt to prevent any State elector from being stripped of their right to vote in Commonwealth elections. It provides:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

In bestowing power on the Parliament of the Commonwealth, s 51 is careful in a number of areas to protect States and, in one instance, seeks to protect individuals. In s 51(ii), a power to make laws with regard to taxation is bestowed but subject to the limitation preventing discrimination against a State or part of a State. Section 99 also contains a prohibition against any preference 'by any law or regulation of trade, commerce, or revenue' to a State or part of a State. Section 117 expressly protects individuals residing in a particular State from discrimination for that reason. It provides that 'a subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.

In s 51(xii) and (xiii), State banking and State insurance are partially excluded from the respective powers to make laws concerning banking and insurance.

In s 51(xxxi), the Parliament is given power to acquire property from a State or a person for any purpose in respect of which Parliament has power to make laws. However, in one of the most important attempts to prevent arbitrary exercise of power, such acquisition may only occur 'on just terms'. It is noticeable, however, that such a constitutional restriction has never applied to State legislatures.

Section 80 was an attempt to protect the rights of the individual by ensuring the continuation of trial by jury in the event of serious offences. Section 80 provides:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

One of the less intentional protections of fundamental freedoms contained in the *Australian Constitution* is contained in s 92. Many sections of the *Australian Constitution* are directed to achieving a customs union between the former colonies, which each had their own customs regime and different views about free trade and protection. As part of ensuring the customs union, s 92 provided:

²⁸ See *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 in which a privative clause seeking to prevent challenges to government immigration decisions was read down so as not to breach s 75(v) of the *Australian Constitution*.

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Since 1901, much litigation has ensued to determine to what extent the words in s 92 'shall be absolutely free' meant other than that customs duty would not be collected at State borders. At times, it has acted as a protection brake upon State marketing schemes for primary product, thereby protecting the producer's right to sell to anyone they choose. The current interpretation involves a more restrained limitation upon actions of State government and is directed more at activities which can properly be described as forms of State protectionism.²⁹

Section 116 is one of the clearer attempts in the *Australian Constitution* to protect fundamental freedoms, namely, the freedom of religion. It provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

It can be seen therefore, that despite their misgivings about a US style Bill of Rights, the founders of the Commonwealth regarded some rights as worth protecting from subsequent Parliamentary majorities.

Assessing the Success or Failure of Constitutions

There are difficulties in assessing the success or failure of a particular constitution at any point in time. A country that has respected the rights of its citizens for several centuries may, at any time, be about to plunge into despotism and human rights excesses. Equally, a country may face a political impasse for several months only to find an unexpected extra-constitutional solution which returns the political system to normal operations.

The design of written constitutions as a compromise between the values of the authors and a way of allowing future generations to express their own governance values will see new values emerge over time. The New Deal policies of a newly elected government may be obstructed by the checks and balances of a multi-house parliament for some years. Some aspects of such policies may fall foul of the independent court system and be held to be unconstitutional. They may simply not be enforced because the courts, applying common law approaches to statutory interpretation, have found the language expressing such changes to be inadequately expressed.

When the policies of elected governments are prevented from being implemented, broader political processes are engaged. Further elections are held. Over time, new judges come to fill the courts. Sometimes, the policies which were held up in the Senate are written into law. Sometimes, the policies which fell foul of the *Constitution*, on a new reading, are found to be within power. Sometimes, other ways of doing things are discovered which avoid the constitutional pitfalls.

On other occasions, the loss of a Senate vote or a case in the High Court leads to a rethinking by the people about the policies in dispute and the government and its brave new ideas become consigned to history's dust bin. One of the justifications of a written constitution is that it protects the people against the speedy implementation of new ideas which may not have been fully thought through by the electors (and even by the politicians).

For this reason, criticisms like those of Lord McCluskey, as quoted by Justice Keane, may be thought to be unfair. It is easy to pick out ideas, like the abolition of racial segregation, thought excellent from the perspective of our time, and criticise a written constitution for a failure by the courts of an earlier time to

²⁹ *Cole v Whitfield* (1988) 165 CLR 360.

recognise the idea as clearly falling within the mainstream. As societies abandon old values, for good reasons, proponents of the old values will seek to have them protected by whatever means are available within the governance system which exists. Sometimes, the protections contained within a constitutional Bill of Rights may provide that means. However, as the new values strengthen their hold on the public imagination, the Bill of Rights prescriptions may be read in the new light and the new values will prevail.

It is just as easy, as Lord McCluskey does, to criticise a Bill of Rights for a failure to protect the basic rights of interned Japanese Americans during the Second World War. In times of war and civil conflict, the conflict between the protection of basic rights, especially of minorities, and the maintenance of security at any cost, will become exacerbated. It is not surprising that the decision in *Korematsu v United States*³⁰ favoured the government. It is perhaps surprising that the vote on the Supreme Court was so close at 6-3. At least Fred Korematsu was able to seek the protection of the *United States Constitution*.³¹ The many Italian Australians who were interned in Australia during the same War had no constitutional provisions on which they could base an argument. Perhaps even the lost case had an important impact on the way Americans think about those actions of their government at that time.³² It is important that the values held by nations develop over time and many things, including unsuccessful litigation, can influence that development.

It may also be unfair to assess any law only by the disputes which flare at its margins. Matters as inherently mainstream in Australian society as social security and workers' compensation legislation can still be the subject of controversy at the edges of their application. Courts and judges may find themselves embroiled in controversy as they arbitrate where the limits of the legislation lie. It is unfair to the courts and the laws themselves only to focus on those controversies at the edge. The same legislation may be the subject of a broad favourable consensus across 90 per cent of the area within which it operates.

The same considerations apply to constitutions and constitutionally entrenched Bills of Rights. It may be unfair in many cases to focus only on those disputes about the limits of the restrictions upon the government of the United States preventing it from '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'.³³ To make any kind of fair assessment, one needs to focus also on the extent to which the people of that country rest happily in the knowledge that their right to peaceably assemble will not be intruded upon by government.

The Constitution of the Commonwealth of Australia: A Few Impressions

The most notable changes in the way in which the Commonwealth operates has been in the distribution of power between the central government and the governments of the States. The introduction of a uniform taxation scheme, the use of special purpose grants under s 96 of the *Constitution*, the growing use of the external affairs power³⁴ as relations between nation states dealt with more and more areas of life, and the availability of the corporations power to regulate most forms of business activity including industrial

³⁰ 323 US 214 (1944).

³¹ Fred Korematsu sought and was granted a writ of *coram nobis* overturning his conviction in 1983 on the basis that the FBI had suppressed evidence showing that Japanese Americans were not a security threat. Although the internment order directed against Japanese Americans survived the 'strict scrutiny' test for constitutional validity, it is one of the few provisions based on race which were able so to withstand the test. Justice Frank Murphy's vehement defence has been very influential. The government apologized in 1980 and reparations were paid in 1983 (under President Carter) with further payments approved in 1992 (by President Bush Snr). Mr Korematsu filed an amicus brief with the Supreme Court in the Guantanamo *Habeas* case of *Rasul v Bush* 542 US 466 (2004) saying: 'The extreme nature of the government's position in these cases is reminiscent of its positions in past episodes, in which the United States too quickly sacrificed civil liberties in the rush to accommodate overbroad claims of military necessity.'

³² *Board of Education of Topeka v Brown* 347 US 483 (1954) was just a decade away.

³³ Amendment 1 to the *US Constitution*.

³⁴ *Australian Constitution* s 51(xxix). See *Commonwealth v Tasmania* (1983) 158 CLR 1.

relations³⁵ have all contributed to massively expand the area in which the Commonwealth government determines the way in which public activity is conducted and private lives are regulated. These changes may be viewed favourably as showing the ability of the *Constitution* to incorporate flexibility which allows the federal arrangement to evolve to meet the needs of a modern nation. Others may view the same developments as whittling away a fundamental aspect of the vision on which the *Constitution* was built.

Despite the absence of a Bill of Rights, the restricted powers of the Commonwealth government have placed the *Constitution* at the centre of major disputes about whether what the elected government was seeking to achieve at particular times was consistent with good conduct in a liberal democracy.

Justice Keane mentioned the likelihood that an Australian Bill of Rights circa 1900 would have incorporated the White Australia Policy as the cornerstone of fundamental freedoms. One may comfortably conclude that the power to make laws for 'the people of any race ... for whom it is deemed necessary to make special laws'³⁶ reflected similar values to those reflected in the White Australia Policy and was included to facilitate such a policy. It is of interest, however, that the White Australia Policy, while maintained with considerable rigidity by governments of all political persuasions for more than 70 years, did not dare to 'speak its own name'. Rather, the immigration legislation over the period provided for a dictation test in a European language at the behest of the minister to keep out people bearing the wrong skin colour. Maybe, the founding fathers, also, might have balked at confessing their racism in a constitutional bill of rights.

When a government over reached and sought to use the dictation test to keep out a white person of unacceptable political leanings, the High Court, in a great civil liberties cause célèbre,³⁷ struck down the use of ancient Gaelic in that particular instance in that it did not come within the ordinary meaning of 'European language'. The White Australia Policy or its appropriateness did not get a mention in the reasons of the respective justices.

The Fate of the Protections in the Constitution

The protection to a right of trial by jury in s 80 of the *Constitution* turned out to be a damp squib. Despite a passionate dissent by Dixon and Evatt JJ in *R v Lowenstein*,³⁸ s 80 turned out merely to be intended 'to prevent a procedural solecism'.³⁹ As Barwick CJ said, 'what might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision'.⁴⁰

The High Court has decided that even capital cases could be decided without a jury provided the procedure chosen was not to proceed using the type of document (on which the offence charged is written) that is called an 'indictment'.⁴¹

The promises of s 41 that any adult who becomes entitled to vote for the more numerous House of the Parliament of their State could not be prevented from being entitled to vote in Commonwealth elections also turned out to be less than it seemed. As it happened, the founding fathers only meant that provision to operate when the Commonwealth Parliament sat down to write their very first version of the *Electoral Act*.⁴² Ever since, its effect in protecting the voting rights of citizens has been spent.

³⁵ *New South Wales v Commonwealth (Work Choices Case)* [2006] HCA 52.

³⁶ *Australian Constitution* s 51 (xxvi).

³⁷ *R v Wilson* (1934) 52 CLR 234. See, also, *Re Carter; Ex parte Kisch* (1934) 52 CLR 221, an earlier decision of Evatt J on the lawfulness of the detention of Egon Kisch, the political activist, prior to the exercise of the dictation test.

³⁸ (1938) 59 CLR 556.

³⁹ 582 (Dixon and Evatt JJ).

⁴⁰ *Spratt v Hermes* (1965) 114 CLR 226, 244.

⁴¹ See most recently *Cheng v The Queen* (2000) 203 CLR 248 and *Kingswell v The Queen* (1985) 159 CLR 264.

⁴² See *R v Pearson; ex parte Sipka* (1983) 152 CLR 254.

There was further disappointment for those who had hoped that the provisions of the *Constitution* which provided for responsible government held out protection to individuals that their effective participation in the creation of those responsible governments would be protected. In *McGinty v Western Australia*,⁴³ the High Court rejected the proposition that heavy vote weighting in favour of country electorates and against city voters was not prohibited by any implied limitations in the *Constitution of the Commonwealth of Australia*. The plaintiffs had argued that, since s 106 of the *Constitution* subjected the continuing State Constitutions to the *Constitution of the Commonwealth*, the provisions providing for representative democracy in the *Commonwealth Constitution* must also be honoured in the States. The process of implication was rejected. The majority also confirmed and left in place the decision in *Attorney-General (Cth); ex rel McKinlay v Commonwealth*⁴⁴ which held that the requirement in ss 7 and 24 of the *Constitution*, respectively, that the Senate be elected 'by the people of each State' and the House of Representatives by the 'people of the Commonwealth' did not mean that the electorates for election of the members of parliament to fill those houses should be required to be, so far as practical, equal. Vote weighting and gerrymander remains a viable and legal option for legislators who currently hold power at either State or Commonwealth level.

However, in 2007, ss 7 and 24 gave unexpected birth. Spurred on by developments in the charter of rights countries of Canada⁴⁵ and the United Kingdom,⁴⁶ the High Court found that the requirements of representative government arising inter alia from the prescription of members or senators 'directly chosen by the people' in ss 7 and 24 meant that some people could not be excluded from the franchise. In practice, this meant that a blanket ban on sentenced prisoners was unconstitutional but that a similar ban on prisoners serving up to three years in prison was permitted by the *Constitution*.

The four guarantees of religious freedom in s 116 of the *Constitution* do not appear to have had much impact on the conduct of governments. The protection against the Commonwealth making 'any laws for establishing any religion' was considered in *Attorney-General (Victoria) ex rel Black v Commonwealth*.⁴⁷ The action in question was the provision, pursuant to special purpose grants under s 96 of the *Australian Constitution*, of funding grants to schools run by religious organisations. The social issue was whether such grants undermined the nineteenth century ideal and call to arms of 'free, secular and universal education'. The legal argument was that such grants amounted to the establishing of religion. The High Court rejected the argument and upheld the practice of making such grants. By way of example, Gibbs J considered that 'establishment' was restricted to making a particular religion a State (or national) religion or church.⁴⁸

It can be seen that most of the specific protections inserted by the founding authors in the *Constitution* have had very little impact on the operation of government or impact on society. In the early part of the last decade of the last century, the nature of responsible and representative government provided for in the *Constitution* has led the High Court to conclude that a limited protection of free speech in matters relating to government and politics may be inferred from the express provisions including ss 7 and 24. The implied freedom of political communication was developed in a number of cases of contempt of the industrial commission,⁴⁹ on bans on political advertising⁵⁰ and on defamation.⁵¹ The implied protection has been held to protect the outspoken demonstrator from criminal prosecution for insulting words⁵² but not personal injury lawyers from restrictions

⁴³ (1996) 186 CLR 140.

⁴⁴ (1975) 135 CLR 1.

⁴⁵ *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

⁴⁶ *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.

⁴⁷ (1981) 146 CLR 559.

⁴⁸ *Ibid* 604.

⁴⁹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

⁵⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁵¹ *Theophanous v Herald and Weekly Times Pty Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁵² *Coleman v Power* (2004) 220 CLR 1.

on advertising.⁵³ Some protection from the restrictions on expression imposed by State governments for the Catholic Church's World Youth Day was also provided by the implied right.⁵⁴

Courts and Politics

One of Justice Keane's concerns was that an entrenched Charter of Rights in the *Constitution* would politicise the role of judges and, ultimately, diminish their standing with the public. The concept of entrenchment, as the *Canadian Constitution* shows, does not mean that courts have the last say on the content of the laws. Under the *Charter of Rights and Freedoms*, entrenched in the *Canadian Constitution* since 1982, the 'notwithstanding clause' in s 33 allows the Parliament to specify that its laws prevail notwithstanding the rights in the *Charter*. In this way, despite the fact that the *Charter* is entrenched, it reserves to Parliament the last say on any subject.

With or without an entrenched Charter of Rights, courts will always be subject to criticism from various elements of society including media and politicians. This is because societies grant to their courts the toughest decision making tasks available. Courts are expected to exercise sentencing discretions in the criminal law area and execute even more difficult tasks going to the heart of people's everyday lives in the family law area. These functions are just a couple of the most obvious which ensure that courts and judges will be constantly the subject of controversy and criticism with the Australian polity.

Justice Keane also raised concern about the way in which confirmation hearings into the appointment of judges in the United States are a symptom of the politicised nature of the United States judiciary. While politicians and the public in the United States take a keen interest in the appointment of judges, the practice of confirmation hearings, which also extends to a large number of public service appointments, is a product of the division of powers in the *United States Constitution* and not the amendments which go to make up the Bill of Rights.⁵⁵

It is also the case that the tasks of interpreting the *Constitution* and its limitations on power, interpreting ordinary statutes, and developing the common law all have a potential to produce political controversy for the judges who decide the cases. The case of *Australian Communist Party v Commonwealth* ('*Communist Party Dissolution case*')⁵⁶ was decided in a highly charged political atmosphere even though it involved only a finding of a lack of powers in the *Constitution* (including a finding that the connection with the defence power was too remote to allow that head of power to support the legislation) to support the Federal Government's objectives.

Equally, the case of *Commonwealth v Tasmania* ('*Tasmanian Dams*')⁵⁷ involved a decision on the limits of a constitutional head of power but involved much political controversy.

The case of *Mabo v Queensland (No.2)*⁵⁸ ('*Mabo*') involved the common law and the impact of legislative and executive actions that had taken place more than a hundred years earlier on the native title rights of Indigenous Australians. It changed the perception of Australian legal history for all Australians. It has had a dramatic social and political impact and remains very controversial in some quarters.

⁵³ *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

⁵⁴ *Evans v New South Wales* [2008] FCAFC 130.

⁵⁵ Article II, Section 2, Clause 2 provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

⁵⁶ (1951) 83 CLR 1.

⁵⁷ (1983) 158 CLR 1.

⁵⁸ (1992) 175 CLR 175.

Even though *Mabo* involved no interpretation of a Charter of Rights, appointments to the High Court at the turn of the twentieth century were discussed in overtly political terms. Many saw the appointment of Justice Dyson Heydon in 2003 as a response to his essay attacking activist judges.⁵⁹ Earlier, Justice Ian Callinan's appointment in 1998 was seen as a response to calls for a 'big C conservative' to be appointed to the High Court.⁶⁰

The judiciary involves a crucially important part of our system of government. That role involves the exercise of power. While judges play this important role, they will be criticised, often on political grounds. The only way in which one can avoid any suggestion of judges being political is to strip them of any important functions. Our society will be the poorer as a result.

It is also arguable that a clear direction from the Parliament (or from the people by amending the *Constitution* to entrench a Charter of Rights) as to the fundamental rights on which emphasis is to be placed in going about the business of governing and the business of judging will, in many respects, be easier to implement and, much of the time, less controversial than the Delphic language of heads of power or the strange technical language of a *Stamp Duties Act*. Certainly, the case of *Al-Kateb v Godwin & Ors*⁶¹ brought as much controversy for the High Court's inability to assist the plaintiff, a man doomed to indefinite immigration detention, as the ability assist might have brought.

Conclusion

The purpose of this paper is not to argue for final positions or to suggest that a particular form of governance, new or old, is right for Australia.

My purpose has been to draw attention to the complexities involved in all discussions about governance. Drawing lessons from events taking place in other countries is a viable practice. It is, however, a complex task.

Justice Keane's observations are incisive and helpful in considering alternatives for the future governance of Australia. Justice Keane expressed the view that the absence of an entrenched Bill of Rights in the *Australian Constitution* has been a good thing for the Australian polity. It may be inferred from those views that Justice Keane has a similar view that a constitutionally entrenched Bill of Rights should continue to be absent.

I am not so sure. I have a suspicion that Australians may enjoy their experience of a statutory Charter of Rights and come to feel that it deserves greater endorsement and greater protection than being just another Act among many. That was Canada's experience after two decades of a statutory Charter. Australia may tread a similar path.

I think that would be no bad thing.

However, in every discussion, there is no such thing as the last word.



⁵⁹ See <<http://www.abc.net.au/am/stories/s749575.htm>>.

⁶⁰ See <<http://www.gwb.com.au/gwb/news/497/1912.html>>.

⁶¹ (2004) 219 CLR 562.

Searching for a Safe Place: Immigrant Women and Child Protection

Heather Douglas and Dr Tamara Walsh

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Dr Tamara Walsh's research interest lies in the impact of the law on people in poverty. Her research to date has included examinations of vagrancy law, social security law, corrections law, citizenship and human rights law.

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We arrive at the house which, from the street, looks like any other suburban house. It's only when we get up close to the front door that we see that every window is barred and there are pamphlets arranged in shelves in the front room. We are ushered into an overcrowded meeting room at the back of the house. It is filled with tattered couches and lounge chairs. We accept tea and go and jiggle our teabags in mugs beside the urn. There is a table spread with sweet biscuits and sliced cake. There is a regular chirrup of birds outside the barred windows. Once our tea looks about the right colour we all settle into the available chairs. After awkwardly explaining our need to record proceedings we set up our equipment and start on introductions. Apart from the two of us, there are about eight other women in the circle. We introduce ourselves and explain that we are researchers here to talk to the group of community workers about their experiences with child protection authorities. The workers assembled in the room work long hours for a community organisation. They assist many refugee and immigrant women; often their clients are fleeing from situations of domestic violence and sexual assault, hence the security precautions on the windows. We ask our lead in question, something along the lines of 'in what contexts do you deal with child protection authorities?' We are not prepared for what we are told.

Sophie tells us softly that many of her clients have been refugees in detention centres for a number of years before coming to Australia. She explains that lots of them have been fighting for their children and saving their children and then finally they come to Australia, the free country, the safe place, and it is here that they are losing their children. 'What', she says, 'does this do for relationships... for trust?' Maria tells us that, especially in new and emerging communities, mothers have a very inadequate understanding of life in Australia. Many have limited life skills because of extended periods spent in refugee camps and the exposure to the systems in Australia is very new. She says that culture is often interpreted as neglect. She tells us about a group of refugees being given a crash course on living in Australia. The people in the course were shown a model house, including the microwave and the fridge and so on. This particular group had spent 10-15 years in a refugee camp, completely cut off from the world of whitegoods. They had lost their skills to look after their families. They had been standing in a line to get food and water for years, losing their independence and decision-making power. This course was their preparation for their new life. After this basic course this group of people were put on a plane to Australia. Maria tells us that once these people arrive, their kids go to school with lunch boxes packed, perhaps, with only a can of coke and a little cake. These lunches are returned home: this is not how you feed your kids, this is neglect ... and this is how it starts. According to Maria, these parents are trying very hard to fit in; it's not just about being poor, but also about language. While kids learn English quickly, parents often don't. Family communication breaks down and there is more and more conflict. Kids change quickly, taking up all the new norms, while parents try to hold on to what they know because that's all they

have. Children are picking up the language, information is being provided to them in their schools. Sometimes child protection authorities are hearing about potential issues in families through the kids. Unless dealt with carefully, parents feel threatened and unsupported and family relationships are challenged.

At this point Sophie breaks in to emphasise that of course children should not be exposed to risk and that of course culture should not override concerns for the safety of children or women. 'But', she says, 'child protection authorities are intervening without parents even knowing what the system offers. Settlement programs have a lot of information...but there's not enough time to process that information or put it in a context that makes sense. If you are talking about child safety on the first week of arrival it's not going to make any sense.' She provides an example of a woman with six children who has recently arrived in Australia. This woman doesn't want a big house; she wants all of her children sleeping in the same room. She experienced armed conflict in her country of origin and she wants to feel that her family are safe. Child protection officers see an issue: there are too many people in the same room and the beds are on the floor. Elena breaks in with yet another example: 'I find you have to talk to women about smacking and what that is, because in their country they smack and there's nothing wrong with that. There are a lot of cultural issues.' Elena has heard of child protection workers going into the houses of new arrivals and opening the cupboards and the fridge without explanation. There's no food, the house is dirty, but the woman has eight kids. 'I have one,' Elena exclaims, 'and it's a disaster.' She goes on to explain that the fridge is often empty because visitors always come in and eat. Whoever comes by has something to eat and gets offered something to eat. Although it appears there is not enough, there will always be enough! Maria says child protection workers go into a house and say 'Where's the cot? Where's the nappy change table? Where's the stuff...?' The group of workers gathered laughs in agreement.

Felicity tells us that her service recently assisted a woman whose children had been in department care for a long time. From the beginning the children had been placed in an environment where they couldn't maintain their language skills. According to Felicity no effort was made by the child protection authorities to make sure these children maintained connections with their community. The department were not even sure what religious faith the children had been brought up with. As three years went by, the children gradually lost their language skills and communication between the children and their mother had to be through an interpreter. Unfortunately interpreters were not always available for their mother's visits. The department explained there were not enough resources. The mother was distressed. Perhaps this explained why, on her fortnightly visits, she pressed the children to eat the food she brought with her – perhaps hoping for a common language. She was also accused of 'holding the children too tightly'. According to child protection workers, the children didn't want to see their mother so often, they didn't like being force-fed, and besides visits would be further contracted soon because the children were going into long-term care anyway.

Another worker, Maria again, explains that often women do not have a body like a child protection department in their country of origin, so there are a lot of misconceptions about the powers and roles of child protection workers. Women don't know about the process, they don't even know that they can ask about the reason why child protection authorities are interested in their children. They don't know about their rights to an interpreter. Maria explains that interpreters are often not used so women are routinely communicating with child protection workers in broken English about the complexities of their situation. When we ask what kind of support child protection authorities do offer immigrant women, we are met with laughter. Even when the children are removed from them, the women are often still not clear about what is going on. They don't know even what constitutes child abuse, there is no clarity there. And for many there are no resources available in their languages. Angelina explains that a child protection officer telephoned her to find out about cross-culturally sensitive counselling services that could engage with interpreters. Angelina was clear; there was really nothing available and was told by the child protection officer 'Oh well, if there's nothing there we'll just have to keep the child.'

Sophie starts to talk once more in her quiet but strong voice. Sophie had another client who was in hospital giving birth to her youngest child. The children had been with their father while their mother was in hospital, and one of the older children had contacted the police with safety concerns. Child protection authorities became involved and in turn they had contacted Sophie. Sophie explained to child protection workers that the first step was to engage an interpreter. She was met with confusion and the child protection worker asked 'How do I do that?' Eventually a telephone interpreter was arranged but according to Sophie, child protection workers failed to fully explain their role, their purpose or their concerns to the mother, leaving this work to Sophie. Ultimately child safety workers believed they had found a solution: they would place the children with one of their father's relatives. Their mother was worried about this option; she knew the proposed carer and believed she could be violent to the children, so she refused to sign the relevant paper work. Sophie communicated the mother's concerns to the child protection officers. 'We can get a court injunction!' they said. Sophie interpreted this as a kind of threat; she described the child protection workers style as 'adversarial and intimidating.' According to Sophie, when child protection workers deal with a woman whose first language is not English, they will still make as much effort as possible to communicate in English. One of the other workers in room laughs ironically and comments that arrangements with interpreters are ad hoc at best.

A large proportion of the women who access the services and support of the workers we are talking to are temporary visa holders. Generally these women are entering Australia on the family reunion stream as a partner, marrying a person who is already in Australia and is already an Australian citizen or resident. Often these women have very limited information and understanding about their rights as migrants in Australia. The workers tell us that their clients are often very fearful about what will happen to them if the relationship were to end. Many of the women believe they will be deported. According to the workers we spoke to, women are often directly misinformed by their partners that if they leave the relationship they will indeed be deported while their children will remain in Australia. This issue of misinformation is particularly important in situations where child protection authorities intervene to protect children from domestic violence. Sometimes child protection workers make ultimatums to mothers: that they must either leave the violent home and go to refuge accommodation in order to keep their children with them; or, if they choose to stay in the violent relationship, lose their children. To add further complication, very often the woman's violent partner is the only support. He is the only family, so he is the perpetrator and supporter at the same time. Many women with temporary visas feel trapped with no realistic options available. They think their alternatives are to stay in the violent relationship and lose their kids or go to refuge and be deported – and lose their kids. Many women new to Australia also don't understand Australian definitions about domestic violence and women's rights. There is a lot of key information missing and learning such new concepts means, for many women, a change to their world view. Changing a world view takes time. Some women with temporary visas are, not surprisingly, fearful of engaging with authorities even though they may be in danger. This may partly be as a result of their experiences in their country of origin and/or refugee camps but also, again, because of a lack of information. Women may be fearful that if they call the police to a violent domestic incident, child protection services will arrive on their doorstep to remove their children and they will then be deported. Lack of knowledge about support services available to them and their legal rights sometimes operate as disincentives to engage properly with authorities, and potentially places women and children at risk.

Felicity tells us that her recent experience is that when child protection authorities become involved, they are quick to remove children but also quick to return them. The statistics reflect this. Child protection removals have increased significantly in recent years. In 2001, 18,241 children were living in out-of-home care in Australia, compared with 27,188 in 2006; this represents a 37 per cent increase in only five years. Removals in some cases are necessary. However many short term removals may not be needed and despite their short term nature, the impacts on the people involved can be very significant. For example, one client, whose children were removed only for a few months, lost her income support which she needed to pay for her housing. At the same time the child protection authorities told her that if she wanted her children returned she would have to maintain her housing. We ask if there is much clarity from child protection authorities about

the conditions on which children will be returned. Elena says that generally there is no clarity. She says that women are often totally in the dark.

One of the impediments to proper engagement is the lack of skilled workers in the child protection field. Many government reports in recent years have identified this issue. According to Felicity, child protection authorities target new graduates in employment drives. For example, the Queensland Department of Child Safety website currently advises that graduates from social work degrees don't need to wait for a vacancy and can apply for a child safety officer job at any time. Apparently 'on the job' induction is provided. Sometimes social work students on 'placement' are working in complex child protection matters with insufficient supervision or support. There is also a high turnover of child protection workers which leads to inconsistent case management and a lack of case memory in the organisation. The combination of being incredibly young, newly graduated, and managing very complex situations, means that workers often don't have the right skills or confidence to deal appropriately with the situations they confront. The support workers we spoke to agree that being older and more experienced makes a positive difference to the relationship between child protection workers and parents. However the problems about child protection workers are not just about inexperience. Maria is concerned that many child protection workers stick to a particular set of values, limit assessments to a western middle class point of view, have a narrow view of diversity, fail to keep an open mind, and are, consequently, failing in their job.

This returns the discussion to the question of culture. Elena points out that family structures and roles vary between cultures. Often members of the extended family and extra children are living in the house. There may be different expectations about children. Emotional sharing between parents and children is good thing to do in some cultures; in other cultures, it is not the same. Sometimes people have a different way of doing things. Child protection workers may not understand the different roles children have in families; in some families older children may have responsibilities for younger children. Felicity gives the example of a child protection worker seeing a need for child protection intervention when she observed a small child carrying a younger sibling down the stairs, and when small children are going to the park without their mother. Developmental ages of children may be also be different, which may lead to different expectations, especially where children have been exposed to trauma and war and are worldly-wise in comparison to other Australian children. Sophie notes 'It's about information, keeping an open mind; it's not just about what you see.' Sophie says that these concerns should be discussed and clarified, and information exchanged, but they sometimes become child protection issues rather than information sharing opportunities.

In many of the situations these workers deal with, they concede that child protection authorities have a legitimate role. However they argue that the trajectory of child protection intervention could be so different – and much less dramatic – if there was better communication, better information sharing, better engagement with interpreters, proper explanations about what is going on and what options are available, and a greater understanding of working in a cross-cultural framework. Community organisations that support women in their dealings with child protection organisations are under-resourced and the workers were well aware that the women they assisted were 'just the tip of the iceberg'.

Media and government-initiated inquiries around Australia have accused child safety departments of failing children by allowing them to remain in abusive or neglectful homes. In response to such criticism, child protection workers have come under pressure to take defensive and adversarial actions and to remove children from their parents. However, it may be that such a focus actually contributes to family dysfunction, social disharmony and system distrust. A child protection system focused on supporting, communicating and sharing information with families, where workers are well-trained, supervised and supported, and have a long-term commitment to their jobs may promote better long-term well-being for children, their families and society.

Our time in this old house has run out, our undrunk tea is cold and the birds are still singing outside the barred windows. We pack up our recording equipment and say our goodbyes. Elena's words stay with us as we walk into the sunshine. She says: 'The kind of engagement families experience sets a pattern for how they are going to settle in this country. If you have a system where people feel let down because they don't understand, where they are out of their depth, how will they build faith in existence here in Australia? The engagement is critical; it should be respectful and sound, and inclusive.'

For a full report on this research see *Mothers and the Child Protection System* at:
<http://www.law.uq.edu.au/documents/research/projects/child-protection-report.pdf>.



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Protection v Prosecution: A Commentary on the *Domestic and Family Violence Protection Act*

Elizabeth Harvey

Elizabeth Harvey undertook the JATL Magistrates Work Experience Program with Magistrate O'Shea in the Brisbane Magistrates Court. Her essay was the winning entry in the JATL Magistrates Work Experience Program student essay competition for 2009.

Domestic and family violence reflect a highly unpleasant and unfortunately widespread aspect of our society: that of harm and abuse occurring within what should be the safety of the home. Its prevalence can be seen by the landmark study into domestic violence conducted by the Australian Bureau of Statistics in 1996 which revealed that 23 per cent of women who had ever been married or in a de facto relationship had experienced violence by a partner at some time during the relationship.¹ Although efforts such as the Federal Government's 2005 'Violence Against Women: Australia Says No' campaign have raised awareness of domestic violence, it often remains hidden and private due to its very nature. The shame, fear, isolation and lack of support felt by victims ensures that domestic violence is chronically underreported,² adding to the conspiracy of silence. It was only during my time with Magistrate O'Shea observing applications for domestic violence protection orders that I truly became aware of both its prevalence and impact. For victims of domestic violence the law can offer, at least in theory, both protection through civil remedies and punishment of the perpetrator through criminal law. There is tension between this dichotomy, however, with civil protection orders forming the main response to domestic violence, at the expense of criminal prosecution.

The *Domestic Violence (Family Protection) Act 1989* was introduced in Queensland to provide for civil domestic violence protection orders. Similar legislation has been introduced in all Australian jurisdictions,³ a move which began in the 1980s and 1990s in response to criticisms of the criminal justice system's failure to protect women from violence.⁴ Since this time there have been 'second-generation reforms' of these civil protection frameworks, widening both the scope of violence and the types of relationships covered by the orders.⁵ The *Domestic Violence (Family Protection) Act 1989* was amended in 1999 to include same-sex relationships.⁶ Amendments commencing in 2003 re-titled it the *Domestic and Family Violence Protection Act (DFVPA)* and extended civil injunctive relief to abuse in non-spousal domestic relationships, bringing Queensland substantially in line with the other states and territories.⁷ These civil remedies impose court ordered restraints on the respondent, aiming to protect the aggrieved by preventing the respondent from certain actions, such as contacting them or being in their close vicinity.⁸ As civil remedies, the burden of proof to attain them is

¹ Jane Mulroney, 'Australian Statistics on Domestic Violence' (*Australian Domestic and Family Violence Clearinghouse*, 2003) 1.

² Ibid 4-5.

³ *Crimes Act 1900* (NSW); *Crimes (Family Violence) Act 1987* (Vic); *Restraining Orders Act 1997* (WA); *Domestic Violence Act 1994* (SA); *Family Violence Act 2004* (Tas); *Domestic Violence and Protection Orders Act 2001* (ACT) (replacing the *Domestic Violence Act 1986*); and *Domestic Violence Act 1992* (NT).

⁴ Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) 198.

⁵ Ibid.

⁶ Sally Kift, 'A New Era in Violence Protection for Queenslanders' (July 2003) *Proctor* 21, 21.

⁷ Ibid.

⁸ Heather Douglas and Lee Godden 'Intimate Partner Violence: Transforming Harm into a Crime' (2003) 10(2) *E Law – Murdoch University Electronic Journal of Law* [3]. <<http://www.murdoch.edu.au/elaw/issues/v10n2/godden102.html>> at 14 August 2003.

satisfied by the balance of probabilities.⁹ However, a breach of a term of the order becomes a criminal offence, exposing the respondent to criminal prosecution, which must be proved beyond a reasonable doubt.

Statistically, women are much more likely to be the victims of domestic violence, with their male partners as the perpetrators.¹⁰ This was illustrated in the applications for domestic violence protection orders from the Brisbane Magistrates Court in 2001, where in 79.7 per cent of cases, the aggrieved was a female spouse and in 80.7 per cent of cases the respondent was a male spouse.¹¹ As Heather Douglas and Lee Godden argue, this data makes it clear that domestic violence is a gendered issue.¹² This gender-specific nature of domestic violence is a reality that needs to be taken into account in the legal response to domestic violence, yet the recent amendments are still important developments in extending protection for all forms of family violence. Although it was far more common to see women seeking protection orders against their male ex-partners, during my time in court I also saw applications made by men against their ex-girlfriends (this was rare, but some male respondents did make counter-claims for protection orders against the female aggrieved); by a granddaughter against her grandfather; by a woman against her former female partner; and by an elderly man against his son.

Protection orders are available for the following four domestic relationships between two people: a 'spousal' relationship; an 'intimate personal' relationship; a 'family' relationship; or an 'informal care' relationship.¹³ A 'spousal' relationship covers people who are currently or have previously been married or in a de facto relationship.¹⁴ It also includes the biological parents of a child, irrespective of whether there is or was any relationship between them.¹⁵ There are two types of 'intimate personal' relationships defined in the *DFVPA*. The first arises if two persons are or were engaged to be married to each other, including a betrothal under cultural or religious tradition.¹⁶ The second exists if two persons date or dated one another and their lives are or were enmeshed to the extent that the actions of one of them affect or affected the actions or life of the other.¹⁷ This relationship does not have to be of a sexual nature,¹⁸ and the court may look to the circumstances of the relationship such as trust and commitment, its length, and the frequency of contact and intimacy between the persons in determining whether it does amount to an intimate personal relationship.¹⁹ A 'family' relationship exists between two persons where they are relatives.²⁰ 'Relative' is defined broadly as someone who is ordinarily understood to be or to have been connected to the person by blood or marriage (here marriage includes relatives through de facto relationships) or anyone reasonably defined as a relative.²¹ The last category of domestic relationship is an 'informal care' relationship, which arises where one person is dependent on another person who helps them with an activity of daily living required due to disability, illness

⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 9.

¹⁰ Renata Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002) 4; Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32, 36. For discussion see Fehlberg and Behrens, above n 4, 179-183, 193-197. For a male account of domestic violence see: Peter Olszewski, 'Violent Femmes' (March 1999) 2(5) *Men's Health* 114-119 <<http://www.mensrights.com.au/page13u.htm>> at 22 July 2009.

¹¹ Douglas and Godden, above n 10, 36.

¹² *Ibid.*

¹³ *Domestic and Family Violence Protection Act 1989* (Qld) s 11A. The last three of these are the new types of domestic relationships, which only came into effect in 2003 with the most recent amendments: Kift, above n 6, 21.

¹⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 12. See also Queensland Government Department of Communities, 'The Domestic and Family Violence Protection Act 1989: Legislation Explained' (July 2008) 4.

¹⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 12.

¹⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 12A(1).

¹⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 12A(2).

¹⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 12A(2).

¹⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 12A(3).

²⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 12B.

²¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 12B. In determining who can reasonably be defined as a 'relative', the *DFVPA* explicitly notes that this might be wider for Aboriginal people, Torres Strait Islanders, members of non-English speaking backgrounds and people with particular religious beliefs.

or impairment.²² This care must be provided in an informal way, and care provided under an arrangement is not covered.²³ An informal care relationship still exists where a carer receives payment from the Commonwealth Government,²⁴ but cannot exist between a child under 18 and their parent.²⁵

Where one of these domestic relationships exists, the court can make a protection order if satisfied that an act of domestic violence has been committed against the aggrieved and that the respondent is likely to commit an act of domestic violence again, or is likely to carry out a threat to commit an act of domestic violence.²⁶ 'Domestic violence' is defined broadly, consisting of acts or threats of wilful injury, wilful damage to the other person's property, intimidation or harassment of the other person, or indecent behaviour to the other person without consent.²⁷ Where a protection order is made, the standard order is that the respondent must be of good behaviour towards the aggrieved and must not commit domestic violence.²⁸ The respondent must also comply with any other conditions imposed by the court.²⁹ These can include: being of good behaviour and not committing an act of domestic violence to any named person; being prohibited from being in or near premises where the aggrieved or a named person may be; being prohibited from approaching the aggrieved; and being prohibited from contacting the aggrieved or any named person.

When faced with an application for a protection order, a respondent may agree to the order made against them and can choose to do so by consenting without admission of the facts in the application. If this is the case, the magistrate will make a decision about the protection order's conditions. If the respondent disagrees with the protection order, it will be set down for hearing, at which the magistrate will listen to the evidence of both parties and determine whether to issue an order. Provision is also made in the *DFVPA* for temporary protection orders. If the respondent has been served with the application, a temporary protection order will be made if the court is satisfied that an act of domestic violence has been committed against the aggrieved.³⁰ Where the respondent has not been served, a temporary order will be made if, in addition to being satisfied that an act of domestic violence has occurred, the court is satisfied that the aggrieved or a named person is in danger of personal injury, or the property of the aggrieved or a named person is in danger of substantial damage.³¹ These temporary orders are useful measures to protect the aggrieved prior to a hearing or where they have been unable to find the respondent to effect service. The *DFVPA* also places a duty on police officers to investigate the circumstances if they believe a person is an aggrieved and if satisfied of this on the balance of probabilities, they may then apply for a protection order to protect the aggrieved.³²

Civil protection orders are an important part of addressing domestic violence. In the 2007-2008 financial year, 23,836 applications for protection orders were lodged in Queensland.³³ Of these, 1,544 were lodged at the Brisbane Magistrates Court.³⁴ Protection orders have risen in popularity, with a 36.2 per cent increase in the number of applications and a 42.1 per cent increase in the number of protection orders made over the past

²² *Domestic and Family Violence Protection Act 1989* (Qld) s 12C.

²³ *Domestic and Family Violence Protection Act 1989* (Qld) s 12C. This means that care will not be covered where it is provided by a community-based organisation such as Meals on Wheels or Blue Care, or by institutions such as nursing homes: Kift, above n 6, 21.

²⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 12C(6).

²⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 12C(5).

²⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 20.

²⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 11.

²⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 17(a).

²⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 17(b).

³⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 39A.

³¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 39D.

³² *Domestic and Family Violence Protection Act 1989* (Qld) s 67.

³³ Magistrates Court of Queensland, *Annual Report 2007-2008*, 9. It is unclear in how many of these cases protection orders were granted. For the 2007-2008 financial year, 32,081 protection orders were made, but this figure includes both temporary protection orders and final protection orders, as well as variations to protection orders, and in rare cases, orders revoking protection orders. See p 78 'Graph 1: Breakdown of orders made 2007-2008'.

³⁴ *Ibid* 77.

seven years.³⁵ As research conducted by Heather Douglas and Lee Godden has found, it has become primarily these orders and not the general criminal law that regulate most aspects of violence between intimate partners.³⁶ Their research demonstrates that domestic violence is rarely regarded as criminal behaviour under the Queensland Criminal Code.³⁷ Douglas and Godden analysed 694 applications for domestic violence orders from the Brisbane Magistrates Court in 2001 and then categorised the violence from the factual circumstances in the application to offences under the Criminal Code.³⁸ They found that in only seven (1 per cent) of these court files were there notes that recorded a police investigation into the possibility of laying criminal charges and that in only three of these matters (0.4 per cent) were criminal charges actually laid.³⁹

The unfortunate consequence of civil protection orders is the apparent decriminalisation of domestic violence. Reliance on civil orders instead of criminal prosecution means that domestic violence is rarely treated as a crime. In this way, the symbolic role of the criminal law in labelling something as unacceptable in society is denied to domestic violence victims. The use of the criminal law is important for its deterrence factor, and when applied to domestic violence plays a role in publicly condemning violence in the home. It has also been argued that applying the criminal law to domestic violence increases police accountability for the protection of women and gives police incentive to treat domestic violence more seriously.⁴⁰ Domestic violence workers interviewed by Douglas and Godden were eager to have domestic violence named as a crime, to 'send a message that it's not okay' and to help 'make domestic violence be seen as a public issue and not just a private issue'.⁴¹ One worker went so far as to say that the introduction of the legislation had actually assisted in legitimising domestic violence being seen as something outside the criminal law.⁴² This reflects an important need to see acts of domestic violence treated as criminal conduct and not as something lesser than 'real' assaults or damage because they occur in the privacy of the home. This idea is in accordance with criticism of the term 'domestic violence' as 'domestic' can be seen to qualify and reduce the violence suffered.⁴³

The failure to treat domestic violence as a crime is particularly pertinent where there is a breach of a domestic violence order. Although breaching a domestic violence order can result in criminal penalties, the abuse needs to have occurred at least twice (once to satisfy the requirements for the application and once to amount to a breach) and the criminal prosecution is then for breach of the order and not for the abuse that occurred. Again there is a failure to treat the violence as criminal. This is revealed in a study by Heather Douglas of 645 files of prosecutions for breach of domestic violence at the Brisbane, Beenleigh and Southport Magistrates Courts in the six month period from 1 July 2005 to 31 December 2005.⁴⁴ Of the 350 of these files for which Queensland Police data provided descriptions, in 193 (55 per cent) the breach was labelled assault, yet in only 16 (5 per cent) of these cases was the defendant also charged with assault and in only 14 (4 per cent) of these cases found guilty.⁴⁵ Of the 116 (33 per cent) of files described as criminal damage, only 9 (3 per cent) were charged as such, with only 7 (2 per cent) found guilty.⁴⁶ For the 61 (17 per cent) stalking offences, no charges were

³⁵ Ibid 9. These are the previous seven years from the 2007-2008 financial year, with figures incorporating the 2008-2009 financial year not yet available.

³⁶ Douglas and Godden, above n 8, [3].

³⁷ Douglas and Godden, above n 10.

³⁸ Ibid 37.

³⁹ Ibid 37; Douglas and Godden, above n 8, [5].

⁴⁰ Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 443; Hayley Katzen, 'It's a Family Matter, not a Police Matter: The Enforcement of Protection Orders' (2000) 14 *Australian Family Law Journal* 1, 15; Douglas and Godden, above n 8, [19].

⁴¹ Douglas and Godden, above n 8, [16].

⁴² Ibid [17].

⁴³ Fehlberg and Behrens, above n 4, 178.

⁴⁴ Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 220.

⁴⁵ Douglas, above n 40, 450.

⁴⁶ Ibid.

laid.⁴⁷ Civil protection orders thus create a framework where in practice the failure to obey a court order is seen as more serious than the act of domestic violence itself.

Further injustice occurs in the sentencing for breaches of protection orders. Although breaches of protection orders are an exception to the low rates of criminal prosecution for domestic violence, with over 8,000 breaches prosecuted in 2005,⁴⁸ the penalties for these breaches are usually quite low. Under s 80 DFVPA the maximum penalty for breach of an order is one year imprisonment, although this increases to two years for a third or subsequent conviction within three years. Douglas' research found that 42 per cent (270) matters resulted in fines, the majority of which (32 per cent, 206) were less than \$500.⁴⁹ She argues that fines are an inappropriate punishment, unlikely to protect the victim or deter or rehabilitate the perpetrator, and that fines are often paid out of family income or money that should be paid as child support.⁵⁰ Douglas supports intermediate penalties (intensive correction orders, community service orders and probation orders) for their rehabilitative nature.⁵¹ These were more commonly awarded at the Southport and Beenleigh Magistrates Courts where perpetrator programs are available, than at the Brisbane Magistrates Court where there is no equivalent program.⁵² That in 40 per cent of cases a conviction was not recorded illustrates that there is a failure to take breaches of protection orders seriously.⁵³

Various factors contribute to the lack of prosecution of domestic violence. The criminal law requires the higher standard of proof, of proof beyond reasonable doubt. This can be difficult to satisfy in domestic violence cases as the prosecutor's case generally relies on the victim's testimony. In many cases, domestic violence victims do not wish to have the perpetrator prosecuted. This may be due to the interconnectedness of the victim and the perpetrator – the parties may have made up, or the victim may not want the perpetrator (usually her partner) imprisoned or fined, both measures that may affect the family finances.⁵⁴ The victim may also be intimidated, or fear retaliation.⁵⁵ Whilst other forms of evidence are available, such as police officer testimony and documentation of injuries, there can be problems with these.⁵⁶ For example, police reports may be incomplete, or merely take down the victim's statement.⁵⁷ Many domestic violence victims forgo medical treatment, or lie about the causes of their injuries due to embarrassment. Medical records may also be incomplete and thus unusable in court.⁵⁸

Whilst the lack of victim testimony is a factor in the police or prosecutor's decision not to prosecute, police attitudes also play a role in the underuse of the criminal law in addressing domestic violence. Although there are difficulties in gathering evidence to prosecute, domestic violence workers interviewed by Douglas and Godden told of a reluctance by police to gather evidence and a failure to treat domestic violence as they would another crime scene.⁵⁹ As Douglas and Godden argue '[i]t is telling that, in spite of the fact that police find a civil standard of proof to support violence or threats of violence, there is usually no corresponding investigation into the possibility of a criminal act'.⁶⁰ They also detail experiences of victims not being told

⁴⁷ Douglas, above n 40, 450.

⁴⁸ Douglas, above n 44, 220.

⁴⁹ Douglas, above n 40, 465.

⁵⁰ Ibid; Douglas, above n 44, 227.

⁵¹ Douglas, above n 44, 233.

⁵² Ibid, 228-230.

⁵³ Ibid, 230.

⁵⁴ Alexander, above n 10, 32.

⁵⁵ Ibid. See also Andrea M Kovach, 'Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present and Future' [2003] *University of Illinois Law Review* 1115, 1126.

⁵⁶ Kovach, above n 54, 1127.

⁵⁷ Ibid. See also Katzen, above n 40, 2, 19 detailing stories of domestic violence victims who would report breaches of orders to police, who would only write it in 'their little book', without taking statements or doing anything further.

⁵⁸ Kovach, above n 55, 1127.

⁵⁹ Douglas and Godden, above n 10, 41.

⁶⁰ Ibid, 36.

about their right to make a complaint about a criminal charge, and the erroneous perception generated by the police that they must choose between either criminal charges or civil protection.⁶¹ A similar experience of police attitudes was illustrated in a study conducted in 1999 in New South Wales into breaches of civil orders. This study revealed a high level of police reluctance to prosecute breaches, officers being influenced by their attitudes to women and to non-custodial fathers, as well as a tendency to see breaches as 'minor' or 'technical', despite the victim's terror at experiencing the breach.⁶² There is also evidence of a predisposition of police to perceive victims as unwilling to prosecute, without ascertaining whether this is the case.⁶³

These problems with the criminal justice system were the reason for the introduction of civil protection orders. There is an established recognition that specialist responses are needed, as the criminal law as it exists is not always ideally suited to address the complexities of domestic violence. Different jurisdictions have moved towards integrated criminal responses. The first specialised family violence court, the Winnipeg Family Violence Court, was established in Manitoba, Canada in 1990. It emphasises protection and fast case processing, with a specialised prosecutorial unit, tailored courtrooms, a distinct family violence probation unit, support and advocacy programs for those affected by family violence, and a pro-arrest policy.⁶⁴ In Australia, the Australian Capital Territory's Family Violence Intervention Program (ACT FVIP) aims to improve the effectiveness of the criminal law's response to domestic violence. The program involves continuous victim support, emphasis on improved prosecutorial practice and the creation of a Family Violence Magistrate to oversee and manage a specialised weekly hearing process.⁶⁵ This integrated criminal response has not yet occurred in Queensland, although a Specialist Domestic Violence List pilot has recently been established at the Rockhampton Magistrates Court.⁶⁶ This works within the framework of civil orders, trying to access pre-sentence domestic violence counselling and programs for offenders who breach domestic violence orders.⁶⁷ The pilot adopts interstate and overseas developments within the current framework, assessing the viability of a specialised domestic violence court.⁶⁸

Civil remedies, especially when backed up with a strong prosecutorial response for breaches, have some advantages over the criminal law. The process for obtaining a protection order is much faster than it would take for criminal domestic violence matters to be heard in court, with urgent applications also available.⁶⁹ With civil orders, the key emphasis is on the safety of victims,⁷⁰ which is often of more importance to them than criminal prosecution. Protection orders have been effective,⁷¹ and offer a response sought by many victims.⁷² The civil standard of proof also means that they are easier to attain. In practice, I found the award of protection orders to be a balancing act, in which Magistrate O'Shea attempted to devise an order that suited the lives of both parties, in order to remove the likelihood of breach. The Safe Room between the two courts used for domestic violence matters meant that the aggrieved and the respondent did not need to run into

⁶¹ Douglas and Godden, above n 10, 39.

⁶² Katzen, above n 40, 13-19.

⁶³ Robyn Holder, 'Domestic and Family Violence Criminal Justice Interventions' (Issues Paper 3, 2001, *Australian Domestic & Family Violence Clearing House*) 9; Douglas and Godden, above n 10, 41.

⁶⁴ Judith Piece, 'Legal Approaches to Family Violence' (Speech delivered at the Victorian Magistrates Conference, Melbourne, 25 November 2004).

⁶⁵ Fehlberg and Behrens, above n 4, 202. For further information on the ACT FVIP see Domestic Violence Crisis Service, *ACT Family Violence Intervention Program*, see <www.dvcs.org.au/Resources/FVIP%20info%20for%20WEBSITE.doc> at 22 July 2009; Robyn Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30.

⁶⁶ Magistrates Court of Queensland, above n 33, 10.

⁶⁷ *Ibid.*, 79.

⁶⁸ *Ibid.*

⁶⁹ Queensland Government Department of Communities, above n 14, 12.

⁷⁰ Under s 3A of the *Domestic and Family Violence Protection Act 1989* (Qld), the main purpose of the Act is safety.

⁷¹ Margrette Young, Julie Byles and Annette Dobson, 'The Effectiveness of Legal Protection in the Prevention of Domestic Violence Among Young Australian Women: Report to the Criminology Research Council' (June 1999, *University of Newcastle*); Alexander, above n 10, 88.

⁷² Alexander, above n 10, 88.

each other waiting outside the courtroom, and in one case the aggrieved and the respondent moved in and out of the court room, so an order could be agreed on without them seeing each other. Some issues with protection orders arose with the interaction between the *DFVPA* and the *Family Law Act 1975* (Cth), especially as many orders were sought on the breakdown of a relationship and the parties already had proceedings relating to children and property on foot under the federal system.⁷³ While there is a perception that domestic violence orders can be a separation tactic and open to abuse,⁷⁴ in reality this does not appear to be the case.⁷⁵

In addressing domestic violence, there should not have to be a choice between protection of the victim or punishment of the perpetrator. Both civil protection orders and prosecution under the criminal law are important elements in the legal response to domestic violence. While the victim's safety should be the immediate concern, it is still important that there are prosecutions of the actual acts of domestic violence to act as general deterrent and to keep domestic violence in the public sphere. That the highly symbolic use of the criminal law is often denied to domestic violence is disturbing, but should not be seen to take away from the benefits of protection orders. Protection orders serve a very useful role in difficult circumstances and should not be discredited. The complexities of domestic violence often mean that it is addressed initially through the civil framework, and there are many advantages in this. While there should be more prosecutions of the actual acts of domestic violence, the reality of the dominance of the civil framework of orders and breach offences means that more emphasis must be placed on the sentencing of breaches. Stronger punishments would ensure that breach offences are seen as sufficiently serious and would aid in deterring and rehabilitating the perpetrator. Indeed, in most cases, fines are insufficient punishment. A better balance between civil and criminal protection would go some way to ensuring that both protection and prosecution are available for domestic violence.



⁷³ See Dean Foley, 'Interaction and Conflict between Family Law Act 1975 and Domestic and Family Violence Protection Act 1989 (Qld), in light of *D v G and Bottoms v Rogers*' (2007) 28 *Queensland Lawyer* 27. For an overview of developments of family violence under the 2006 amendments of the *Family Law Act 1975* (Cth), see Felhberg and Behrens, above n 4, 212-218.

⁷⁴ This perception can be seen in men's rights groups, see Miranda Kaye and Julia Tolmie, "'Lollies at a Children's Party' and Other Myths: Violence, Protection Orders and Fathers' Rights Groups' (1998-1999) 10 *Current Issues in Criminal Justice* 52. See also Rachael Field and Belinda Carpenter 'Issues Relating to Queensland Magistrates Understanding of Domestic Violence' (Paper presented at the Domestic Violence Court Assistance Network (DVCAN) Conference, 17-19 June 2003), 4-6.

⁷⁵ These claims are refuted by Kaye and Tolmie, above n 74, 59; and by Field and Carpenter, above n 74, 6-13.

Addressing Issues in Juvenile Justice: A Children's Special Circumstances Court?

Sina Hutton

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The Special Circumstances Court is a specialist court designed to provide defendants who are homeless or who suffer from mental or intellectual disability with an alternative to the mainstream court system, where that defendant is charged with a minor offence. In the short time the Special Circumstances Court has been operating in Brisbane, the model has been praised as a great success.¹

This article examines the operation of the Special Circumstances Court in the adult jurisdiction and whether an appropriately adapted model should be introduced into the Children's Court jurisdiction to cater to the special needs of young people with an intellectual or mental illness and/or homelessness. In particular, this article will focus on the offending behaviour surrounding youth homelessness and the need for a specialist court to address the related criminal and social problems.

Issues in Juvenile Justice

Young people from disadvantaged backgrounds are often caught up in the criminal justice system. Homeless young people are at a far greater risk of offending behaviour due to their street lifestyle. For homeless young people, crime is seen both as a means for survival and a part of the sub-culture of street-living.² A 2008 National Youth Commission Inquiry into Youth Homelessness revealed that the most common crimes committed by homeless young people include evading fares on public transport, offensive language charges, and failing to obey a police move on order.³

One of the greatest obstacles faced by homeless people is compliance. Research undertaken by the Public Interest Law Clearing House (Vic) Inc. (PILCH) Homeless Persons' Legal Clinic found a perception that traditional penalties imposed upon homeless persons, such as suspended sentences and good behaviour bonds, 'set people up' to fail.⁴ Given that homeless persons' offending behaviour is usually directly related to their lifestyle or living conditions, their ability to comply is severely restricted. As a result, homeless persons are often faced with harsh outcomes for breaching the conditions of their original sentence.⁵

¹ See Jelena Popovic, 'Homelessness and the Law: A View from the Bench' (2004) 17(1) *Parity* 53; and Tamara Walsh, 'The Queensland Special Circumstances Court' (2007) 16 *Journal of Judicial Administration* 223.

² See National Crime Prevention, *Living Rough: Preventing Crime and Victimization Among Homeless Young People* (1999) 35.

³ National Youth Commission, *Australia's Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness* (2008) 285.

⁴ PILCH Homeless Persons' Legal Clinic, *Improving the Administration of Justice for Homeless People in the Court Process: Report on the Homeless Persons Court Project* (2004).

⁵ PILCH Homeless Persons' Legal Clinic, above n 5, 28.

The Special Circumstances Court Model

There has been in recent years a growing number of specialist courts introduced to address the needs of marginalised and disadvantaged groups. Therapeutic jurisprudence is the practice of linking the court process with social service intervention, the court being able to use the coercive power of the law to 'address complex causes of offending behaviour'.⁶

The Special Circumstances Court was established in the Brisbane Magistrates Court in May 2006 based on a 'special circumstances list' previously adopted in Melbourne in 2002.⁷ The Melbourne model was an initiative responding to the view that the Magistrates Court was becoming a 'revolving door through which socially and economically disadvantaged people passed, subject to a continuing barrage of charges for public space and other minor offences'.⁸

A person is eligible to be dealt with in the Brisbane Special Circumstances Court if he or she satisfies the following criteria: he or she must be homeless or suffering from an impaired capacity as a result of a mental health issue, intellectual disability or neurological disorder.⁹ In addition, he or she must be over the age of 17 and plead guilty to an offence arising from circumstances which have an aspect of 'public order'.¹⁰ This includes offences such as public nuisance, public drunkenness and begging, and extends to associated procedural offences such as failure to appear and breach of bail.¹¹

In issuing a penalty, the presiding magistrate may attach certain conditions which give a measure of support and structure to the offending person's sentence (that is, through formal supervision and referral to certain programs and services). For example, conditions may be attached to a good behaviour bond requiring a defendant to be supervised by a corrective services officer and attend at counselling sessions or other programs as directed by that officer or the court.¹²

The Special Circumstances Court is better able to deal with offenders who are continually in court charged with public order-type offences because of their circumstances. These offenders often have difficulty complying with traditional sentences such as fines and good behaviour bonds due to their homeless lifestyle or mental or intellectual impairment. The Special Circumstances Court takes into account the circumstances of the offender and attempts to avoid imposing inappropriate and unmanageable sentences without the support and management of appropriate services.¹³

In addition, because the Special Circumstances Court adopts a therapeutic approach towards the administration of justice, the magistrate encourages a supportive environment in which the offender can foster positive relationships with the court and with the wider community. The magistrate encourages offenders to 'tell their stories', and by doing so the offender has a chance for his or her voice to be heard and perceptions of fairness within the court system are greatly improved.¹⁴

⁶ Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems' (Speech delivered at the Australian Institute of Judicial Administration Magistrates' Conference, 20–21 July 2001, Melbourne, Australia) 13–14 available at <<http://www.aija.org.au/Mag01/FREIBERG.pdf>>; PILCH Homeless Persons' Legal Clinic, above n 5, 4; and David Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders Make Good' (2001) 18 *Spring Court Review* 27.

⁷ See Popovic, above n 2.

⁸ See Walsh, above n 2, 223.

⁹ See Walsh above n 2, 225; Judge Marshall Irwin, 'Special Circumstances List' (Paper presented at the 'Lock Them Up? Disability and Mental Illness Aren't Crimes' Conference, 17–19 May 2006, Brisbane).

¹⁰ See Walsh above n 2, 225; Irwin above n 10.

¹¹ See Walsh above n 2, 225; Irwin above n 10.

¹² See Walsh above n 2, 226 and *Penalties and Sentences Act 1992* (Qld) ss 90–93.

¹³ PILCH Homeless Persons' Legal Clinic above n 5, 4; Freiberg, above n 7.

¹⁴ See Recommendation 18 PILCH Homeless Persons' Legal Clinic, above n 5, 48.

Specialist Courts in a Juvenile Setting

Specialist courts play an important role in the administration of justice in the Children's Court. A good example of this is the success of the Children's Murri Court which provides indigenous children who find themselves before the court with culturally appropriate court room setting and sentencing outcomes.

A Special Circumstances Court within the Children's Court jurisdiction, similar to the adult model, would have the capacity to more appropriately sentence children from disadvantaged backgrounds, such as the homeless, who are particularly prone to becoming perpetrators of crime. The Court would also be able to assist homeless young people or people with mental and intellectual impairments to access the support services they need to address the underlying reasons for their offending.

Homeless young people, like homeless adults, are vulnerable to unjust outcomes as a result of compliance issues. This is particularly worrying given that research demonstrates that the more severe the sanctions issued by the courts, the higher the levels of reoffending, and that even more lasting damage is caused as a result of incarceration.¹⁵

The Special Circumstances Court is by no means the solution to the problems facing juvenile offenders and its success is largely contingent upon the existence and quality youth services to support the homeless or mental or intellectually impaired offender. Nevertheless positive experience within the adult jurisdiction demonstrates that there is merit to a similar model being implemented in the Children's Court jurisdiction. More research is needed to explore whether the existing services are sufficient to support a Special Circumstances Court, and whether the adult model would need to be altered in any way in order to be suitable to the Children's Court jurisdiction.



¹⁵ See Michael Cain, (1996) *Recidivism of Juvenile Offenders in New South Wales*. See also Department of Juvenile Justice: Sydney; National Crime Prevention, above n 3.

Substance Abuse and Sentencing

Samuel Volling

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There is a definite, albeit complex, relationship between substance abuse and crime.¹ It is, therefore, in the interests of both offenders and the community for the criminal justice system to have the ambition of treating patterns of substance abuse among offenders.² I argue that this is to be achieved, by substance abuse resulting in an increased emphasis upon rehabilitation in sentencing, and operating, where appropriate, as a mitigating factor. Further to this, I argue in favour of the drug court model which has recently seen implementation in Australia under the auspices of State Magistrates Courts, as a demonstrably effective means of targeting the drug-crime nexus.

Substance Abuse as a Mitigating Factor

The sentencing process entails a consideration and weighting of all relevant factors relating to the offender and the offence,³ including an offender's culpability.⁴ In certain circumstances, an offender's substance abuse should serve as an indicator of diminished culpability and, thus, as a mitigating factor.

Theoretical Underpinnings of Culpability

In making this argument, it is necessary to have regard to the underlying theoretical basis for the role of moral culpability as a sentencing factor. At the foundational level, culpability is a significant sentencing consideration because it indicates the degree of free will and deliberation underpinning criminal conduct.⁵ Aside from being relevant from a Kantian perspective emphasising moral autonomy,⁶ culpability is also an important concept in utilitarian theories of punishment, as the extent of deliberateness and moral turpitude behind an offence will often be indicative of the risk an offender poses to the community.⁷ As Bennett and Broe argue, a shifting political culture over recent decades has seen the rising dominance of culpability-based sentencing:

The revival of the retribution approach [...] has been reported in the 1980s and 1990s, and to have coincided with the rise of the doctrine of economic rationalism which highlighted the market as the major economic as well as social force...under this pervasive doctrine [...] the rehabilitative models of sentencing were forced to make way

¹ Jason Payne, 'A Discrete-time Survival Study of Drug Use and Property Offending: Implications for Early Intervention and Treatment' (2006) 24 *Technical and Background Paper Series* 1, 3-4.

<<http://www.aic.gov.au/publications/tbp/tbp024/tbp024.pdf>> at 15 September 2008. See also, Clare Cappa, *From Retribution to Reintegration: Drug Courts in Australia* (D Phil Thesis, The University of Queensland, 2007) 51.

² Ian Freckelton, 'Sentencing the Substance Dependent Offender' (1994) 1(1) *Psychiatry, Psychology and Law* 11, 11.

³ *Penalties and Sentencing Act 1992* (Qld) s 9(2)(r).

⁴ *Penalties and Sentencing Act 1992* (Qld) s 9(2)(d).

⁵ Steven Tudor, 'The Relevance of Remorse in Sentencing: A Reply to Bagaric and Amarasekara (and Duff)' (2005) 10(2) *Deakin Law Review* 760, 764.

⁶ See David A J Richards, 'Rights, Utility, and Crime' (1981) *Crime and Justice* 247, 251.

⁷ Mirko Bagaric, 'Proportionality in Sentencing: its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 143, 157.

for economic rationalist views of personal responsibility, and thus sentencing models of retribution and individual culpability.⁸

It is certainly true that, at the most basic intuitive level, such a 'just deserts' approach to sentencing sounds acceptable. However, as Edney argues, the fundamental weakness with 'just deserts' theory, as typically propounded, is a presumption of formal equality, such that each individual in society is assumed to be responsible for their actions, with no regard being had for the widely varying circumstances of individual offenders.⁹ Whilst the trial stage of criminal justice proceedings is understandably controlled by broad general rules, out of practical necessity if nothing else, sentencing has developed in a far more discretionary and flexible manner so that the individual offender's life and circumstances can be fully taken into account.¹⁰ This serves to minimise the injustices arising from what France describes as 'the majestic equality of the law which prohibits the wealthy as well as the poor from sleeping under bridges, from begging in the streets, and from stealing bread.'¹¹ Any consideration of culpability in sentencing should, therefore, entail a wide-ranging inquiry into the individual circumstances of an offender, rather than simply focussing on the rudimentary concept of 'personal responsibility'.

Culpability and Substance Abuse

From the above, the question arises as to how an offender's substance abuse problems should impact upon an offender's culpability.

One answer to this problem is to hold that substance abuse should not mitigate, to any extent, an offender's sentence by reducing culpability. At the most rudimentary level, this might be justified by the attitude that the use of illegal substances is itself wrongful and, thus, should not serve as a mitigating factor.¹² This dovetails with the view taken by Spigelman CJ, of the majority, in *R v Henry*, where His Honour held that substance abuse cannot mitigate, because individuals must be held responsible for the 'completely free choice' to take drugs initially and the subsequent choices to commit crime whilst under an addiction, and to not seek treatment.¹³ In a similar vein, Wood CJ at CL held that, because each person makes a 'free choice' to initially experiment with drugs, and the perils of addiction are well-known, a substance abuser is responsible for the consequences of their 'choice' to become addicted.¹⁴ Chief Justice at Common Law Wood reasoned similarly, emphasising that he was not convinced that there was an 'inevitable' causal relationship between substance abuse and crime and that other factors, such as socio-economic disadvantage and involvement in criminal subcultures, often played a role in effecting criminality.¹⁵

It is argued, contrary to the views above, that in certain circumstances an offender's substance abuse ought to result in diminished culpability and, thus, sentence mitigation. Such an approach to substance abuse in sentencing is illustrated by the Queensland Court of Appeal decision of *R v Hammond*,¹⁶ where it was held that evidence of an offender's substance abuse problems can serve as evidence of diminished culpability. In that case, the offender, convicted of several robbery offences, had begun using drugs whilst at high school, amidst

⁸ Hayley Bennett and GA (Tony) Broe, 'Brains, Biology, and Socio-economic Disadvantage in Sentencing: Implications for the Politics of Moral Culpability' (2008) 32 *Criminal Law Journal* 167, 170.

⁹ Richard Edney, 'Just Deserts in Post-Colonial Society: Problems in the Punishment of Indigenous Offenders' (2005) 9 *Southern Cross University Law Review*.

¹⁰ Martha Nussbaum, *Sex and Social Justice* (1999) 175.

¹¹ Anatole France, *The Red Lily* (first published 1894, 2009 ed) Online Literature <<http://www.online-literature.com/anatole-france/red-lily/8/>> at 24 May 2009.

¹² Cappa, above n 1, 51.

¹³ *R v Henry* (1999) 46 NSWLR 346, 385 (Spigelman CJ).

¹⁴ *Ibid* 395 (Wood CJ at CL).

¹⁵ *Ibid* 385 (Wood CJ at CL).

¹⁶ *R v Hammond* [1997] 2 Qd R 195, 199-200.

poor relations with his family, and had shifted to heroin after his long-time de facto partner ended their relationship and commenced one with the offender's best friend.¹⁷

Whilst stressing that substance abuse was not an excuse for offending, the Court in *R v Hammond* recognised that evidence of drug addiction can establish that criminal conduct was a 'secondary consequence of desperation', as opposed to a 'primary choice' to offend.¹⁸ This approach harmonises the tension Freckleton identifies between giving due recognition to the fact that substance abuse is often a *sine qua non* of offending whilst, at the same time, recognising that, unlike cases of automatism, the offender has made a choice, albeit an impaired one, to engage in criminal conduct.¹⁹ Hence, although substance abuse should not be regarded as a universal mitigating factor,²⁰ in certain circumstances it can indicate a reduced level of deliberation behind criminal conduct.

Moreover, the argument that drug use is a 'free choice' becomes significantly weakened in light of the fact that many substance abusers begin using drugs whilst young or in desperate situations.²¹ It was for this reason that Simpson J, dissenting in *R v Henry*,²² urged that courts should not treat substance abuse as if it occurred in a 'social or environmental vacuum'. Likewise, as Kirby J commented in *Dang v R*,²³ in which special leave to appeal on the question of mitigation was denied, many people who develop substance abuse problems find it very difficult to escape and begin abusing substances in circumstances where their decisions are neither entirely wilful nor morally blameworthy. As Ashworth argues, one need not be a behavioural determinist to recognise that offenders will, to varying extents, have reduced responsibility by virtue of their social background.²⁴ For an offender in the position of Hammond, it would be wrong to treat him or her as being fully responsible for the decision to take drugs when that decision was made in dire circumstances.²⁵ In such circumstances, substance abuse ought to effect sentence mitigation as the decision to take drugs cannot be regarded as a 'free choice' for which the offender should be held entirely culpable.

An alternative basis for rejecting the relevance of substance abuse as a mitigating factor was put forward by the English Court of Appeal (Criminal Division) in *R v Brewster*,²⁶ which held that because the extenuating circumstances surrounding substance abuse will be of little concern to a victim of crime, substance abuse should be unable to serve as a mitigating factor. This objection essentially invalidated by the fact that, in exercising sentencing discretion, courts routinely take into account factors, such as age and character, which will be of scant interest to a victim of crime. As Taylor argues, 'if the yardstick of relevance to the victim were adopted as the sole test of what counts in sentencing, the exercise of that discretion would look rather different from what the law requires it to.'²⁷

Rehabilitation

Prioritising Rehabilitation in Sentencing

Whether or not substance abuse mitigates a sentence, it should ordinarily have the effect of orienting sentences towards rehabilitation. Rehabilitation serves the interests of both the community and offenders, by

¹⁷ *R v Hammond* [1997] 2 Qd R 195.

¹⁸ *Ibid*, 200 (Court of Appeal).

¹⁹ Freckleton, above n 2, 17.

²⁰ See, eg, *R v Dwyer* [2008] QCA 117 (Unreported, de Jersey CJ, Keane JA and Douglas J, 6 May 2008).

²¹ Greg Taylor, 'Should Addiction to Drugs be a Mitigating Factor in Sentencing?' (2002) 26 *Criminal Law Journal* 324, 337.

²² *R v Henry* (1999) 46 NSWLR 346, 385.

²³ Transcript of Proceedings, *Dang v R* (High Court of Australia, Gleeson CJ, Gummow and Kirby JJ, 21 June 2000).

²⁴ Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed, 2005) 144-147.

²⁵ *Ibid* 86.

²⁶ *R v Brewster* [1998] 1 Cr. App. R. 220, 225.

²⁷ Taylor, above n 21, 337.

directing sentencing towards the treatment of substance abuse problems.²⁸ Effective rehabilitation can assist substance abusers to overcome their problems and, hence, can reduce recidivism.²⁹ Moreover, as Ashworth argues, there are strong humanitarian grounds for persisting in providing offenders with opportunities to be reintegrated into the community.³⁰ Ashworth's argument has particular applicability to substance abuse offenders given, as argued above, that substance abuse problems are often the result of an individual's harsh life circumstances.

The Drug Court Model

For offenders with particularly serious substance abuse problems, the drug court model of sentencing procedure serves to better facilitate rehabilitation. Queensland introduced its Drug Court Program in 2000,³¹ with similar programmes operating in other Australian jurisdictions.³² Unlike traditional courts, drug courts fully incorporate therapeutic jurisprudence ideas into court procedure, reflected in the absence of conventional adversarialism and in direct judicial intervention.³³ Goldkamp, White and Robinson deem this approach 'iconoclastic', noting that it radically transforms the traditional role of a court into one which is therapeutic, informal, and encouraging of the judge becoming involved.³⁴ In many respects, this reflects the fact that development of the world's first drug courts in the United States was led by judges who themselves were deeply committed to rehabilitating offenders and improving court procedure.³⁵ As such, drug courts are designed so as to better enable court processes to address the substance abuse problems underpinning offending conduct.³⁶

One of the most significant differences between drug court sentencing process and conventional sentencing process is the fact that the judge or magistrate essentially assumes the role of 'therapeutic manager'.³⁷ Whilst this is necessary in order to properly promote rehabilitation, McGlone argues that one risk which arises is that 'shopping' by defendants for particular judges will become increasingly prevalent, given the more extensive judicial role.³⁸ Moreover, it is imperative, throughout the sentencing process and throughout the treatment program, for the judge to remain impartial and not become emotionally engaged, despite the more intensive and ongoing personal involvement.³⁹

Moreover, the therapeutic jurisprudence principles underpinning drug courts require defence counsel to be generally supportive of treatment in the sentencing process, rather than simply obtaining a lower penalty.⁴⁰ As King argues, the drug court process operates best where defence counsel fully advise their clients in relation to their rights and encourage them to be comfortable speaking before the drug court.⁴¹ Potter notes that

²⁸ Freckelton, above n 2, 11.

²⁹ Anida Chiodo, 'Sentencing Drug-Addicted Offenders and the Toronto Drug Court' (2002) 45 *Criminal Law Journal* 53, 53.

³⁰ Ashworth, above n 17, 84.

³¹ Payne, above n 31, 7.

³² Ibid 3.

³³ David Indermaur and Lynne Roberts, 'Finding Alternatives to Imprisonment: Drug Courts in Australia' (2005) 86 *Reform* 28, 28.

³⁴ Goldkamp, White, and Robinson, above n 30, 29.

³⁵ Daniel McGlone, 'Drug courts – A Departure From Adversarial Justice' (2003) 28(3) *Alternative Law Journal* 136, 138.

³⁶ Jacqueline Joudo, 'Responding to Substance Abuse and Offending in Indigenous communities: Review of Diversionary Programs' (2008) 88 *Research and Public Policy Series* 59 <<http://www.aic.gov.au/publications/rpp/88/rpp88.pdf>> at 11 September 2008.

³⁷ Indermaur and Roberts, above n 42, 28.

³⁸ McGlone, above n 44, 138.

³⁹ Murrell, above n 33, 22-23.

⁴⁰ McGlone, above n 44, 138.

⁴¹ Michael S King, 'Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective' (2007) 31 *Criminal Law Journal* 12, 15.

encouraging a desire to work with the drug court system is especially important in relation to Indigenous offenders, who conventional court systems have often failed.⁴²

Intensive drug rehabilitation orders (IDROs) may be ordered by drug court magistrates and operate as an alternative to imprisonment, taking the form of a suspended sentence combined with a rigorous treatment program.⁴³ Similar programs exist across Australia, though with variations in the profiles of targeted offenders and precise treatment offered.⁴⁴ The sentencing philosophy underpinning this approach is one of recognition that the conventional model of ever-increasing penalties fails to address the substance abuse underpinning much offending conduct.⁴⁵ As such, drug court sentencing regimes represent a diversionary approach, emphasising therapy rather than punishment.⁴⁶

In a classically utilitarian approach to sentencing, IDROs and similar programs entail a system of penalties and rewards, with the ultimate aim of promoting rehabilitation.⁴⁷ An IDRO involves a staged plan for the offender, first seeking to treat addiction, then promoting stability, and, finally, reintegrating the offender into community life.⁴⁸ In practice, the most common penalty for breaching an IDRO condition is imprisonment, with the most common reward being progression to the next program stage.⁴⁹ The primary advantage of such programs is that they address substance abuse as a medical problem – an approach supported by health professionals – whilst still recognising responsibility for criminal conduct.⁵⁰ Aside from being more economically efficient in the long-term than conventional punishment,⁵¹ Payne's research has found substantially lower recidivism rates among IDRO graduates than among terminates and a prisoner control population.⁵²

Despite the clear advantages of rehabilitative programs like the IDRO, it is necessary to ensure that such programs do not, in pursuit of rehabilitation, end up being overly punitive. Although the average time taken to complete an IDRO is 420 days,⁵³ there is no upper limit on the program's length.⁵⁴ As Jeffries argues, because drug court programs are indefinite in length and very onerous upon offenders, there exists a risk of such programs making excessive incursions upon the rights of offenders.⁵⁵ To some extent, this concern is mitigated in Queensland, as only offenders otherwise facing imprisonment come before the Queensland Drug Court.⁵⁶ However, as Jeffries notes, this effectively means that offenders are forced to choose between imprisonment and an IDRO, potentially impinging upon the degree to which offenders are truly give voluntary consent to an IDRO and its burdensome requirements.⁵⁷ Thus, whilst the rehabilitative emphasis of the drug court model

⁴² Deen Potter, 'Lawyer, Social Worker, Psychologist and More: The Role of the Defence Lawyer in Therapeutic Jurisprudence' (2006) 1 *E Law Journal (Special Series)* 97 <<https://elaw.murdoch.edu.au/issues/special/lawyer.pdf>> at 15 September 2008.

⁴³ *Drug Court Act 2000* (Qld) s 19.

⁴⁴ Ruth Lawrence and Karen Freeman, 'Design and Implementation of Australia's First Drug Court' (2002) 35(1) *The Australian and New Zealand Journal of Criminology* 63, 64.

⁴⁵ Richard Edney, 'The Victorian Drug Court: An Overview' (2002) 2(5) *Criminal Law News Victoria* 33, 34.

⁴⁶ Joy Wundersitz, 'Criminal Justice Responses to Drug and Drug-related Offending: Are They Working?' (2007) 25 *Technical and Background Paper Series* 1, 31 <<http://www.aic.gov.au/publications/tbp/tbp025/tbp025.pdf>> at 14 September 2008.

⁴⁷ John S Goldkamp, Michael D White, and Jennifer B Robinson, 'Do Drug Courts Work? Getting Inside the Drug Court Black Box' (2001) 31(1) *Journal of Drug Issues* 27, 41-42.

⁴⁸ Jason Payne, 'The Queensland Drug Court: A Recidivism Study of the First 100 Graduates' (2008) 83 *Research and Public Policy Series* 1, 25 <<http://www.aic.gov.au/publications/rpp/83/rpp83.pdf>> at 14 September 2008.

⁴⁹ *Ibid* 40.

⁵⁰ Gay Murrell, 'Breaking the Cycle: NSW Drug Court' (2000) 77 *Reform* 20, 21.

⁵¹ Samantha Jeffries, 'How Justice 'Gets Done': Politics, Managerialism, Consumerism, and Therapeutic Jurisprudence' (2005) 17(2) *Current Issues in Criminal Justice* 254, 260.

⁵² Payne, above n 31, 68-72.

⁵³ Payne, above n 31, 28.

⁵⁴ See *Drug Court Act 2000* (Qld).

⁵⁵ Jeffries, above n 34, 261

⁵⁶ Payne, above n 31, 7.

⁵⁷ Jeffries, above n 34, 261.

does have clear benefits, it is imperative to ensure that this emphasis does not result in offender's receiving what would otherwise be considered excessive punishment.

In summary, an offender's substance abuse should, in certain circumstances, mitigate a sentence and should, generally, affect both the sentence and sentencing process in order to prioritise rehabilitation as an objective. Specifically, mitigation should occur where evidence of substance abuse and relevant circumstances establishes diminished culpability. Sentences should also be oriented towards rehabilitating offenders, though not in such a way that risks being overly punitive. Finally, substance abuse should affect the sentencing process so that there is better scope for engagement with an offender's treatment needs, whether it be through conventional sentencing processes or more intensive drug court programmes. By responding to substance abuse in the outlined ways, there is greater assurance of substance abusing offenders being dealt with justly and having the best possible chance at recovery.



Lost in Translation? An Examination of Court Interpreting in Australia

Nicole Choolun

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As evidenced by the 2006 Census, Australia's multicultural character continues to flourish. Australia's 2006 overseas-born population constituted approximately 24 per cent (4.9 million) of the national population,¹ 47.3 per cent of whom came from a non-English speaking background (NESB). Approximately 3 per cent (495,000) of the national population, primarily Cantonese, Italian, Mandarin, Greek, Vietnamese and Arabic-speaking,² were not proficient in English.³

NESB persons require particular support to overcome a myriad of potential language difficulties that impede their integration into Australian society. This paper seeks to assess the extent to which the NESB person's ability to participate in the Australian legal system is currently assisted by the use of court interpreting services. It begins by examining the NESB person's right to a court interpreter, and seeks to clarify the interpreter's role in the legal setting. It then canvasses some of the shortcomings in existing court interpreting practices and suggests methods for their amelioration. Although applicable to any Queensland – or indeed Australian – court or tribunal, this discussion is particularly relevant to the Magistrates courts, where the majority of both criminal and civil matters are heard and where legal representation is less customary. Ultimately, securing equal access to the legal system for the NESB person, by removing the language barriers, has an overriding social and moral imperative: justice.

The NESB Person's Right to an Interpreter

Somewhat surprisingly, Australian common law does not provide an automatic right to an interpreter for any party to a dispute, including a witness or the accused.⁴ In South Australia, however, a statutory right to an interpreter exists for a witness who is not fluent in English in any court proceedings or when being questioned by police.⁵ The Victorian and Commonwealth governments grant the right to an interpreter in more limited circumstances.⁶

¹ Australian Bureau of Statistics, *Yearbook Australia 2008: Country of Birth* (2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/bb8db737e2af84b8ca2571780015701e/F1C38FAE9E5F2B82CA2573D200110333?opendocument>> at 2 July 2008. Of Australia's total population of 20,605,500 in 2006, its overseas-born population comprised 4,956,900. See also Australian Bureau of Statistics, *2006 Census QuickStats: Australia*, 14 April 2008, <<http://www.censusdata.abs.gov.au>> at 2 July 2008.

² Australian Bureau of Statistics, *Migrants General Social Survey Australia 2006* (2007) <[http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/1A7A27EEB008EAC4CA25739800125C72/\\$File/34150ds0007_2006_gss_migrants.xls#Table 2.4!A1](http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/1A7A27EEB008EAC4CA25739800125C72/$File/34150ds0007_2006_gss_migrants.xls#Table 2.4!A1)> at 2 July 2008.

³ Australian Bureau of Statistics, *2006 Census: Population and Housing* (2008) <<http://www.censusdata.abs.gov.au>> at 30 June 2008. English non-proficiency is self-assessed on the basis of speaking English 'not well' or 'not at all.'

⁴ *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 80 ('Adamopoulos'); *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458; *De La Espriella-Velasco v R* (2006) 31 WAR 291, [18]; *Filios v Morland* (1963) 63 SR (NSW) 331.

⁵ *Evidence Act 1929* (SA) s 14; *Summary Offences Act 1953* (SA) s83A.

⁶ For Victoria: *Crimes (Family and Violence) Act 1987* (Vic); *Children and Young Persons Act 1989* (Vic) s 22 (for a child or parent of a child); *Magistrates Court Act 1989* (Vic) s 40 (for an accused charged with an offence punishable by

Beyond these circumstances, and in all other jurisdictions where the common law prevails, whether to use an interpreter is a matter within the discretion of the presiding judicial officer.⁷ In criminal proceedings, exercising such discretion entails consideration of the accused's common law right to a fair trial,⁸ a fundamental aspect of the criminal justice system pioneered in *Dietrich v R*.⁹ Commenting on the content of a fair trial, the English case of *Kunnath v The State* continues a strong line of authority¹⁰ that:

It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the accused...not simply that there should be corporeal presence but that the accused, by reason of his presence, should be able to understand the proceedings. An accused who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial.¹¹

In *R v Tran*, Lamer CJ elaborated, 'the very legitimacy of the justice system in the eyes of those who are subject to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.'¹² This consideration is paramount irrespective of whether the NESB person is the accused himself, or a witness in the trial.¹³ The judicial officer must in both cases measure the likely impact of an interpreter on the trial's ultimate verdict.

In civil proceedings, the disadvantage caused by the absence of an interpreter, as a matter of natural justice, appears subject to competing considerations: the possible prejudice to the interests of the other party deriving from delay and costs of interpreting services; the time at which the request for an interpreter is made; the necessity of an interpreter for the issues; ulterior motives for the request; and the reality that, for reasons explored below, evidence via an interpreter will not necessarily facilitate the ascertainment of truth.¹⁴ In any case, however, as stressed Kirby J in *Gradidge v Grace Bros*, the judicial officer's discretion must not be coloured by idiosyncratic opinions or personal views.¹⁵

The failure to provide adequate or proper interpreting services for a NESB person when necessary for a fair trial may result in a miscarriage of justice for which proceedings may be stayed.¹⁶ As a matter of practice, then, common law discretion usually favours the accused. However, certainty and uniformity call for a prima facie legislative right to an interpreter in all Australian states, rebuttable only on the grounds of English language proficiency. Further, in accordance with the recommendations of the Australian Law Reform Commission (ALRC), this right should apply to criminal *and* civil matters, but be dispensable in the latter if other considerations take priority.

In assessing whether the NESB person's level of English proficiency is sufficient to understand proceedings, either pursuant to statute or the common law, the often-monolingual judicial officer faces an unenviable task.

imprisonment). For the Commonwealth: *Evidence Act 1995* (Cth) s 30 (for witnesses in criminal trials); *Migration Act 1958* (Cth) s 427(7) (for parties before the Refugee Review Tribunal); *Defence Force Discipline Act 1982* (Cth) s 101H(6).

⁷ *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464; Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Report (1991) 39.

⁸ See, eg, *Adamopoulos* (1991) 25 NSWLR 75 (Kirby P); *Filios v Morland* (1963) 63 SR (NSW) 331; and *R v Johnson* (1986) 25 A Crim R 433, 440 (Shepherson and Williams JJ).

⁹ (1992) 177 CLR 292.

¹⁰ See, eg, *R v Lee Kuhn* [1916] 1 KB 337, 341; *Weiss v R* (2005) 80 ALJR 444.

¹¹ *Kunnath v The State* (1993) 4 All ER 30.

¹² [1994] 2 SCR 951, 975 (Lamer CJ); see also *Ebatarinja v Deland* (1998) 194 CLR 444, 454 (Gaudron, McHugh, Gummow, Hayne and Callaghan JJ); *Gradidge v Grace Bros* (1988) 93 FLR 414, 422 (Kirby P), and 426 (Samuels JA) ('*Gradidge*'); *R v Saraya* (1993) 70 A Crim R 515, 516 (Badgery-Parker J); *R v Scobie* (2003) 85 SASR 77, 109-110 (Gray J); *R v Watt* (2007) QCA 28; *Frank v Police* (2007) SASR 288, [22].

¹³ *R v Johnson* (1986) 25 ACR 433.

¹⁴ *Adamopoulos* (1991) 25 NSWLR 75, 81.

¹⁵ (1988) 93 FLR 414, 423 (Kirby J).

¹⁶ See, eg, *Dietrich v R* (1992) 177 CLR 292, 301; *Frank v Police* (2007) SASR 288, [70]; and *Jago v District Court of New South Wales* (1989) 168 CLR 23, 30.

So as to avoid conferring an unfair advantage on those persons with some knowledge of English,¹⁷ courts have generally limited the use of interpreters to those NESB persons with demonstrably inadequate proficiency.¹⁸ This approach has received considerable criticism, not least from Kirby P in *Adamopoulos v Olympic Airways SA*, who warned that elementary English will not suffice:

[T]he mere fact that a person can sufficiently speak the English language to perform mundane or serial tasks or even business obligations does not necessarily mean that (s)he is able to cope with the added stresses imposed by appearing as a witness in a court of law.¹⁹

Judicial officers would thus benefit from objective criteria from an English language authority to assist their assessment of proficiency.

Role of the Court Interpreter

The Australian Institute of Interpreters and Translators' (AUSIT) *Code of Ethics* stipulates eight amorphous principles underpinning the practice of interpretation in all disciplines: professional conduct; confidentiality; competence; accuracy; impartiality; employment; professional development; and professional solidarity.²⁰ In the field of court interpreting, the interpreter's adherence to these principles is often problematic by virtue of his or her complex – and to some extent, conflicted – role in legal proceedings.

Given the attention to detail required in legal proceedings, great emphasis has been placed on accuracy in evaluating a court interpreter's performance.²¹ *Gaio v R*,²² a 1960 case considering the role of the court interpreter prior to the advent of accreditation, first advocated 'word-for-word' (or literal) interpretation as a direct method of delivery. However, this approach reflects the misconception, notably among lawyers, that interpreting from one language to another is a purely mechanical process (whereby the interpreter performs the role of a 'conduit pipe') rather than 'a complex human interaction.'²³ *Filos v Morland*²⁴ and *Dairy Farmers Co-operative Milk Co Ltd v Acquilina*²⁵ subsequently reaffirmed this view. To be sure, several characteristics of the conduit model benefit the courtroom agenda. Its machine-like function encourages impartiality by restricting the interpreter's exercise of discretion.²⁶ In so doing, it severely limits the interpreter's contribution to proceedings, confines the potential influence that interpreters may wield over lawyers' linguistic strategies, and thereby enables lawyers to maintain courtroom control.²⁷ The elimination of discretion also facilitates adherence to an otherwise seemingly illusive 'objective standard of good interpreting'.

Nevertheless, in 1985 the ALRC concluded that this narrow conception of the court interpreter's role excludes the 'human elements' – linguistic, cultural and social – of the interpreting process, regularly sought when

¹⁷ See, eg, *Gradidge* (1988) 93 FLR 414: '[A]n accomplished linguist might have a field day hearing and understanding the questions asked in the language of cross-examination and having ample time to consider and then answer through an interpreter.' (Samuels JA).

¹⁸ See, eg, *Galea v Galea* (1990) 19 NSWLR 263.

¹⁹ See, eg, Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Report (1991) 49-51.

²⁰ Australian Institute of Interpreters and Translators (AUSIT), *AUSIT Code of Ethics* (2008) <<http://www.ausit.org/eng/showpage.php?id=650>> at 2 July 2008.

²¹ See, eg, *R v Watt* (2007) QCA 28, 35: 'It is essential to the proper conduct of a criminal trial that the interpreter accurately relate the questions to the complainant and accurately relate the complainant's responses to the Court.'

²² (1960) 104 CLR 419.

²³ *Gaio v R* (1960) 104 CLR 419, 430 (Kitto J). This case echoed the English case, *R v Attard* (1958) No 43 Ct Ap, in which court interpreters were referred to as 'mere ciphers.'

²⁴ (1963) 63 SR (NSW) 331.

²⁵ (1963) 109 CLR 458.

²⁶ Kathy Lastor and Veronica Taylor, 'The Compromised Conduit: Conflicting Perceptions of Legal Interpreter' (1995) 6(4) *Criminology Australia* 10, 10.

²⁷ Kathy Lastor and Veronica Taylor, *Interpreters and the Legal System* (1994) 111.

precise equivalence in the target language is unavailable.²⁸ These elements become particularly crucial in the courtroom, where technical and strategic language abounds. Indeed, in the words of Kathy Laster and Veronica Taylor, 'it is ironic that law, as a profession of words, should deliberately construct a role for interpreters which denies the complexities inherent in language.'²⁹ Kirby P and Samuels JA in *Gradidge v Grace Bros* voiced similar reservations.

If we accept Professor Sandra Hale's view that 'accuracy' encompasses both accuracy of *content* and of *message intention and effect* ('pragmatic equivalence'),³⁰ then in its haste to ensure the former but not the latter, the conduit model does the pursuit of accuracy a disservice. Indeed, the linguistic strategies adopted by the adversarial lawyer rely on message intention and effect as much as message content for their impact. A lawyer in cross-examination, for example, uses communication as a tool to control the witnesses' responses and highlight weaknesses in their testimony. Accordingly, the interpreter must have due regard to all aspects of the spoken delivery if he or she is to convey (although not advance) the cross examiner's strategic objectives. The NESB person's response carries similar nuances. Failure to attend to these, by construing accuracy – and therefore the conduit model – in narrow terms, may result in the NESB gaining an unfair advantage or being misrepresented.

On balance, recent empirical studies have found that lawyers and interpreters generally subscribe to a loose notion of interpreter as conduit.³¹ Under this model, which Lastor and Taylor term the 'compromised conduit,' the interpreter attempts to place the NESB in 'as close a position as an English speaker in the same situation.'³² In so doing, he or she interprets what is said and the manner in which it is said, so that the message is understood *in the same way* as the original. Coupled with avoiding omissions and personal ideas or expressions, this model encompasses pauses, tone of voice, hesitations, style and register. Furthermore, it allows for the possibility that, since adverse inferences of credibility are drawn from a range of features, the interpreter may need to intervene to provide clarification where cultural differences inform the NESB person's behaviour and speech.³³ This aspect of the interpreter's role, however, is finely etched. Hale notes the NESB person's tendency to expect advice, assistance and moral support from the interpreter on the misunderstanding that the interpreter is an advocate of his or her interests. Accordingly, editing utterances to improve comprehensibility, coherence and relevance, are strongly discouraged as running counter to impartiality. Similarly, the interpreter must not simplify language or arguments to assist the non-English speaker's understanding beyond what is necessary to remove the language barrier.³⁴ Outside the courtroom, on the other hand, the interpreter represents an accessible source of information on Australian culture and the legal system. Ultimately, in navigating his or her judgment-driven and sometimes ambiguous court role, the interpreter should afford overriding loyalty to the court in whose hands justice to the NESB person lies.

Common Issues in Court Interpreting

Court interpreting faces a number of obstacles in its pursuit justice for the NESB person. Some are quite unavoidable. Hale argues that the interpreter's capacity to place the NESB person in the same position as an

²⁸ Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) 339-340.

²⁹ Lastor and Taylor, above n 26, 10.

³⁰ Sandra Hale, *The Discourse of Court Interpreting* (2004) 7. See also Alan Crouch, in *Access to Interpreters in the Australian Legal System*, above n 7, 47: '[W]ords without an informing context are unlikely to have the right meaning ascribed to them. Literalness implies code switching and it is certainly not the source of accurate translating or interpreting...'

³¹ See, eg, Lastor and Taylor, above n 26; Hale, above n 30.

³² Hale, above n 30, 9.

³³ See, eg, *Kathiresan v Minister for Immigration and Multicultural Affairs* (Unreported, FCA No VG 305, 1997) [48]-[49] (Gray J).

³⁴ See, eg, Edwards, in Hale, above n 30, 12: '[I]t is not up to the interpreter to tell the witness what the counsel really meant. Nor is it up to the interpreter to suggest in court how counsel or the court might frame their questions for clarity. Counsel will have to figure that out themselves.'

English speaking witness is inherently constrained by the triadic nature of the interaction.³⁵ Interaction between the two parties is fundamentally slowed, and thus the dynamic between them affected, by the relaying of the message. In spite of assistance provided by the 'compromised conduit' model, there is much to be said for Brereton J's stance in *Filios v Morland* that evidence given through an interpreter loses much of its impact:

The jury do not readily hear the witness nor are they fully able to appreciate, for instance, the degree of conviction or uncertainty in which his evidence is given; they cannot wholly follow the nuances, inflections, quickness or hesitancy of the witness.³⁶

In her well-justified view, Hale further argues that the interpreter, inadvertently or otherwise, exerts some influence on the process. Appeals to impartiality, however, should limit this influence to the subject of language alone. Occasions where pragmatic equivalence is prevented by words, phrases or questions that are linguistically or culturally incapable of interpretation are likewise unavoidable. This situation arises most commonly in cross-examination, where deliberately vague or complex questioning complicates the interpreting process. The English double negative, for example, finds no pragmatic equivalent in many languages, including French, Mandarin and Spanish.³⁷ In such instances, accuracy of content alone must suffice.

Fortunately, these interpreting issues are the exception; most are capable of being addressed subject to the willingness of the parties. Poor quality interpreting, prevalent as it is, constitutes the overarching concern. While no objective standard of interpretation exists, Lamer CJ in *R v Tran* suggested that accuracy, consistency, competency, contemporaneousness, continuity and impartiality inform any assessment of quality interpreting. Consistency, the subject in *R v Saraya*,³⁸ discourages the use of different interpreters in the one case and, I would add, intermittent interpreting. As Kenny J in *Perera v Minister for Immigration and Multicultural Affairs*, endorsing a cultivated understanding of accuracy, explained: 'the interpreter must express, in the target language, as accurately as *that language and the circumstances* permit, the *idea or concept* as it has been expressed in the source language.'³⁹ The Queensland Interpreter's Oath alludes to some, if not all, of these criteria.⁴⁰ Hale's 2004 study, echoing that of Taylor and Lastor ten years prior, found that court interpreting regularly falls short on each. Both studies underline that legislation providing for an interpreter creates a mere illusion of a right if the quality of interpreting itself is so poor as to lead to a miscarriage of justice.⁴¹

Apart from a lack of academic and practical training (discussed below), a number of shortcomings in the current court interpreting system likely exacerbate this problem. These shortcomings reveal a system that does not sufficiently accommodate either the interpreter or the NESB person. Firstly, preparation afforded to the interpreter prior to the commencement of a case is limited in duration and content: he or she is provided with the NESB person's name, the court number, and sometimes a short briefing. Without further insight into the case, or adequate time to acquaint him- or herself with its subject matter, the interpreter's quality of

³⁵ Hale, above n 30, 36.

³⁶ *Filios v Morland* (1963) SR (NSW) 331, 341. See also *R v Johnson* (1986) 25 ACR 433, 440 where Williams J stated, 'experience has shown that the tribunal of fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness.'

³⁷ See, eg, Hale, above n 30, 48.

³⁸ (1993) 70 A Crim R 515.

³⁹ (1999) 92 FCR 6, [29], emphasis added. See also *De La Espriella v R* (2006) 31 WAR 291, [75] (Roberts-Smith JA).

⁴⁰ *Oaths Act 1867* (Qld) s 29:

You swear that you understand the language of the witness and are able to interpret between the witness and the court and jury and the prisoner and all persons conversant with the English language. You shall well and truly interpret and true explanation make between the witness, the court and jury and the prisoner and all persons conversant with the English language and the evidence which you shall give to the court and jury sworn between our Sovereign Lady the Queen and the prisoner at the bar shall be the truth the whole truth and nothing but the truth. So help you God.

⁴¹ See, eg, *R v Imrie* (1917) 12 Cr App R 282; *De La Espriella v R* (2006) 31 WAR 291; *R v Saraya* (1993) 70 A Crim R 515.

interpreting is, understandably, compromised. Secondly, courtroom seating from time to time positions the interpreter at a distance from the NESB person in the witness stand. Hearing difficulties that flow from this arrangement – to the detriment of the interpreting quality – unequivocally outweigh any contribution to perceptions of impartiality. Thirdly, and more contentiously, interpreters regularly voice concerns over the speed, length and type of questioning employed by lawyers. As highlighted above, these methods of delivery are more often than not deliberate. As such, to insist that lawyers radically appropriate their adversarial style to assist interpretation would undermine strategic objectives. Nevertheless, it remains reasonable to expect from all parties articulate, clearly worded, manageable expression. On this matter, the judicial officer's regulation is crucial. Fourthly, court interpreting – perhaps more so than interpreting in other disciplines – requires sustained concentration and an ability to follow complex thought which is both physically and mentally demanding. Accordingly, it is imperative that interpreters be afforded adequate breaks during cases for rest and recuperation. Concern regarding the courts' insufficient observance of this need appears well-founded. As with those already identified, this shortcoming reflects a lack of understanding among parties to the proceedings of the interpreting process, and the interpreter's contribution to that process.

A significant shortage in accredited professional interpreters – a mere 231 Australia-wide in 2008⁴² – constitutes the predominant issue alongside poor quality interpreting. Apart from the strain placed on available interpreters (with likely indirect impacts on the quality of their performances) this shortage leaves the court at risk of being unable to provide the NESB with an interpreter on request. No more evident is this matter than to Aboriginal Australians, for whom the availability of interpreters in the traditional Wik-Mungkan language is increasingly scarce as highlighted in *Frank v Police*⁴³ and, in Queensland, *R v Watt*.⁴⁴ Moreover, the few available Wik-Mungkan interpreters are often found to be related to a witness, thereby precluding the interpreter's participation in the case and thus the assistance of video conferencing. In the face of judicial criticism, the South Australian government in June this year announced additional funding for training of Wik-Mungkan interpreters. Queensland would certainly benefit from following suit, a point opined by the trial judge in *R v Watt*.⁴⁵ The Commonwealth Department of Immigration and Citizenship (DIAC) also recently supplied funding to the National Accreditation Authority for Translators and Interpreters (NAATI) for the accreditation of new interpreters in emerging community languages.⁴⁶ Retaining interpreters once accredited, however, requires fair remuneration and support that reflects their expertise and contribution to the pursuit of justice for the NESB person.

Interpreter Training and Accreditation

Laster and Taylor contend that poor quality of interpreting – particularly incompetency and inaccuracy – can be at least partly alleviated by academic and practical training. While the era of de facto or ad hoc interpreters may have long passed,⁴⁷ the misconceived notion that interpreting is an exercise capable of being carried out by any bilingual individual lingers, particularly among the legal profession. Shortage of qualified interpreters and inadequate remuneration are, as will be explained, implicated in this issue. Jakubowicz and Buckley, as early as 1975, emphasised that, 'competent interpreting is not merely an ability to speak a language, however

⁴² National Accreditation Authority for Translators and Interpreters, *Online Directory* (2008) <<http://mail.naati.com.au/naati/pdsearch/pdsearch.aspx>> at 28 July 2008.

⁴³ (2007) SASR 288.

⁴⁴ (2007) QCA 28.

⁴⁵ (2007) QCA 28. The trial judge in this case emphasised that the District Court had raised the shortage issue with relevant state government authorities for the past six years to no avail.

⁴⁶ National Accreditation Authority for Translators and Interpreters (NAATI), *Annual Report: 2006-2007* (2007) 2.

⁴⁷ Cf *De La Espriella-Velasco v R* (2006) 31 WAR 291, where one of the two interpreters who alternated interpreting for the accused was the accused's wife.

fluently, but is an acquired skill with specialisation needed in appropriate areas together with a strict code of professional ethics.⁴⁸

NAATI, established by the Commonwealth government in 1977, is responsible for setting the profession's standards. It also represents the predominant avenue through which interpreters enter the profession. In 1982, the Australian Institute of Multicultural Affairs recommended that tertiary institutions collaborate with NAATI in establishing tertiary training courses for interpreters.⁴⁹ It also raised the need for specialised legal interpreters.⁵⁰ NAATI currently offers four levels of accreditation: (1) para-professional; (2) translator/interpreter; (3) advanced translator/conference interpreter; and (4) advanced translator (senior)/conference interpreter (senior). The majority of court interpreters are accredited at the 'interpreter' level, which is awarded on the basis of a 75 minute generalist examination for which no prior interpreting training is required.

With tertiary training courses few⁵¹ and non-compulsory, the vision that interpreters would universally enter their profession via completion of tertiary education has not yet come to fruition. Furthermore, the absence of specialist examination has resulted in frequent criticism that NAATI-accredited interpreters are ill-equipped for court interpreting.⁵² The introduction of a sight translation test to NAATI's interpreter-level examination in March 2008⁵³ has strengthened the examination's overall relevance to court interpreting. However, the examination still overlooks the simultaneous mode of interpreting used in the courtroom, as well as the linguistic registers, precision of interpretation, and understanding of legal procedures required in a legal context.⁵⁴ NAATI's 2008 catalogue provides translator and interpreter training opportunities, including specialist instruction in court interpreting. However, as long as training courses remain non-compulsory, and no increased remuneration follows, there exists little incentive for their completion.

Demonstrably, then, mandatory training in interpreting from tertiary institutions as a pre-condition to accreditation would serve several functions. Firstly, it would enable universities to share the task of examining candidates for NAATI accreditation, thereby rendering the process of accreditation more expedient and increasing the availability of interpreters. Secondly, it would address the aspects of academic and practical competency not covered in the examination. Thirdly, it could necessitate suitable specialised training for court interpreters to better prepare them for the particular demands of this discipline. Corresponding training or continued legal education for those interacting with interpreters – lawyers, judges or magistrates, witnesses, and the general public – would provide valued clarification regarding the interpreter's role. It would also serve to illuminate the interpreter's professional character. In addition, the respect and appropriate remuneration that it warrants may in turn stimulate a renewed interest in this career.

Conclusion

It is surprising that in the multicultural Australia of today there is so little material available on the evidential and other issues relating to the use of interpreters in the law. This lack of material is no doubt a reflection of

⁴⁸ Jakubowicz and Buckley, *Migrants and the Legal System* (1975) 22. See, also, Committee on Overseas Professional Qualifications, *The Language Barrier* (1978) 8-9.

⁴⁹ Australian Institute of Multicultural Affairs, *Evaluation of Post-Arrival Programs and Services for Migrants* (1982) 156.

⁵⁰ Ibid 160. See also Senate Standing Committee on Education and the Arts, *Report on a National Language Policy* (1984) 189; Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Report (1991) 89.

⁵¹ The University of Western Sydney (NSW), RMIT (VIC), Monash University (VIC) and The University of Queensland (QLD) provide some of the few tertiary training courses in interpreting at the professional level.

⁵² See, eg, Hale, above n 30, 27; Roseann Dueñas González et al, *Fundamentals of Court Interpretation* (1991) 91; Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Report (1991) 89.

⁵³ National Accreditation Authority for Translators and Interpreters (NAATI), *Manual for Candidates: Information About NAATI Accreditation by Testing, Course Completion and Overseas Qualification* (2008).

<<http://www.naati.com.au/pdf/publications/Manual%20for%20Candidates%202007%20text.pdf>> at 29 June 2008.

⁵⁴ Ibid.

the wider apparent lack of appreciation within the justice system and the legal profession of the importance of language and the nature and proper use of professional interpretation.⁵⁵

When Roberts-Smith QC made this observation in 1990, he would surely have expected that the scenario of which he spoke would bear little resemblance to that encountered in today's courts. As this paper has sought to highlight, the resemblance remains all too great. Indeed, as recently as 2006, the Western Australian Supreme Court in *De La Espriella-Velasco v R* noted that the process of understanding court interpreting and recognising its contribution to justice for the NESB person is far from complete.⁵⁶ Australia's growing migrant population necessitates interpreters in greater numbers and more diverse language pairs, which in turn requires investment in training programs and appropriate remuneration schemes. Thorough, mandatory training for both interpreters and court participants also promises to align expectations regarding the interpreter's role in proceedings. Coupled with improvements to the interpreter's working environment, training will similarly serve to enhance the quality of interpreting. In sum, regard for these tenets of justice contributes to equal treatment before the law for all people in Australia, irrespective of their native language. As a gratifying by-product perhaps, in the words of author Simon Winchester, 'the understanding of tongues other than our own offers us a chance to come to a better understanding of peoples other than ourselves – an understanding than can only be for the betterment of us all.'⁵⁷



⁵⁵ Roberts-Smith, QC, in Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Report (1991) 36.

⁵⁶ (2006) 31 WAR 291, [16]. See also *R v Watt* (2007) QCA 28, [43].

⁵⁷ Simon Winchester, in CJ Moore, *In Other Words* (2004) 9.

Law's Claim to Ethical Responsibility: The Law and Morality of Torture

Nicholas Elias

Nicholas Elias (Juris Doctor, University of Melbourne) was selected as the winner in the Australian Legal Philosophy Students Association (ALSPA) annual student essay competition 2009 for this paper.

In the political climate after September 11, the importance of information and the belief that it could be better obtained through coercive techniques lead the Bush Administration to seek clarification on the law regarding legal limits on coercive interrogation. In 2003 the Office of Legal Council of the Department of Justice produced a legal opinion¹ ('the memo') which portrayed what had appeared to be a comprehensive and non-derogable prohibition against torture, protected by the *US Constitution* and by an international law of *jus cogens*, as something far less comprehensive. The legal interpretation and analysis of the memo made a space for exceptions to these rules and participated in creating a climate where what constituted torture was contestable, and where practices that appeared to many to amount to torture were permissible.²

The starting point for this paper is that the memo and the responses to it expose the fragility of the legal prohibition of torture and the ethical consensus that supports it. In its political context, the release of the memo is an event which challenges us to question again law's claim to ethical responsibility, and the responsibility of the lawyer who claims to speak for it. I propose to examine the memo for what it illustrates about the characteristics of the legal approach to a 'morally perilous' question such as the use of torture, and through this, to question the presumption that this kind of legal advice can exist within a sphere of amorality. The first part the paper will examine how the memo approaches the existing law and definition of torture. In the second part, I examine the use of explicitly moral reasoning in the memo's discussion of the availability of the *necessity defence*. In doing so, I show that despite the explicit disavowal of any moral evaluation by the authors of the memo, moral evaluations operate implicitly in a way that affects both the approach and content of the legal advice provided. Finally, I wish to consider the role of the lawyer giving advice on morally perilous issues and to explore the possibility that articulating these moral evaluations will improve the value of legal advice by allowing lawyers and clients to be responsible for them in a conscious and considered way.

The Legal Prohibition

The legal content of the prohibition on torture that the memo addresses derives principally from the *UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* ('CAT').³ This

¹ Memorandum for William J. Haynes II, General Counsel of the Department of Defense, March 14, 2003, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*.
<http://www.abajournal.com/news/declassified_doj_memo_said_president_could_override_laws_torture_ban/> at November 22 2008.

² See Richard Bilder and Detlev Vagts, 'Speaking Law to Power' (2004) 98 *American Journal of International Law*, 689, fn 14 for commentators and sources suggesting that the release of the memos created a permissive climate in which abuses such as those at Abu Ghraib could occur.

³ UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force June 26 1987). In ratifying this convention the US Senate attached a reservation with regard to article 16, stating that it would only be bound to prevent 'cruel, inhumane or degrading treatment or punishment' to the extent that this had meaning equivalent to the 'cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th and 14th Amendments to the US Constitution. See Alan Hyde, 'Torture as a

convention was designed to strengthen the pre-existing prohibition against torture⁴ already codified in a series of international agreements.⁵ The CAT demanded that countries enact legislation implementing its provisions domestically and importantly sought to define 'torture' in a way it hoped would be sufficient to uphold criminal prosecution under domestic law.⁶

Article 1 of the CAT defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him or a third person...when such pain or suffering is inflicted by... a public official or other person acting in an official capacity.'

Article 2 provides that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency may be invoked as a justification of torture.'

As the memo states, '[t]he key statutory phrase in the definition of torture is that acts amount to torture if they cause "severe physical or mental pain or suffering".'⁷ The memo's analysis of the CAT definition⁸ is premised on the claim that torture, and the criminal sanctions and stigma that attach to it, is distinct and separate from other kinds of acts including cruel, inhumane or degrading treatment, which are not subject to the same sanctions or stigma.⁹ Jeremy Waldron offers an insightful comment on the moral evaluation implicit in this kind of legal approach. He argues that whilst there is clearly a legitimate interest in knowing with precision how fast you can legally drive along a road, to seek to know with precision 'to what extent I can push my wife around before it becomes domestic violence,' or 'to what extent I can flirt with my students before it becomes harassment' suggest that 'there are some scales that we really should not be on.'¹⁰ At the very least this should alert us to the fact that the definitional claim of the memo involves the tacit adoption of a moral orientation toward the issue which is unarticulated; in this case, seeking a bright line demarcation between criminal torture and legally permissible 'almost torture' assumes that there is a legitimate interest in knowing how much pain one can legally inflict.

To arrive at a definition of 'severe pain', the memo offers the dictionary meanings, 'hard to endure', 'grievous', and 'extreme'. That these all refer to subjective experience renders them problematic if adopted as the basis for a legal test. At this point, rather than discuss relevant domestic or international case law the memo proceeds to examine the use of the term 'severe pain' in another statute of the US Code which defines 'emergency medical conditions' for the purpose of allocating health care resources. In this statute the term 'severe pain' is used to describe a symptom which is but one of the defining characteristics of an emergency medical condition.

Problem of Ordinary Legal Interpretation' (2006) *Cornell Legal Studies Research Paper No. 06-046* 18

<<http://ssrn.com/abstract=948297>> at November 22 2008 for a discussion of US law implementing the CAT.

⁴ Article 1(2) of the CAT provides that '[t]his article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.'

⁵ Art 5 of the *Universal Declaration of Human Rights* GA res. 217A (III), UN Doc A/810 at 71 (adopted on December 10, 1948) and art 7 of the *International Covenant on Civil and Political Rights* 999 U.N.T.S. 171, (entered into force March 23, 1976) contain provisions prohibiting torture. The Geneva Conventions, especially common article 3, and article 17 from the Third Geneva Convention also contain non-derogable prohibitions on torture, as do art 3 of the *European Convention on Human Rights*, art 5 of the *American Convention on Human Rights* and the *UN Standard Minimum Rules for the Treatment of Prisoners*.

⁶ The United States enacted 18 USC §§ S2340A which prohibited torture outside the US by any person subject to US law. Provisions of the *United States Constitution* and general criminal law were thought to prohibit torture within the States.

⁷ Memo, above n 2, 38.

⁸ As the relevant text of art 1 of the CAT and USC 18 §§ S2340A is the same, I propose not to distinguish between the two.

⁹ Memo, above n 2, 49.

¹⁰ Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 *Columbia Law Review* 6, 1681, 1701.

Whilst it is admitted that this statute addresses a 'substantially different subject from section 2340'¹¹ no mention is made of the textual complications involved in taking a term from one context and applying it directly to another. This, together with the fact that in one statute 'severe pain' is used as one *indicator* of an emergency condition, and in the other as that which is *indicated* by the presence of other indicators of that condition, suggests that there is insufficient logic to support the importation of the term.

The result of this process of (re)-definition is that for an act to constitute 'torture' the act must be specifically intended to inflict severe pain at a level that 'would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure or serious impairment of bodily functions.'¹² This seems to have narrowed the definition of torture to such a degree that many of the acts that we intuitively feel constitute torture no longer fall within the legal prohibition. As Saul observes, '[t]he result of such reasoning is that legal rules become nothing but tools lawyers utilize on behalf of whichever side they represent'.¹³ Such an approach undermines the certainty and stability of law. Further, it reveals a morally contestable attitude toward legal norms which is neither explicitly stated, nor argued for, yet is one which affects the content of the legal advice resulting from this attitude.

The Moral Prohibition

The question of whether and when torture may be morally acceptable or desirable is not addressed in the memo, indeed it is explicitly avoided by the authors of the memo.¹⁴ Very little weight is given to the moral considerations or politico-historic context that gave rise to the CAT and other international instruments, which have typically adopted a deontological approach to the prohibition on torture by denying its permissibility in any circumstances.

The one occasion where a moral evaluation is made explicitly in the memo occurs in the context of advising on the availability of the defence of necessity.¹⁵ The memo adopts a consequentialist approach, stating that 'a particular detainee may possess information that could enable the United States to prevent imminent attacks that could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.'¹⁶

This hypothetical, as well as neglecting the complexities of the necessity defence, has the effect of undermining an already a fragile commitment to absolute values by creating a situation in which to hold them seems unrealistic. Alan Hyde, while examining the classic form of this hypothetical¹⁷ identifies a further function, a kind of 'silencing of potential discussion of torture'¹⁸ which seeks to minimise the importance of moral evaluations to any understanding of the legal prohibition of torture. The assertion that any pain would be 'insignificant', clearly a moral evaluation, supports this view. Hyde is not alone in questioning the value of these kinds of hypotheticals to our moral reasoning on this issue.

¹¹ Memo, above n 2, 38.

¹² Memo, above n 2, 39; 45.

¹³ Ben Saul, 'The Equivalent Logic of Torture and Terrorism: The Legal Regulation of Moral Monstrosity' (2008) in S Lewandowski et al (eds) *Torture and Terrorism* (2008); *Sydney Law School Legal Studies Research Paper No. 08/113* p.10 <<http://ssrn.com/abstract=1277548>> at November 22 2008.

¹⁴ Memo, above n 2, fn 1.

¹⁵ Unless expressly prohibited by the legislation this defence applies whenever the commission of a harm is held to be justified by virtue of its preventing a greater harm. It can apply to the commission of a crime, if, due to the particular situation of the committer, that crime is committed to prevent a greater harm.

¹⁶ Memo, above n 2, 75

¹⁷ In its classic form the hypothetical proceeds; the police have captured a terrorist who planted a bomb in a major city that will kill thousands of innocent lives. Importantly, the police know for certain the detainee planted the bomb and knows how to stop it. If the police get information about the location of the bomb from the detainee the innocent lives will be saved. If not, they will die. Is torture permissible in this case?

¹⁸ Hyde, above n 4, 29.

There are many moral evaluations which may impact a legislator's, judge's or lawyer's interpretation of the law surrounding torture. Importantly, we can never know with certainty that a detainee has information, and never know if torture will reveal it for us. Further, we can never know when to end our torturing if information is not forthcoming – there is always the tempting possibility that just a little more would reveal all. Empirically, there is evidence that torture doesn't produce reliable information,¹⁹ but rather leads victims of torture to confirm any assumptions already held by the torturer. Roth raises the argument that allowing torture may ultimately make us less safe if future criminal prosecution is undermined due to evidence obtained under torture not being admissible in proceedings.²⁰ It is also likely that permitting torture even in exceptional cases may encourage it by lessening the legal and moral stigma attached to it. The danger of a slippery slope here is made even greater since, as Waldron notes, this is not an area where human motives are trustworthy.²¹

That moral evaluations can lead us in different directions, even starting with a commitment to a consequentialist approach, is well illustrated by considering the factors we may choose to weigh against each other, and the value we give them when weighing up a preferable outcome. Kimberly Frazen reminds us that we may not wish to exclude all deontological considerations from our balance with her poignant example of a surgeon killing a healthy man and using his organs to save five others.²² If we believe as Saul does that 'torture irreparably damages human dignity, devalues human life and corrupts the institutions and officials of democratic societies,'²³ what value do we give to this on our scales? How can we possibly balance the evil effects of torture in a rational manner?²⁴ As White aptly demonstrates, what portrays itself as a rational analysis of costs and benefits is very difficult to sustain on the basis of rationality for long.²⁵

The relationship between law and these extra-legal considerations is a complex one. It is worth remembering that even if torture may be morally permissible in certain areas, the question of whether this implies it should be made legally permissible is distinct and must be argued for.²⁶ Indeed, it is possible to take a very wide and nuanced range of moral evaluations on the merit of torture in particular circumstances, as Sherry Colb's comprehensive survey demonstrates.²⁷ Here, the memo explicitly adopts one moral evaluation in the service of its legal advice on necessity, without engaging with the complexities that evaluation gives rise to.

This analysis of the memo as a whole suggests that it focuses on potential defences to prosecution by American or international courts and is structured to apply the law so as to remove the legal rules that prohibit a desired form of coercive interrogation, rather than to attain a better understanding of what these legal rules demand. It offers little to support the view that 'compliance with the law means more than seeking to avoid

¹⁹ Cf Sanford Levinson, 'Contemplating Torture: An Introduction' in Sanford Levinson (ed) *Torture* (2004), 28, 34. Levinson surveys cases where torture has been effective.

²⁰ Kenneth Roth, 'Getting Away with Torture' (2005) 11 *Global Governance* 389, 393.

²¹ Waldron, above n 11, 1717.

²² Kimberly Frezan, 'Torture, Necessity and the Union of Law & Philosophy' (2004) 36 *Rutgers Law Journal* 183, 186. We may question too whether this surgeon would be able to employ the defence of necessity to escape criminal sanction.

²³ Saul, above n 14, 20.

²⁴ Waldron, though in a different context gives the example of a previously honest man being offered a bribe. His friends warn of the possible effects not just of the immediate act but on the future of his character. Even if it does not lead to future dishonest acts, though it may well, it undermines something essential in the moral standing the man had before, 1737.

²⁵ James White, 'Law Economics and Torture', H Powell and J White (eds) (forthcoming) *Law and Democracy in the Empire of Force* (2009); *U of Michigan Public Law Working Paper No. 116*, 19-20 <<http://ssrn.com/abstract=1238427>> at 22 November 2008, describes astute the role of the desired outcome in shaping reasons through his examples of whether to balance 'the safety of the nation' against 'a desire to keep this piece of information secret' or 'the value of this piece of information' against 'our system of government under law.'

²⁶ See eg, Oren Gross, 'The Prohibition on Torture and the Limits of the Law' in Sanford Levinson (ed) *Torture* (2004) 9-12 <<http://ssrn.com/abstract=485043>> at November 22 2008.

²⁷ Sherry Colb, 'Why is Torture 'Different' and How 'Different' is it?' (2008) *Columbia Public Law Research Paper No 08-171* 8-13 <<http://ssrn.com/abstract=1099061>> at November 22 2008.

sanctions – it entails an attitude of respect toward legal norms’.²⁸ The memo explicitly disavows moral responsibility, yet its implicit, and explicit moral evaluations operate to shape its advice. Where it does adopt moral evaluation, it does so in a way that discourages further engagement on moral terms.

Law and Moral Responsibility

Assuming moral evaluations are implicit in legal advice, or at least legal advice relating to these ‘morally perilous’ questions, it still must be shown whether these evaluations play any useful role. A typical argument for the separation of law from these moral evaluations centres on the difficulty of accounting for law’s authority if it is held to depend on moral evaluations since moral consensus is rarely possible.²⁹ As Wendel argues, ‘substantive criteria, such as the justice of a law, protecting the rights of individuals, or “the best possible constructive interpretation” of a legal system are too contestable in a pluralistic society to serve as standards of legitimacy.’³⁰ Joseph Raz accounts for the authority of law by arguing that rather than existing alongside other reasons for action, law’s commands replace those reasons that existed prior to the law’s existence.³¹ Raz argues that in order for law to be serviceable as an authority it must be possible for people to understand its content without recourse to the plurality of prior reasons. Once a law is law, moral reasoning is necessarily separate from the content of its commands.

Wendel gives the following example of how individual moral evaluation fails to provide authority for the moral evaluation of society. He argues;

Instead of thinking ‘what should I do?’, a member of society considering a political issue is thinking, ‘(1) what do I think about what we should do, and (2) what should we do?’³²

He concludes that because disagreement about (1) is possible, (2) can never follow directly from (1). This possibility of disagreement undermines any claim that law can be identified with morality.

Though we may accept that the impossibility of a moral consensus precludes the simple identification of law with morality, it does not follow that we must rely on a strictly formal understanding of legal rules. Dworkin’s work on ‘law as integrity’ provides a strong argument that the legal approach must go beyond an understanding of law as rules, and requires that law be addressed also at the level where it forms a ‘coherent set of principles’ which provide for its intelligibility as a system.³³ If we only view laws as mere rules without this substantive coherence we cannot explain the practice of law, or the processes involved in writing the memo. We require some concept of this coherent set of principles to decide which interpretation of the law prohibiting torture is preferable. Further, Wendel’s example fails to account for why we choose to give some norms the status of law, but not others.

I have argued that there is moral evaluation implicit in the legal approach adopted by the memo toward the question of torture; in the unstated assumption that some level of coercive interrogation was desirable, in the instrumental approach to the existing legal regime, and in the conceptualisation of torture within the framework of necessity. I have attempted to show that a strict separation between law and morality was not achieved in the memos, and is not mandated by this positivist account of law’s authority. If, as I have argued, moral evaluation operates in ways that affect legal advice on morally perilous questions, the choice is one of whether to make these evaluations explicit in a way that can be addressed.

²⁸ W Bradley Wendel, ‘Legal Ethics and the Separation of Law and Morals’ (2005) 91 *Cornell Law Review* 67, 70.

²⁹ Cf Radack, ‘Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism’ (2005) 77 *University of Colorado Law Review* 1, 10 for evidence of a broad based consensus against the legalisation of torture.

³⁰ Wendel, above n, 28, 76.

³¹ Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *Minnesota Law Review* 1003, 1019.

³² *Ibid* 25.

³³ Ronald Dworkin *Law’s Empire* (1986) 243.

Lawyers as Advisors

Vischer leads us to wonder whether the pervasiveness of the separation between legal and moral advice is supported by a lack of moral resources with which to engage in giving moral advice.³⁴ Vischer's work aims to do two things; to deconstruct the 'presumption of amorality'³⁵ of legal advice by showing that 'while the amorality of legal advice is a fiction, it is not a harmless fiction,'³⁶ and also to support Thomas Shaffer's objection to the assumption that 'the client and the lawyer, while they may talk to one another are not likely to influence each other.'³⁷

Assuming that moral evaluation is implicit in the legal advice of the memo, is it desirable for these evaluations to be made explicit? From Wendel's conception of law's authority discussed above, it is clear that moral disagreement need not undermine law's authority. Indeed, the memo's disavowal of any moral claims presupposes that the choice to provide moral advice is open to lawyers. If, as Waldron believes, 'in the end a legal prohibition is only as strong as the moral and political consensus that supports it'³⁸ there is further reason to believe that a lawyer has a responsibility to engage openly with this consensus.³⁹

In support of the thesis that lawyers should not articulate their moral evaluations, we may argue that respect for the moral autonomy of the client denies lawyers the right to impose their moral views. The danger, identified by Vischer, is that inclusion of moral reasoning in legal advice risks the advice 'devolv[ing] into a lawyer-by-lawyer conception of lawyering, which in turn threatens individuals' equal access to law.'⁴⁰

We may question too whether rather than reflecting a lack of moral resources, the fact that so many lawyers operate under the presumption of amorality suggests that amorality is an effective perspective for lawyers to operate within and is one that allows them to be comfortable in their professional roles and to achieve the goals of clients. It could be argued that having lawyers articulating their personal moral views undermines the institutional value of the adversarial approach. This criticism is especially appropriate in the field of criminal law.

However, if moral evaluation is operative in legal advice even when not articulated, what is required is that lawyer and client become aware of their own evaluations and, through dialogue, allow the other to engage with them. This kind of dialogue allows for the correction or broadening of moral evaluations without requiring moral truth. It is a method that can recognise the independence and autonomy of the lawyer and client and accept the plurality of moral evaluations. This is not an argument that lawyers should seek to convince or even achieve consensus with their clients, but simply that lawyers should present their own moral evaluation in a way that can be authentically engaged with.

Shaffer presents with clarity the common failing in situations where a moral evaluation is provided, either only by the client or only by the lawyer in the absence of this engagement. In both cases the operative assumption is that 'lawyers and clients operate in moral worlds, but that their worlds are isolated from one another.'⁴¹ Shaffer identifies the inauthenticity of this isolation since neither party's moral evaluation is made vulnerable. Shaffer argues that authentic moral engagement exposes us to a degree of risk, inherent in 'leaving one's

³⁴ Robert Vischer, 'Legal Advice as Moral Perspective', (forthcoming) *Georgetown Journal of Legal Ethics* (2005); *University of St. Thomas School of Law Legal Studies Research Paper No. 05-03*, 4 <<http://papers.ssrn.com/abstract=771006>> at November 22 2008.

³⁵ Ibid 8.

³⁶ Ibid 6.

³⁷ Shaffer, *On being a Christian and a Lawyer* cited in Vischer above n 31, 45.

³⁸ Waldron, above n 10, 1712.

³⁹ Waldren, above n 11, 1712.

⁴⁰ Vischer, above n 31, 37.

⁴¹ Thomas Shaffer, 'The Practice of Law as Moral Discourse', 55 *Notre Dame Law* (1979-80) 231, 242.

island'⁴² and in accepting that it is more than advice that is being asserted, 'but a person and a relationship that is being – not asserted but addressed.'⁴³ We may apply this same critique to any approach that requires one's 'professional ethics' to operate in isolation from the lawyer's natural moral orientation.

The presumption of amorality in legal advice is insufficient to ground the ethical responsibility of a lawyer. I have argued that an ethically reflective commitment to moral engagement helps ensure that the moral evaluations that may be operative in legal advice are acknowledged, even in cases where a lawyer feels she should uphold the principle of client autonomy. Deborah Rohde correctly frames the inquiry by stating: 'the critical question is not by what right do lawyers impose their views, but by what right do they evade the responsibility of all individuals to evaluate the normative implications of their acts?'⁴⁴

Conclusion

I have argued that moral evaluation is implicit in the legal advice given by the memo on the question of the legality of torture. I have suggested that there is a complex relationship between law and moral evaluation which must be addressed by those speaking for law if law is to claim ethical responsibility. I have argued that the presumption of amorality or moral isolation of legal advice is insufficient to discharge this responsibility. The danger of this presumption of amorality is that the lawyer's moral perspective, which may well include a commitment to the 'public interest' and client autonomy, is 'forced into the background, where it is not susceptible to exploration by the client.'⁴⁵

I believe, as White does, that 'the law at its best improves our thought and our language. What has been happening to law, however, is that it is becoming an instrument of empire, and in the process is losing its essential character.'⁴⁶ I have concluded that by articulating their personal moral evaluations and seeking to authentically engage others in this process, lawyers can assume a natural ethical responsibility for their legal advice and by way of this articulation can both help others realise their moral autonomy and more fully realise their own in an ethically responsible way.



⁴² Ibid 248.

⁴³ Ibid 249.

⁴⁴ Deborah Rhode, 'Ethical Perspectives on Legal Practice', cited in Vischer, above n 31, 42.

⁴⁵ Vischer, above n 31, 7.

⁴⁶ White, above n 24, 15.

Securities Related Litigation in the People's Republic of China

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In 2002, the first serious steps towards minority shareholder protection against securities related fraud were taken by Chinese regulatory authorities. The watershed was the establishment of a legal framework through which defrauded investors can file civil compensation cases with the People's Court. Today, however, the important issues remain unresolved, for instance, what is the current status of the right to file suit, how are these cases limited by the authorities and how does the regulatory landscape reflect commercial reality? This article examines the different philosophies and methodologies which have been put forward in the literature to explain China's legal and regulatory transition towards good corporate governance and the enforcement of minority shareholder's rights. This discussion is introduced by first setting out the histories and complexities of shareholder protection in China. From this perspective, analysis of the discursive differences between Chinese and non-Chinese scholars and also the Chinese regulatory authorities draws particular insight into the multiple directions and conceptions of Chinese legal reform and the future development of civil litigation as an effective tool of good corporate governance in China.

Introduction

It may be said that, in the past, China's legal and political institutions have been sceptical about the recognition and enforcement of private rights through the national and provincial courts (People's courts). However, recent regulatory developments have privileged the notion of good corporate governance and recognised civil litigation of securities related fraud as a valid form of protection for minority shareholders' interests. Since 2001, the intention of China's top regulators has been clear – civil litigation will play an expanding role in the enforcement of good corporate governance in China. This development has generated both legal and economic benefits. Recourse to civil justice is an effective deterrent against company directors engaging in securities fraud, protecting both shareholders and creditors. On the other hand, civil enforcement will continue to play an important role in the Chinese commercial landscape, which is rapidly re-inventing itself. Part I of this article considers the aforementioned issues and the current regulatory design as laid down in the *Company Law of the People's Republic of China* (2005)¹ (*Company Law 2005*) and *Securities Law of the People's Republic of China* (2005)² (*Securities Law 2005*).

Today, the reality for defrauded investors is somewhat different from the lofty intentions of regulators. Part II critically examines the ways in which the right to file a civil compensation suit have been markedly curtailed by the Supreme People's Court (SPC). In 2002, the SPC entirely ruled out United States style class action suits and

¹ *Company Law of the People's Republic of China* (revised by the 18th Session of the Standing Committee of the 10th National People's Congress, 27 October 2005, PRC).

² *Securities Law of the People's Republic of China* (revised by the 18th Session of the Standing Committee of the 10th National People's Congress, 27 October 2005, PRC). At the end of 2005, a *Revision Bill* (*Xiuzhengan*) of the *Criminal Law* was also passed to combat 'the crimes that bring severe damages to the interests of listed companies and their public investors.' See Reported to the Standing Committee of the NPC, *An Introduction to the Revisions of Criminal Law of the People's Republic of China* (VI)(Draft (2005)) (*Guanyu 'Zhonghua Renmin Gongheguo Xingfa Xiuzhengan* (Liu Caoan) De Shuoming) 24 December 2005 (An Jian, Deputy Director of the Legal System Working Commission of the Standing Committee of the NPC).

deferred its authority to the China Securities Regulatory Commission (CSRC), who must issue an administrative penalty against the offender before the SPC will hear a civil suit brought by an aggrieved shareholder. These limitations expose the fundamental tensions inherent in China's transition from a socialist market economy to a market economy with Chinese characteristics. Part III attempts to historically contextualise the status quo, examining key securities litigation cases and the Chinese legal system's preference for administrative and criminal punishment over private enforcement of securities regulation.

In order to evaluate the future possibilities for civil justice in securities related matters, Part IV critically investigates various perspectives found in the literature surrounding civil enforcement and good corporate governance in China today. By expounding on the manner in which Chinese scholars, Western scholars, the judiciary and key regulators conceptualise economic and legal reform, it becomes clear that, in the future, securities related civil litigation will play a greater part in the regulatory web encompassing Chinese economic reform.

I China's Contemporary Regulatory Design

The 10th National People's Congress (NPC), in October 2005, extensively revised the fundamental laws governing securities related civil litigation and the corporate governance standards of listed companies. This formal recognition of the interrelation between corporate governance and minority stakeholders' interests marked a turning point in Chinese economic regulatory reform.³ The revised Company Law 2005 and the Securities Law 2005 have been widely applauded in China.⁴ Some scholars have emphasised that these revisions will increase the welfare of minority shareholders,⁵ however, other scholars continue to focus on what has been left out of China's new suite of commercial regulation and what needs to be done in the future.⁶

³ This period had been dubbed a 'legal construction year for China's securities market.' See Liu Junhai, 'Innovations of the Securities Legal System (Zhengquan Falü de Zhidu Chuangxin)' (2005) 22 *China Finance (Zhongguo Jinrong)* 48, 50.

⁴ See Liu Junhai, 'Innovations of the New Company Law (Xin 'Gongsifa' De Zhidu Chuangxin)' *Sina: Finance News*, 1 November 2005, <<http://finance.sina.com.cn/g/20051101/09502083807.shtml>> at 28 May 2008, This article was originally printed in *Legal Daily (Fazhi Ribao)*, however, the *Sina* resource is more accessible; Fan Jian and Wang Jianwen, *Corporation Law (Gongsifa)* (2006) 85–3; See, also, Reported to the Standing Committee of the 10th NPC, *An Introduction to the 'Securities Law of the People's Republic of China' (Draft Revisions)* (Guanyu 'Zhonghua Renmin Gongheguo Zhengquanfa (Xiuding Caaan) De Shuoming) 24 April 2005, 16–21 (Zhou Zhengqing, Deputy Director of the Finance and Economics Commission of the NPC); Liu Junhai, 'A Securities Law with Institutional Innovation' (Yibu Zhidu Chuangxin De Zhequanfa), *China Securities (Zhongguo Zhengquan Bao)*, 17 November 2005, 9; Guo Feng, 'The New Securities Law: A Balance Between State Intervention and Deregulation' (Xin Zhengquanfa: Guojia Ganyu Yu Fangsong Guanzhi Zhi Pingheng), *21st Century Business Herald (21 Shiji Jingji Baodao)*, 9 January 2006, 5.

⁵ See Tang Xin, 'Protecting Minority Shareholders in China: A Task for Both Legislation and Enforcement' (2007) *University of Michigan Law School* <<http://www.law.umich.edu/centersandprograms/cicl/workshop/workshopseries/Documents/Paper%20-%20Tang%20Xin.pdf>> at 27 May 2008; this article is a chapter in the very soon to be released Curtis Milhaupt (ed) *A Decade after Crisis: Transforming Corporate Governance in East Asia* (2008). See also Shen Yifeng, Xu Nianhang, and Yang Yi, 'Test on the Legal Protection of Minority Investors in Different Stages' (Wuoguo Zhongxiao Touzizhe Falu Baohu Lishi Shijian De Shizheng Jianyan) (2004) 9 *Economic Review* 90, 100; Shen Yifeng, Xiao Ming and Huang Juanjuan, 'Investor Protection and the Corporation Cost of Equity' (*Zhongxiao Touzizhe Falu Baohu Yu Gongsu Quanyi Ziben Chengben*) (2005) 6 *Economic Review (Jingji Yanjiu)* 115, 124.

⁶ See generally James V Feinerman, 'New Hope for Corporate Governance in China?' (2007) 191 *The China Quarterly* 191; Susan V Lawrence, 'Shareholder Lawsuits: Ally of the People' (2002) 99 *Far Eastern Economic Review* 27; Walter Hutchens, 'Private Securities Litigation in China: Material Disclosure about China's Legal System?' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 599; Chen Zhiwu, 'Capital Markets and Legal Development' (2003) 14 *China Economic Review* 451.

A The Securities Law 2005 and the Recognition of Civil Litigation as a Protection of Minority Shareholder's Interests

The fact that the Securities Law 2005 amended up to 40 per cent⁷ of its first version (promulgated in 1998) demonstrates that legislators have struggled to keep up with a 'new and transitional [securities] market',⁸ which has developed rapidly since the early nineties.

A cursory glance at the history of the securities market may shed light on the importance of the 2005 amendments. The emergence of the securities market can be traced back to the reform of the economic system which started in late 1978.⁹ The earliest permutations of the Chinese securities market sprung up in the early 1980s, when the first government and enterprise bonds were issued.¹⁰ After that, in 1984, the public was allowed to buy shares in newly formed joint stock companies.¹¹ This burgeoning market was characterised by rampant speculation, poor quality listed firms, widespread corruption and insufficient regulation.¹² These shortcomings reflect the stumbling blocks faced by many developing economies: a weak rule of law and insufficient regulatory expertise.¹³ However, particular to the Chinese experience is the political logic which has guided its development. Even Premier Zhu Rongji, noted for his ideological scepticism of capitalist modes of ownership and control, recognised the benefits of a well structured and functioning marketplace.¹⁴ The journey towards the 2005 amendments formally began with the founding of the Shanghai and Shenzhen stock exchanges in 1990 and 1991 respectively. Since then, the securities market, as a whole, has become the lynch pin of a rapidly expanding Chinese market economy.¹⁵

The first version of the Securities Law, promulgated in 1998, emphasised criminal and administrative penalties against companies or individuals who committed insider trading or were found to have manipulated the market. Only six articles of the Securities Law of the People's Republic of China 1998 (PRC) dealt with civil compensation and civil liability; the other 30 articles in Chapter 11 entitled 'Legal Responsibilities', were concerned with administrative and criminal liabilities and penalties.¹⁶ On the other hand, the Securities Law 2005 has dramatically enlarged the scope of offences for which civil liability and compensation claims may be filed. Today, if investors suffer a loss at the hands of some misfeasance, it may be categorised as one of the following scenarios, which give rise to a civil claim:

1. where companies or individuals commit insider trading or market manipulation;¹⁷
2. where securities companies commit fraud¹⁸ or violate investor's instructions or express intentions¹⁹;
3. where securities investment consultancy organisations trade on behalf of a client company;²⁰ and

⁷ Cao Shouye, 'Major Contents of the Revision of Securities Law and Impact on Litigation (Zhengquan Fa Xiuding de Zhuyao Neirong Yiji Dui Susong de Yinxing)' (2006) 2 *China Law (Zhongguo Falü)* 24 for Chinese version, 81 for English translation. Cao Shouye is a Senior Justice of the SPC.

⁸ Legal Department of the CSRC, 'A Landmark for the Development of the Chinese Securities Legal System: The Background, Process and Significance of Securities Law Amendments (Zhongguo Zhengquan Fazhi Fazhan de Lichengbei: "Zhengquan Fa" Xiuding de Beijing, Licheng he Yiyi)' *China Securities Journal (Zhongguo Zhengquan Bao)* 17 November 2005, 8.

⁹ Zhu Sanzhu, *Securities Dispute Resolution in China* (2007) 1. See generally Mei Xia, *The Re-emerging Securities Market in China* (1992); Zhu Sanzhu, *Securities Regulation in China* (2000), Stephan Green, *The Development of China's Stock Market 1984-2002: Equity Politics and Market Institutions* (2004).

¹⁰ See generally Zhu (2007) above n 9, Chapter 3.

¹¹ Ibid 43; see also Zhu (2000), above n 9, 6.

¹² Stephen Green, *China's Stockmarket: A guide to its Progress, Players and Prospects* (2003) 5.

¹³ Ibid 4.

¹⁴ Ibid.

¹⁵ Zhu Sanzhu (2007), above n 9, 1.

¹⁶ See *Securities Law of the People's Republic of China 1998* (PRC) Chp 11.

¹⁷ *Securities Law of the People's Republic of China 2005* (PRC) Article 76, 77.

¹⁸ Ibid Article 79.

¹⁹ Ibid Article 210.

²⁰ Ibid Article 171

4. in certain circumstances of securities underwriting and takeover activities where trading is commenced without approval.²¹

The origin of these new provisions can be traced back to 2001 where they were formally recognised in the Code of Corporate Governance for Listed Companies in China. This white paper was a joint initiative of the CSRC and State Economic and Trade Commission and designed to 'promote the establishment and improvement of modern enterprise system[s] by listed companies, to standardise the operation of listed companies and to bring forward the healthy development of the securities market [in China].'²² However, the act of formally writing these provisions into law marks a paradigm shift in the focus of Chinese economic regulatory theory which acknowledges the benefits of using the threat of civil liability and compensation to both protect minority investors' interests²³ and increase economic stability through good corporate governance.²⁴

B Reforms to the *Company Law 2005*

The *Company Law 2005* made wholesale amendments to the first version promulgated in 1993.²⁵ While the actual substantive changes to corporate governance practice and the availability of civil litigation remain the topic of heated debate, it was hoped that the revised *Company Law 2005* would 'normalize the corporate governance of listed companies, discipline [fraudulent] companies and their related personnel and promote the stable and healthy development of the capital market.'²⁶ It is clear that the *Company Law 2005*, in conjunction with the *Securities Law 2005*, provide a more succinct regulatory web which will eventually serve increased minority shareholder protection through civil litigation.²⁷ However, at present, minority shareholders' standing is still bound by the limitations decreed by the SPC, which has decided to hear only single or joint action civil cases where the CSRC has already handed down an administrative penalty against the offender.

II Limitation of the Scope of Civil Compensation cases by the Supreme People's Court

While the 2005 provisions are a major improvement on previous laws, their practical implementation has been limited by the SPC. Prior to the promulgation of the *Securities Law 2005*, there were only a limited number of provisions concerning civil compensation and liability present in the *Securities Law of the People's Republic of China 1998*. For instance, Articles 67–71, 183 and 184 deal with insider trading and market manipulation, however, they do not mention civil liability. Only Article 63 expressly mentions civil liability and compensation for losses caused by false recording, misleading statements and material omissions made by issuers and securities companies.²⁸ Civil liability and compensation were also only briefly mentioned in the *Provisional Regulations on Share Issuing and Trading 1993*. Article 77 states: 'where the provisions of this regulation are violated, [the offending party] shall bear liabilities for civil compensation according to law.'²⁹ As we can see, the pre-2005 regulatory environment makes mention of civil claims but only affords a very limited scope for

²¹ Ibid Articles 190, 191 and 214.

²² See, CSRC and State Economic and Trade Commission, *Code of Corporate Governance for Listed Companies in China* (2001) <http://www.ecgi.org/codes/documents/code_en.pdf> at 1 May 2008.

²³ Liu Junhai, 'Innovation of the Securities Legal System (Zhengquan Falü de Zhidu Chuangxin)' (2005) 22 *China Finance (Zhongguo Jinrong)* 48, 49.

²⁴ See, Reported to the Standing Committee of the NPC, *An Introduction to the Securities Law of the People's Republic of China (Draft Revisions)* (Guanyu 'Zhonghua Renmin Gongheguo Zhengquanfa (Xiuding Caaan)' De Shuoming) 24 April 2005 (Zhou Zhengqing, Deputy Director of the Finance and Economics Commission of the NPC).

²⁵ Zhu Sanzhu (2007), above n 9, 220.

²⁶ See, Reported to the Standing Committee of the NPC, *An Introduction to the Company Law of the People's Republic of China (Draft Revisions)* (Guanyu Zhonghua Renmin Gongheguo Gongsifa (Xiuding Caaan) De Shuoming) 25 February 2005 (Cao, Kangtai, Director of the Legal Affairs Office of the State Council).

²⁷ Liu Junhai, above n 4.

²⁸ *Securities Law of the People's Republic of China 1998*, Articles 63, 67–71, 183 and 184.

²⁹ *Provisional Regulations on Share Issuing and Trading 1993* (PRC), Article 77.

their implementation. When compared to the comprehensive administrative and criminal sanctions in place by 2001,³⁰ the limited legislative provisions and the subsequent substantive inability of minority shareholders to bring civil actions, was a major weakness in the regulatory landscape.³¹ Between the early 1990s and 1998, this weakness was exacerbated by the dramatic increases in both listed companies and market investors on the Shanghai and Shenzhen stock exchanges.³² This rapid growth begot an increase in the number of securities related infringements and defrauded investors, whose losses were compounded by the indifference of the provincial courts, who refused to hear their cases. In fact, between 1991 and 2002, none of the civil actions brought to redress insider trading, market manipulation or false statements were continued to the stage of a substantial hearing.³³

In response to an increased number of civil suit filings, the SPC issued three circulars, between September 2001 and January 2003, outlining how local courts should handle civil compensation claims arising from securities related fraud. In September 2001, the SPC issued *The Notice of the Supreme People's Court on Temporary Refusal of Filings of Securities-Related Civil Compensation Cases (First Circular 2001)* directing lower courts to temporarily ignore civil compensation cases concerning insider trading, fraud or market manipulation.³⁴ The circular simply stated that the courts 'do not have necessary conditions to accept and hear such cases due to current legislative and judicial limitations.'³⁵

Four months later, on 15 January 2002, the SPC reversed this position, issuing *The Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Cases Arising From False Statement on the Securities Market (Seconde Circular 2002)*.³⁶ It stated that particular Intermediate People's Courts, as designated by the SPC, would begin to accept and hear civil compensation cases arising from false statements only — not insider trading or market manipulation — thus marking the first possibilities of recourse to civil justice for securities related offences in the PRC. On 9 January 2003, the SPC affirmed this position in *Several Provisions of the Supreme People's Court on Hearing Civil Compensation Cases Arising from False Statements on the Securities Market (Third Circular 2003)*,³⁷ which detailed the procedural and administrative conditions of hearing such cases, essentially obliging lower courts to begin accepting cases.

³⁰ See section below.

³¹ Zhu Sanzhu (2007), above n 9, 159. According to the Shanghai and Shenzhen stock exchanges, by the end of 2007 the market consisted of 71.30 million investors and 860 listed companies and 35 million investors and 540 listed companies respectively. The total market capitalization of the Shanghai and Shenzhen exchanges hit RMB 26.98 trillion and around RMB 1 trillion respectively at the end of 2007. For further information on the Shanghai exchange see <http://www.sse.com.cn/sseportal/en_us/ps/about/bi.shtml> and for Shenzhen see <<http://www.szse.cn/main/en/aboutsse/sseoverview/>>.

³² Zhu Sanzhu (2007), above n 9, 159.

³³ See Li Guoguang, 'Deputy President of the Supreme People's Court Li Guoguang Talks about Judicial Protection for the State's Financial Safety (Gaofa Fuyuanzhang Li Guoguang Xishao Guojia Jinrong Anquan de Sifa Baozhang)' *News Weekly* 23 July 2002.

³⁴ *The Notice of the Supreme People's Court on Temporary Refusal of Filings of Securities-Related Civil Compensation Cases (Zuigao Remmin Fayuan Guanyu She Zhengquan Minshi Peichang Anjian Zan Buyu Shouli de Tongzhi)* 2001 (Supreme People's Court) issued on 21 September 2001.

³⁵ Ibid.

³⁶ *The Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Cases Arising From False Statement on the Securities Market (Zuigao Renmin Fayuan Guanyu Shouli Zhengquan Shichangyin Xujiachengshu Yinfa de Minshi Qinquan Jiufen Anjian Youguan Wenti de Tongzhi)* 2002 (Supreme People's Court), issued on 15 January 2002.

³⁷ *Several Provisions of the Supreme People's Court on Hearing Civil Compensation Cases Arising from False Statements on the Securities Market (Zuigao Renmin Fayuan Guanyu Shenli Zhengquan Shichang Yin Xujiachengshu Yinfa de Minshi Peichang Anjian de Ronggan Guiding)* 2003 (Supreme People's Court), issued on 9 January 2003.

By issuing the *First Circular 2001* it seemed that the SPC had squandered its chance to expand its political standing and reputation within Chinese society by protecting private economic interests.³⁸ While the *Second Circular 2002* did theoretically accommodate civil claims, it imposed express limitations and prerequisites on their implementation. The most restrictive of these limitations is that the only cases which may be heard are those where the CSRC or another relevant administrative body has previously investigated the alleged false statement and already imposed an administrative penalty. In these cases the plaintiff must rely on the administrative penalty as the factual basis for their claim.³⁹ Proponents of this restrictive rule can be found from within the judiciary itself. Kong Lin and Ye Jun,⁴⁰ of the SPC, and Shen Huanwei and Zhu Chuan,⁴¹ of the No. 1 Intermediate People's Court of Shanghai, in their respective articles, support the position of the *Second Circular 2002*. They argue that the decision is concordant with the limited resources of the courts, which could not have coped with an impending 'securities litigation time bomb'.⁴² Further, that the restrictions are reconcilable with the strong overall power of administrative regulators to monitor and adjudicate securities related matters, they also contend that the measures will protect investors by helping plaintiffs collect evidence.⁴³ While these authors acknowledge that SPC rules will disadvantage defrauded investors in cases where no administrative decision is made,⁴⁴ they privilege the institutional dominance of administrative bodies, like the CSRC, over judicial independence. In many senses, these judges and Court's representatives are bound by official positions, as such, their rationalizations are indicative of the practical compromises Chinese lawmaker's have made in the implementation of securities related laws. Despite the positive outcomes for corporate governance and the economy provided by a functional suite of civil law causes of action, these compromises reflect Chinese political and commercial realities and demonstrate a historical privileging of administrative control of economic concerns.

Criticisms of the SPC's position highlight substantive deprivation of an investor's right to civil litigation under the Civil Procedure Law 1991 and chastise the SPC for exceeding its powers of judicial interpretation.⁴⁵ Alluding to possible political motives, some critics question the basis upon which the SPC has justified not hearing cases which ultimately spare government officials from the possibility of 'angry shareholders organising themselves into nationwide networks for the purpose of litigation.'⁴⁶

Further criticism points out that the SPC ruling creates incentives for those under investigation to use bribery or social connections to influence decisions of the first-instance administrative body and thus escape civil liability.⁴⁷ Such subterfuge seems apparent in the case of Hainan Minyuan Modern Agricultural Company,⁴⁸

³⁸ Chen, above n 6, 464.

³⁹ *Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Cases Arising From False Statement on the Securities Market 2002* (Second Circular of the SPC), Article 2.

⁴⁰ Kong Lin and Ye Jun, 'Conditions for Acceptance of Civil Compensation Cases arising from False Statements on the Securities Market (Zhenquan Shichang Yin Xujia Chenshu Yinfa de Minshi Peichang Anjian de Shouli Tiaojian)' (2003) 4 *Application of Law (Falü Shiyong)*.

⁴¹ 'On the Causal link of Civil Compensation Cases Arising from Securities-Related False Statements (Zhengquan Xujia Chenshu Minshi Peichang Yinguo Gaunxi Lun)' (2003) 6 *Legal Science (Faxue)*.

⁴² Kong Lin and Ye Jun, 'Conditions for Acceptance of Civil Compensation Cases arising from False Statements on the Securities Market (Zhenquan Shichang Yin Xujia Chenshu Yinfa de Minshi Peichang Anjian de Shouli Tiaojian)' (2003) 4 *Application of Law (Falü Shiyong)*, 21.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ See Lu Guping, 'Private Enforcement of Securities Fraud Law in China' (2003) *Pacific Rim Law and Policy Journal* 781, 795–8; Yin Jie, 'On the System of Civil Liability of Securities-Related False Statements (Zhengquan Xujia Chenshu Minshi Zheren Zhidu Lun)' (2003) 6 *Legal Science (Faxue)* 110, 111; Tu Binhua, 'On the mechanism of Civil Compensation Liabilities for Securities-Related False Statements (Zhengquan Xujia Chenshu Minshi Peichang Zheren Jizhi Lun)' (2003) 6 *Legal Science (Faxue)* 94, 96.

⁴⁶ Lawrence, above n 6, 27.

⁴⁷ See Zhu Sanzhu (2007) above n 9, 167.

where, in 1997, the five directors approved an inflation of accounts in the order of 1.2 billion yuan. The five directors, two of whom had close political ties to Deng Xiaoping and his son Deng Pufang, subsequently disappeared and the CSRC was powerless to compel the company to cooperate in locating them. Given the importance of personal connections in Chinese business practice, it is not impossible that the directors had behind-the-scenes protectors who eventually effected the investigation to lapse.⁴⁹

The final judicial position of the SPC, to allow some claims and to formalize procedural rules, can be seen as a positive step towards recognizing minority shareholder's interests and promoting good corporate governance.⁵⁰ However, due to the operation of the administrative prerequisite rule, the full force of the threat of civil litigation as a deterrent to securities related fraud is undermined.⁵¹ Moreover, the limitations on the scope of civil actions available to redress securities related infringements is demonstrative of the highly politicized nature of the regulatory landscape in which China's commercial sector is situated.

B Judicial Limitations on Joint Action Civil Compensation Suits

An examination of the different models of mass litigation open to defrauded investors sheds some light on the difficulties of incorporating civil litigation into the Chinese regulatory landscape. The provisions for joint actions in the *Civil Procedure Law 1991* and 2007 seem to draw heavily on the US model of mass litigation.⁵² The *Second Circular 2002* ruled out US-style class action suits (jituan susong) as an acceptable form of action arising from securities related false statements.⁵³ The scope of civil litigation is thus limited to individual actions (dandu susong) and one category of joint action (gongtong susong), where multiple parties, all with the same object of action, can be combined into one trial.⁵⁴ However, in this form of joint action the number of plaintiffs must be registered and their number fixed before hearing.⁵⁵ The *Second Circular 2002* contradicts the *Civil Procedure Law 1991* and its 2007 counterpart, which provide that suits, in which the number of plaintiffs is not fixed prior to hearing, are acceptable forms of joint action litigation.⁵⁶ This limitation burdens potential claimants with the responsibility of joining an action before hearing, in effect limiting the number of claimants and potential damages to listed companies. This ruling lays down a sufficient procedural hurdle to substantially disadvantage small investors and curtail their access to judicial recourse.⁵⁷

C Support and Criticism of the SPC's Decision to Proscribe US-style Class Actions

Proponents of the SPC's decision can be found from within the judiciary – the main thrust of their argument is that conditions are not ripe for such civil litigation. Particularly, that China currently has no organisation capable of providing services similar to the intermediaries in the US, who register thousands of defrauded investors and calculate their damages.⁵⁸ Further, supporters of the restrictions posit that it is unfair to rely on

⁴⁸ See Daniel M Anderson, 'Taking Stock in China: Company Disclosure and Information in China's Stock Markets' (2000) 88 *Georgetown Law Journal* 1919, 1935.

⁴⁹ Ibid.

⁵⁰ See Zhu Sanzhu (2007), above n 9, 166 and 195.

⁵¹ Ibid 195.

⁵² Zhu Sanzhu (2007), above n 9, 176.

⁵³ *Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Cases Arising From False Statement on the Securities Market 2002* (Second Circular of the SPC), Article 4 and 12.

⁵⁴ Zhu Sanzhu (2007), above n 9, 174.

⁵⁵ *Notice of the Supreme People's Court on Relevant Issues of Filing of Civil Tort Dispute Cases Arising From False Statement on the Securities Market 2002* (Second Circular of the SPC), Article 14.

⁵⁶ Article 54 and 55 of the *Civil Procedure Law of the People's Republic of China 2007* and the *Civil Procedure Law of the People's Republic of China 1991* are exactly the same.

⁵⁷ See Lu Guping, above n 45, 798-801.

⁵⁸ See Jia Wei, 'The Commencement of Civil Liability in Tort on the Securities Market: Explanation and Analysis of Several Provisions of the Supreme People's Court on Hearing Civil Compensation Cases Arising from False Statements on the Securities Market' (Zhengquan ShichangQinquan Minshi Zeren zhi Faren: Jiexi Guanyu Shenli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Peichang Anjina de Ruogan Guiding) (2003) 3 *Application of Law (Falü Shiyong)* 9. Jia Wei

the courts to make the requisite announcements, register investors or undertake any work in relation to the application of their judgements.⁵⁹ On the other hand, commentators, corporate lawyers, business people and the public media have increasingly voiced their support for the implementation of a US-style class action system which can adequately meet the demands of defrauded investors.⁶⁰

Given the vast resources, which the CSRC and other governmental bodies have dedicated to comprehensively and efficiently effecting radical economic reforms, such as the split share reform,⁶¹ it is imaginable that if political will prevailed, the relevant intermediaries needed to make class actions work could be established within a short period of time.⁶² Moreover a class action system (founded in Chinese laws) seems very possible, the aforementioned proponents of restricted joint actions seem to have left this door open, in a fashion familiar to Chinese politics and reform. It follows that one day conditions will be ripe for the expansion of the scope of civil compensation cases to the extent that they operate as an effective deterrent to fraud on the securities market.

Many critics see the decision not to adopt US-style class actions as economic and political in nature.⁶³ Large class actions could expose state owned publicly listed companies to massive securities related civil litigation judgments, possibly triggering political unrest. Further, the concentration of large numbers of aggrieved shareholders into organised groups has the potential to sharpen conflict between currently dispersed individual investors and the state.⁶⁴ Moreover, the possible dilution of state assets into the private sector contradicts the notion of a socialist economic system and may considerably undermine the political base of the Communist Party's leadership.⁶⁵ This possibility lead Li Guoguang, Vice President of the SPC, to concede in interview with Chen Zhiwu⁶⁶ that, in relation to the initial total ban on securities related civil litigation, 'if there were numerous lawsuits against all the listed firms and if the private plaintiffs were awarded the rightfully deserved relief, it would lead to major losses of state assets.'⁶⁷ Given the close inter-connectedness between the Chinese government and the judiciary, the correlation between the protection of state assets and the limitation of civil actions can easily be extended to justify the SPC's final decision to hear only a restricted category of joint actions qualified by administrative discretion.

The refusal to institute US-style class actions lends insight into the fundamental tensions inherent in the Chinese legal system. Tensions which exist between the legitimacy of the courts, plaintiffs' private rights, governmental control over lawyers, legal institutions and the vast milieu of ideological and economic

is a judge of the Supreme People's Court who participated in the drafting of the SPC circulars. See also, Xi Xiaoming and Jia Wei, 'Understanding and Application of 'Several Provisions of the Supreme People's Court on Hearing Civil Compensation Cases Arising from False Statements on the Securities Market' ('Guanyu Shenli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Peichang Anjina de Ruogan Guiding' de Lijie yu Shiyong) (2003) 2 *People's Judiciary (Renmin Sifa)* 11.

⁵⁹ Ibid.

⁶⁰ Cheng Yong and Wu Zhanyu, 'Shang Fuling (Chairman of the CSRC): the 'Eleven-Five Plan' Will Promote 5 Basic Institutions' (*Shangfuling: 'Shiyi Wu' Litui Wuxiang Jichuxing Zhidu Sheji*) (2005) *Shanghai Securities*, 3 November 2005, Shang Fuling is the Chairman of the CSRC; Wang Lu, 'Appeal for Class Action Arouses From Zhengbaiwen Case' (*Zhengbaiwen An Yinfa Jituansusong Huyu*) (2005) *Shanghai Securities*, 6 December 2005; Xia, Lihua, 'Shenzhen Securities Exchange Advises Judicial Explanations To Be Drafted To Support Securities-related Litigations (*Shenjiaosuo Jianyi Chutai Sifajieshi Zhichi Zhengquan Susong*)' (2005) *China Securities* 29 December 2005.

⁶¹ See generally Sandra P Kister, 'China's Share-Structure Reform: An Opportunity to Move Beyond Practical Solutions to Practical Problems' (2007) 45 *Columbia Journal of Transnational Law* 312.

⁶² See generally Tang, above n 5, 27. The relevant intermediaries would include administrative bodies mandated to facilitate the registration and processing of potential plaintiffs.

⁶³ Ibid 14. Wang Jiangyu, 'Dancing with Wolves: Regulation and Deregulation of Foreign Investment in China's Stock Market' (2004) 5 *Asian-Pacific Law and Policy Journal* 2, 43; Chen, above n 6, 465.

⁶⁴ See Hutchens, above n 6, 644–5; Lawrence, above n 6, 29.

⁶⁵ Yu Guanghua, *Comparative Corporate Governance in China* (2007) 28.

⁶⁶ Chen Zhiwu is a scholar from Yale School of Management, see, Chen, above n 6, 465.

⁶⁷ Ibid, and see generally, Li Guoguang, above n 33.

reasoning which drives law-making decisions in China.⁶⁸ The evolution of joint actions into a tool which can effectively offer incentives for good corporate governance can thus be seen as a yard stick against which the development of China's legal and market institutions can be measured.

III Weak Enforcement of the Securities Law: Civil Litigation to Date

By examining some of the securities related cases which have been heard so far, it becomes obvious that the availability of only restricted joint actions has markedly affected investors' prospects of relief. According to Song Yixin,⁶⁹ by 2006 around 10,000 suits had been filed since the first securities related action in 1996. Of those, less than 10 per cent have garnered some form of compensation through settlement and damages recovered have amounted to less than 5 per cent of total losses to investors.⁷⁰ Moreover, since the Second and Third Circulars handed down in 2002 and 2003 respectively, of the 120 companies (and their related executives, directors and accountants) who fell within the strict formulation of the class of defendants against whom an action may be brought, only 17 have been pursued all the way to court.⁷¹ These statistics shed light on the extent of the institutional and practical barriers, which stand in the way of minority shareholders utilising the civil justice system. There is a theoretical avenue to litigation on the books, however, weak enforcement and institutional barriers to a functional civil justice system seem to reflect the primary policy concerns that have dominated Chinese regulatory discourse since the country initiated economic and legal reforms in 1978.

In a market economy, private companies compete for scarce financial resources and, traditionally, the cost of capital is lower for companies with strong corporate governance. However, in the past such market theories have not bound Chinese commercial interests; listed state owned enterprises (SOEs), the wardens of state owned assets, can access capital through state taxation powers and support projects and practices which would be uneconomical in a private sector mediated by traditional market forces.⁷² Further, a market economy, which aims at the efficient allocation of capital, requires not only practical laws and regulations mitigate securities fraud but also the credible threat of these powers being exercised.⁷³ SOEs are accountable to the CSRC and the State Owned Assets Supervision and Administration Commission (SASAC), however, until 2003 there remained no mechanism of public accountability, as now made possible through the civil justice system. While 'in-house', administrative punishment of securities fraud and protection of state assets remain the primary motivators for regulators and lawmakers, it seems unlikely that a Western, civil justice modulated style of securities regulation will be strictly enforced.⁷⁴ However, the SPC's experimentation with civil actions and the expansive civil justice provisions slated in 2005 do strongly indicate that Chinese law makers believe the time is ripe for stronger protection of minority shareholders' rights to become an essential element of an efficient economy based on conventional market principles.

A secondary element of the historically weak enforcement of the securities law is that the courts and the CSRC have been forced to adopt a reactionary model of regulatory development. The consequences of revolutionary changes to the share structure of listed companies, rapid developments in market conditions and the rise of managerial fraud during the 1990s have market conditions that existing regulatory frameworks were ill-equipped to deal with. Normally, the result of these regulatory crises has been the initial administrative proscription of certain behaviour followed by a gradual formulation and implementation of a

⁶⁸ See Zhu Sanzhu (2007), above n 9, 177.

⁶⁹ Yixin Song, 'The Underground Stories of the Justice Claiming Team for the Compensation From Kelon and Deloitte' (*Kelong, Deqing Weiquantuan De Muhou Gushi*) (2006) *China Securities* 14 September 2006.

⁷⁰ Ibid.

⁷¹ Tang, above n 5, 12.

⁷² See W Megginson and J Netter, 'From State to Market: A Survey of Empirical Studies on Privatisation' (2001) 39 *Journal of Economic Literature* 321, 331.

⁷³ Yu Guanghua, above n 65, 54.

⁷⁴ Ibid.

regulatory framework designed to address the particular problem. The case of Chengdu Hong Guang Industrial Ltd⁷⁵ (Hong Guang), which precipitated the SPC's decision, in 2001, to temporarily ban People's courts from accepting securities related civil actions,⁷⁶ is an excellent example of this reactionary model.

Hong Guang engaged in speculative trading on the stock market and misreported 157 million Yuan of profits in 1997. Subsequently, in 2000, the Sichuan Intermediate People's Court sentenced three of the company's directors to jail terms of up to three years. This was the first case of criminal liability being brought home for securities fraud, however, the court refused to hear claims of civil liability.⁷⁷ Defrauded investors then filed suits in other jurisdictions. First among them was Jiang, whose filing was rejected by the District People's Court of Pudong.⁷⁸ Spurred on by the publicity created by these filings, civil actions against companies with similar factual scenarios were filed across China. Eventually, in September 2001, a lower court in Wuxi decided to entertain a case against Yin Guang Xia Ltd.⁷⁹ Shortly after the Wuxi court accepted the case, on 21 September 2001, the SPC issued the *First Circular 2001* effecting a temporary ban on the hearing of securities related civil actions. The temporary ban was lifted four months later by the *Second Circular 2002*, where a qualified form of civil action was permitted. Immediately after the temporary ban was instituted, such was the volume of public outcry against the decision and the intensity of criticism from academics, lawyers and professionals,⁸⁰ that it took only four months for the SPC to lift the ban. From the Hong Guang example, we can see that a combination of weak enforcement and an insufficient regulatory regime is inextricable from a previously dominant paradigm of reactionary regulatory design. However, with the promulgation of the *Company and Securities Law 2005*, regulators have moved towards a more comprehensive and proactive model of regulation, which, despite having the relevant laws on the books, remains subject to the SPC's 2002 decision only to hear a limited class of securities related civil actions.

A Administrative Rather Than Private Enforcement

While the temporary ban and limited class of civil actions are now heard by the courts, protection of investor's rights is still primarily enforced by administrative bodies like the CSRC.⁸¹ Since 2001, the CSRC has 'cracked down on ... serious securities crime cases that impaired investors' interests and exerted bad social influence.'⁸² Such administrative diligence and penalties generate positive outcomes for corporate governance. However, without the parallel threat of weighty civil damages, administrative action will remain an insufficient deterrent to securities fraud. In reference to the expansive provisions of the *Company and Securities Law 2005*, it is possible that, in the near future, recourse to civil justice will become a more significant factor in the enforcement of good corporate governance.

⁷⁵ Ibid.

⁷⁶ *The Notice of the Supreme People's Court on Temporary Refusal of Filings of Securities-Related Civil Compensation Cases* (First Circular of the SPC 2001).

⁷⁷ Other cases where no civil actions were allowed, even after investigation and sanction by the CSRC are the ENERGY 28 Case and the Sanjiu Medical and Pharmaceutical Co Ltd Case, see generally Yu, above n 67, 55.

⁷⁸ See Huang Xiangyuan, 'The Case of the Fraud of Hong Guang Could not Easily be Ended (*Hong Guang Qizha An Mei Namongyi Wanjie*)' *Securities Newspaper (Zhengquan Ribao)* 28 December 2000.

⁷⁹ See Xue Li, 'From Hong Guang to Yin Guang Xia: How Far We Still Have To Go For Civil Compensation (*Cong Hong Guang dao Yin Guang Xia: Minishi Peichang De Lu You Duochang*)' *Shanghai Securities Newspaper (Shanghai Zhengquan Bao)* 6 September 2001.

⁸⁰ Yu Guanghua, above n 65, 54.

⁸¹ It is interesting to note that at the top of the CSRC's homepage the by-line reads '[i]nvestors protection is our top priority'; this text is superimposed over the image of the type of desk bell which is rung when a reception desk is left unattended, see <<http://www.csrc.gov.cn/n575458/n4001948/>>.

⁸² China Securities Regulatory Commission, *Crack Down on Crimes for the Protection of Investors' Legal Interests* (12 May 2008) <<http://www.csrc.gov.cn/n575458/n4001948/n4002030/10416997.html>> at 25 May 2008.

IV Critical Methodologies and the Future of Minority Shareholder Protection

Western critiques of China's regulatory protection of minority shareholders emphasise that transition economies should have stronger rules than those found in developed market economies⁸³ and that it is 'extraordinary that in an authoritarian state, like China, the courts simply cannot enforce their decisions in civil cases.'⁸⁴ Donald Clarke refines this position by critiquing the ineffectiveness of the Chinese court system in enforcing civil judgments, not only as pandering to 'local protectionism', but as an extension of the People's Courts' function as an ancillary, bureaucratic arm of the state.⁸⁵ It is true that recent economic regulatory design in China has focused on methods of establishing good corporate governance as the guiding principle for the expansion of the securities market, and that Western notions of good governance are almost exclusively relied upon to this end. However, western legal models must be integrated into the Chinese political and cultural landscape with great finesse, and this can be seen clearly in the political realities which underpin the SPC's decision only to hear restricted joint action civil compensation cases.

Part IV looks at three different perspectives on the enforcement of securities related regulation in China. First, a comparison between the discursive styles of a Chinese and a Western scholar is conducted in an attempt to flesh out the differences between how Chinese and Western (essentially English-speaking) commentators conceptualise Chinese regulatory development. Second, the abovementioned academic approaches are put in context by an analysis of the language and opinions of one of China's top regulators in the field. Third, an economic rationalist's 'crash then law' theory of Chinese law-making is discussed in comparison to political justifications behind the same regulatory development. The object of these investigations is to survey and assess differing positions on the future of civil justice as an effective enforcement mechanism for good corporate governance in China.

A Difference between Chinese and Western Discursive Styles

The interaction between Western legal principles and Chinese legal reality highlights the subtle nuance between the manner in which Chinese and Western scholars consider the future of minority shareholder protection in China. This distinction is evident in the comparison of two recent articles on the topic, the first by *James v Feinerman*⁸⁶ and the second, Tang Xin's response.⁸⁷ Feinerman, while acknowledging that there has been some shift away from administrative penalties and towards private enforcement of minority shareholders interests,⁸⁸ focuses his analysis on how the current regulatory regime 'falls short'⁸⁹ of adequate protection and what 'will have to change in the future.'⁹⁰ Tang on the other hand, while professing only to add to Feinerman's enumeration of the issues, comes at the problem from a different angle. Tang emphasises that the laws on the books 'seem to be fine' but that there remain enforcement problems.⁹¹

Tang's analytical methodology seems to be more sensitive to a non-linear model of legal and regulatory development in China, where the future lies somewhere along a path which branches out in multiple, overlapping and contingent directions, all eventually converging on a perceived 'present' and then re-

⁸³ Alexander Kiseliou, 'General Principle of Company Law for Transition Economies' (1999) 24 *Journal of Corporation Law* 196, 204.

⁸⁴ Stanley B Lubman, 'Introduction: The Future of Chinese Law' in Stanley B Lubman (ed) *China's Legal Reforms* (1996) 1, 6.

⁸⁵ Donald Clarke, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments' (1996) 10 *Columbia Journal of Asian Law* 1, 5.

⁸⁶ James V Feinerman, 'New Hope for Corporate Governance in China' (2007) 191 *The China Quarterly* 590.

⁸⁷ Tang Xin, 'Commentary on 'New Hope for Corporate Governance in China' (2007) 191 *The China Quarterly* 613.

⁸⁸ Feinerman, above n 86, 601. Feinerman identifies the fiduciary type duties conferred on directors by the *Company Law* 2005 as emblematic of a more generalised shift towards private enforcement of good corporate governance principles.

⁸⁹ *Ibid* 600.

⁹⁰ *Ibid* 600.

⁹¹ Tang (2007), above n 87, 614.

diversifying in all directions as the observer turns their attention to the next problem. Feinerman seems to model regulatory development over time in a linear or evolutionary fashion which appeals to teleological limits and subjugates wider context specific factors.

One way of visualising this difference is by considering Tang's methodology as a rhizome system, like a potato or couchgrass.⁹² While, on the other hand, Feinerman might be said to conceive of regulation and its development as more analogous to a tree. In the up-down schematic of a tree, the leaves of the crown are the final and ultimate incarnation of the collective efforts of the roots, trunk and branches. Similarly, Feinerman's position seems to tend towards an efficient Western-styled regulatory system as the ultimate goal and evolutionary ideal of Chinese legal and economic development.⁹³ From this point of view, Feinerman focuses on shortcomings and presents a pessimistic outlook for the status of civil litigation in the future. Feinerman states, 'as for balancing the interests of majority and minority shareholders, especially in attempting to enhance the protection of minority shareholder's interests, the new laws do make some progress. It remains to be seen how effective they will turn out to be in practice.' He continues, 'it remains to be seen how a more characteristically Chinese corporate governance system might evolve.'⁹⁴

On the other hand, in a rhizome system every discrete part is radically connected to every other part, the connections run in all directions, back and forth. This is a different model to that of the tree, which plots a path upwards and fixes an order to its development. Just like couchgrass, a rhizome can expand and move forward in any direction and along any plane, it is not bound by the linear dichotomies which determine the process from root to trunk to branch to leaf. Tang's treatment of the development of securities regulation is more sympathetic to the political, economic and social interconnectedness which informs Chinese regulatory decision making. Tang's focus on wider contextual considerations leads him to state that the 'critical question remains: to what extent will the "law on the paper," on which Feinerman concentrates, improve China's corporate governance in the real world?'⁹⁵ This can be seen in the *Hong Guang* case, where a complex array of social, ideological, economic and legal factors came together and resulted in the SPC's issuing its three circulars, which form the basis of today's regulatory design. The rhizome model of regulatory development does not privilege any particular direction of development as ideal, rather emphasises the reasons why development proceeds in a certain direction. Tang states, 'China's corporate governance has made great advances in the past ten years, during which increased awareness of investor protection has changed into significant policy issues.' However, in agreement with Feinerman, Tang emphasises that there is still much work to be done.⁹⁶ In this sense, Tang's outlook seems more optimistic that securities regulation will develop in a positive direction.

One reason for this discrepancy might be that Tang draws a lot of his source material from Chinese authors writing in China, whereas Feinerman's resource set comprises mostly of articles in Western academic journals. Another possibility is that Tang, and the Chinese writers he draws upon, do not necessarily apply the academic rigors and institutions of the Western canon in the same way that Feinerman does. Despite these differences, the authors do however, reach similar conclusions. This may be cursorily explained by reference to the feedback loops which run throughout the two writers discussion and commentary, by this means various ideas and outcomes are eventually normalised. For instance, Tang, in his early 2007 essay, 'Protecting Minority Shareholders in China: A Task for Both Legislation and Enforcement', stated that a class action system 'is both

⁹² See generally, Gilles Deleuze and Felix Guattari, *A Thousand Plateaus* (1988) 5. Deleuze and Guattari first put forward the concept of a rhizome as an analogy for the development of semantic meaning. However, especially in contrast to the linear model of the tree, the visual imagery of the rhizome helps draw out the methodological differences between Tang and Feinerman.

⁹³ Feinerman, above n 88, 611.

⁹⁴ Ibid.

⁹⁵ Tang, above n 87, 614.

⁹⁶ Ibid 618.

necessary and possible.⁹⁷ However, later in 2007, he reversed his position claiming that ‘class actions seem unfeasible in the foreseeable future.’⁹⁸ The literature elucidates no clear answers for the future of securities-related civil litigation and substantive minority shareholder protection: however, all quarters agree that it is a good idea in theory.

B What China’s Leading Reformers Say and How They Say It

By examining the ways in which one of China’s most progressive and reforming regulators, Zhou Xiaochuan,⁹⁹ reconciles Western influences and articulates the project of Chinese regulatory reform, we see a determined intention to develop good corporate governance and protect minority shareholder’s interests.

Zhou speaks of corporate governance as the core principle of Chinese economic development.¹⁰⁰ While he acknowledges that each nation operates ‘country-specific corporate governance stemming from its cultural tradition and legal system,’ he goes on to affirm that the ‘common elements’ espoused in the OECD’s guidelines¹⁰¹ for good governance are the ‘most important and most basic’¹⁰² in terms of Chinese development. Zhou goes on to reconcile the notion of a shifting ideological basis for legal reform in China by appealing to a historicist analysis of regulatory development, he states: ‘compared to the past, many of the old concerns no longer exist. We need to study our history carefully, cool-headedly, in a fresh perspective, and learn our lessons.’¹⁰³ Zhou expresses the need to ‘study and combine international experiences with China’s own situation and come up with our own solutions for stakeholder protection.’¹⁰⁴

In these statements Zhou masterfully navigates the ever-present ideological barriers to Chinese legal reform. He establishes that international standards are a set of guidelines that Chinese regulators should be mindful of when learning from the lessons of their own past. The obvious influence of Western regulatory standards is thus underplayed and permissibly integrated into a ‘socialist market economy with Chinese characteristics’ founded upon China’s own experiences.¹⁰⁵ His masterful politic leaves the door open to reform in a way similar to the aforementioned judges who advocate curtailing civil compensation actions until the time is ripe to turn the tides.¹⁰⁶ Zhou’s artifice is the re-creation of Chinese historical norms from a suite of economic reforms which are substantively Western in ideological genesis and, in so doing, he shows us that there will come a time in China’s future when civil securities litigation both protects investors and acts as a frontline deterrent to fraud against the market.

⁹⁷ Tang, above n 5, 15.

⁹⁸ Tang, above n 87, 615.

⁹⁹ Previously Head of the CSRC until 2001 and now Governor of the People’s Bank of China.

¹⁰⁰ Zhu Xiaochuan, ‘Take Care of Stakeholders and improve Corporate Governance’ (Speech delivered at the Beijing Hi-Tech Expo, 23 May 2006). This was formalised during the Fourth Plenum of the Chinese Communist Party’s 15th Central Committee held in September 1999, where corporate governance was identified as the core of the modern enterprise system. See also, Feinerman, above n 88, 593; Tang (2007), above n 89, 615; Wu Xiaoling (Deputy Governor of the People’s Bank of China), ‘Conditions and Environment for Improving Corporate Governance Structure of China’s Financial Enterprises’ (China International Finance Development Forum, Beijing, 23 April 2005).

¹⁰¹ Organisation for Economic Co-operation and Development, *Five Principles on Corporate Governance* (1999); Organisation for Economic Co-operation and Development, *Revised Principles on Corporate Governance* (2004)

¹⁰² Zhou Xiaochuan, above n 100.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ See, above n 59, for the comments of Jia Wei and others.

Chen Zhiwu applies John Coffee's 'crash then law' analysis¹⁰⁷ to the development of China's securities regulatory scheme.¹⁰⁸ Chen explains this relationship as a strict linear model of initial financial and economic 'crash' followed by subsequent regulatory reaction. This model seems to fit the SPC's initial ban on hearing civil compensation cases, which was precipitated by an increased number of civil filings driven by a substantial market downturn in early 2001. By extension of the model into the future, market forces will eventually necessitate an increased acceptance of civil actions. There is definitely virtue in the clear delineations and certainty generated by this economic rationalist approach. However, conditions accompanying the SPC's lifting of the ban are not easily reconcilable, for instance, an initial administrative penalty as a precondition to hearing. Chen's free-market, Chicago School approach underplays contextual factors, such as, conflicting political ideology, economic realities and the limited resources of the SPC. Chen's analysis also undervalues the fact that practical implementation and enforcement remain problematic even after regulation has been passed to address this particular problem. Since the beginnings of securities regulation in China, regulators have struggled with the implementation of all the principles enumerated in the abovementioned OECD guidelines.¹⁰⁹ The 'crash then law' analysis overlooks the fact that the difficulties of applying Western principles to Chinese cultural and legal contexts lies at the heart of China's enforcement problems in the securities sector.¹¹⁰

A pessimistic view might be that Zhou's appeal to the 'lessons of the past' might more accurately be framed as an appeal to the 'lessons of the West'. However, over-emphasising western standards as the teleological endgame of Chinese regulatory design, does not account for the influence of feedback loops in the regulatory experience, which Zhou seems to highlight when he says, 'we will learn by doing and reviewing experiences.'¹¹¹ Chen's teleological vision of corporate governance and regulatory development subordinates 'Chinese characteristics' to the ever developing bastion of corporate governance standards dominated by Western theories of good corporate governance. Whether by Chen's direct linear progression, or through Zhou's process of learning from lessons, it is obvious that Chinese securities regulation is tending towards the models implemented in the West. It is important, however, to discuss how such regulation will develop, on what fronts and for which reasons, if predictions about its future are to be of any merit.

Tang and Feinerman agree, albeit by differing methodology, that increased recourse to civil litigation is good in theory, yet much work needs to be done. Zhou shows us that Chinese regulators are focusing on the lessons of the past and the West, in order to establish a sound system of corporate governance with Chinese characteristics. In a practical sense, an ideal model of reform would generate a careful and measured liberalisation of China's stock markets driven by improved efficiency of regulatory reform.¹¹² However, Chen's 'crash then law' model of development all but removes the possibility of such smooth sailing. No one model or theory of regulation is comprehensive and exclusively accurate. However, it is most important when considering Chinese regulatory design, to be sensitive to the synthesis of Chinese practicalities and Western ideals, which react against each other and create unique regulatory outcomes relevant to the context specific undulations of the China's regulatory landscape.¹¹³ With this in mind, it is the author's opinion that recourse

¹⁰⁷ See John Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 111 *Yale Law Journal* 1, 16–21.

¹⁰⁸ See Chen, above n 6, 452.

¹⁰⁹ See Feinerman, above n 86, 592.

¹¹⁰ Tang, above n 87, 619.

¹¹¹ Zhou Xiaochuan, above n 100.

¹¹² Green, above n 9, 7.

¹¹³ For more detail of Zhou Xiaochuan's concept of gradual reform which aims to avoid 'shocks' to the system see, Zhou Xiaochuan, 'Remarks on China's Trade Balance and Exchange Rate' (Speech delivered at the China Development Forum, Beijing, 20 March 2006).

to civil litigation in securities matters will increase in the future, however, it is more difficult to say how this will be made possible.

V Conclusion

Whether conceptual methodologies privilege teleological development towards Western principles or emphasise context specific and contingent analysis, it seems that civil justice will eventually play a greater role in China's commercial regulatory framework. This process began in 2002 and has developed in a sporadic fashion to the extent reflected by the *Securities and Company Laws 2005*. Rather than delimiting the recognition of minority shareholder's rights, the hearing limitations imposed by the SPC offer hope that, at some point in the future, the scope of actionable offences will be expanded. Scholars and regulators adopt different methodologies when considering the prospects of increased recourse to civil litigation. Some, like Chen and Feinerman, emphasise a linear, teleological model which focuses on where the Chinese regulatory landscape falls short of Western standards. Others, including Tang and Zhou, are more optimistic about the prospects of regulatory reform, focusing on lessons to be learnt and what needs to be achieved. In all, there is consensus that lawmakers, corporations and the judiciary have a lot to achieve before a reliable and function standard of corporate governance is developed in China. Until then, minority shareholders' ability to utilise the civil justice system will remain in an unstable state of flux.



Afterword

We would like to thank every one involved in the production of *Pandora's Box 2009*.

In particular, many thanks to those members of the judiciary and The University of Queensland Law faculty who graciously and anonymously donated their time to review this year's academic submissions. We appreciate the valuable input of our reviewers, as this helps to ensure that *Pandora's Box* remains a quality publication.

On behalf of the Justice and the Law Society, we also take this opportunity to express our sincere gratitude to the magistrates involved with the Magistrates Work Experience Program 2009. The Program's essay competition was adjudicated this year by Professor Charles Rickett of the TC Beirne School of Law, and we also wish to pass on our thanks to him for selecting our winners.

We would also like to recognise the ALPSA executive committee, particularly Michelle Delport, Competitions Convenor, for their work in organising their annual student essay competition. This competition provides an excellent opportunity for students to explore areas of law and legal theory outside the parameters of the law school curriculum, and we are pleased to include the first and second place papers from 2009 in this edition of *Pandora's Box*.

Finally, we thank the Executive Committee and members of the Justice and the Law Society, as well as the TC Beirne School of Law and the Faculty of Business, Economics and Law of The University of Queensland for their continued support of *Pandora's Box*.

Laura Hogarth and Yii Fen Tan
Editors, *Pandora's Box 2009*





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The Program runs from early April to late June. The final part of the Program requires participants to write an essay on a topic of their choice, related to their work experience. Selected essays from the Program are published in *Pandora's Box* each year.

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Contact JATL for more information.



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 TC 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. We welcome anyone with an interest in law and justice.

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.

Broadly our activities come under three categories:

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A legal perspective on social justice issues is something that underpins all of JATL's activities. We run a number of Social Justice Seminars each year focusing on the legal and social justice implications of topical issues.

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- Careers Conferences and related publications; and
- 'Wigs at the Bar'

SOCIAL

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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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