

Pandora's Box

DISSENTING OPINIONS 2010



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Editorial

Welcome to the 2010 edition of *Pandora's Box*.

Traditionally, the theme chosen for each edition of *Pandora's Box* has focussed on a particular subset of social justice issues, such as "Women and Peace" (2006), "In the Service of Justice" (2008), and "Advance Australia Fair" (2009).

This year's theme, "Dissenting Opinions", represents a departure from the norm. Instead of focussing the theme on a specific issue, we invited submissions on a wide range of legal and social issues, but with a specific emphasis on submissions that presented unorthodox or challenging perspectives.

Our motivation in selecting this theme was to honour the retirement in 2009 of The Hon. Michael Kirby AC CMG, renowned as "The Great Dissenter". We are delighted to include in this edition of *Pandora's Box* the transcript of a recent interview with Mr Kirby on the subject of LGBT rights.

Please enjoy *Pandora's Box* 2010.

Samuel Volling and Joshua Underwood

Editors, 2010

About *Pandora's Box*:

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

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

Academic articles submitted for publication in *Pandora's Box* are peer reviewed through a double-blind reviewing process, and *Pandora's Box* is now listed as an official peer reviewed publication on Ulrich's International Periodical Directory. Other submissions, such as speeches, 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 paper is included in the publication.

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

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

Interview with The Hon. Michael Kirby AC CMG, “Pride and Prejudice Exhibition” State Library of Queensland

Question 1: You have talked in the past about how lonely it was to be a young gay person. Do you think young GLBT still feel isolated or lonely in Australian society?

Young GLBT citizens in Australia still feel isolated or lonely. Particularly if they live in country towns or in families that lack understanding or are burdened with religious misinformation. But things are getting better. Certainly, initially no-one today in Australia would think that he or she was the ‘only gay on the block’. That was how I felt when I started out on this journey in 1950.

Question 2: Queensland has often being criticised, especially by the southern states, for its conservative past; do we still have a long way to go in terms of GLBT rights?

Queensland took longer than most Australian states to reform its criminal laws against gay men. Even then, it did so grudgingly. To this time, there are discriminatory provisions in Queensland law which do not exist elsewhere in Australia. The age of consent for sex is one example: it is different between heterosexual and gay sex. Still, progress has been made in more recent times and I expect that Queensland will catch up with the rest of Australia before long.

Question 3: Queensland is the only jurisdiction that enforces the sodomy law, is it likely this law will be repealed in the near future?

The Queensland Criminal Code, like the other penal codes of the British Empire, contain sodomy offences long after Napoleon’s codifiers had got rid of them in the civil law countries of Europe. These horrible offences, with their ugly names, linger on in the countries of the old British Empire to curse gay people to this very day. Apart from everything else, they are a serious impediment to fighting AIDS. Every now and then, an old ‘sodomy’ offence is dusted off and prosecuted in Australia. This is not only in Queensland. We should get rid of such offensive relics that constitute a patriarchal imposition on the private consensual activities of citizens. As Pierre Trudeau, Prime Minister of Canada, once said: ‘We should get the government out of the bedrooms of the nation’. Certainly so far as consenting participants beyond an equal age of consent.

Question 4: Are you surprised by the continued resistance to gay marriage?

Repeated public opinion polls show that Australian attitudes to gay marriage are softening. A clear majority now favour some form of legal recognition of stable, long-term, same-sex relationships. Yet successive federal governments, Coalition and ALP, have not budged on this issue. They are now clearly behind Australian popular opinion. They have buckled to special interest groups. If Spain and Albania can give such recognition, it is hard to see how we in Australia can justify the stance we have taken. It can only be in the interests of a civilised society to support and recognise stable, loving, human relationships of a sexual kind. And not to discriminate by measuring the mechanics of how a loving couple express their sexual feelings for one another. What an intrusive affront to human dignity this patriarchal inquisition is.

Question 5: Do you think there is still societal confusion between homosexuality and paedophilia? Is time the only antidote to this ignorance?

Unfortunately, the media and some churches sometimes confuse homosexuality and paedophilia. A sexual interest in under-aged persons is legitimately offensive to society because children cannot give an informed consent to sexual activity. Sitting in the courts, one realises that the biggest problem with paedophilia exists in serial ‘straight’ relationships, where young children are exposed to close proximity with straight adults (usually ‘stepfathers’) who have no incest inhibition against engaging in sexual conduct with a child. Sadly, such relationships of proximity also exist in church environments as the worldwide child sex abuse scandals demonstrate.

Question 6: What are the key areas of gay law reform that still need to be addressed?

The key areas for ongoing law reform include (1) relationship recognition, (2) surrogate birth rights, and (3) the provision of anti-discrimination laws to give redress against sexual stereotyping and anti-GLBT discrimination in decisions that are not merely trivial.

Question 7: You say “science is a great weapon against irrational hatred”, but can we rely on it to stamp out discrimination?

Science undermines the assumption that sexual variation in the human species is unnatural and deliberately chosen by wicked people to affront society and its moral teachings. Science shows that sexual variations, such as homosexuality, are as natural in nature as left-handedness. Once this is realised, it demands rethinking by churches, moralists and all citizens of their objections to the rights of same-sex attracted people. It may take time, but a lot of progress has been made in my lifetime. Constructive actions by the media (including in dramas and documentaries) can influence popular culture.

Question 8: Opposition leader Tony Abbott recently told Sixty Minutes he felt a “bit threatened” ... “as so many people (do)” by homosexuality. It still seems to illicit feelings of discomfort in some people, does that still surprise/frustrate you? Is he being irresponsible in airing such views or is he just an easy target given his religious stance?

I do not think Tony Abbott was being irresponsible in expressing truthfully response to homosexuality. It is probably a product of his religious upbringing. Fortunately, that kind of religious attitude is on the wane in Australia today because of the growing knowledge in our community of the science of sexual variation. There may be special reasons in Tony Abbott’s seminarian life, when he was training to be a priest, to explain why he felt “a bit threatened”. Most younger people today do not feel “threatened” because many younger GLBT peers today are open about their sexuality. They do not waste their time on ‘straights’ who do not share their feelings.

On the whole, it is better that people should explain their feelings about sexuality honestly and candidly than that they should bottle them up. At least then, the fears can be confronted and examined rationally and calmly so that, where they are irrational, they can go away. Like most spooks in the dark, this is the way to overcome personal demons. I do not say it is so in Mr. Abbott’s case, but my own experience in life has been that the most homophobic people are often those who are trying to suppress sexual feelings that they prefer not to have. Dr. Kinsey’s research in the 1940s showed, as much experience and research since then has confirmed, that sexual orientation is not binary. It exists in differing degrees in all people. Including Mr. Abbott and me. We just have different mixtures. He’s at one end of the spectrum. I’m at the other.

Question 9: What responsibility does the head of a major political party have when speaking about issues relating to GLBT?

Of course, national leaders carry a larger responsibility to inform themselves of basic science and also social science before launching into expressing opinions that could reinforce stigma against a particular group in society. How would we feel if our leaders went around saying they felt ‘a bit threatened’ by black people? Or by Islamic citizens. Or by Aboriginals. Of course, I did not take Mr. Abbott to be giving a scientific lecture on GLBT issues. He was only explaining his own personal response to homosexuality. It is up to the voters to decide whether that response is out of date, misinformed, unscientific, ignorant or such as could be likely to occasion prejudice to a vulnerable minority in society. If citizens do not like this, they have the privilege of voting against it.

Question 10: Mr Abbott still says homosexuality challenges “orthodox notions of the right order of things” – do you think true understanding is ever possible? What effect will that have on young people struggling with their sexuality?

In speaking in this way, suggesting that homosexual feelings are against the 'right order of things', Mr. Abbott is doubtless trying to express the natural law understandings of the Roman Catholic Church taught at least at the time he was in a seminary training to be a Catholic priest. Since then, progress has been made, even if not enough. For example, the Pope's representative at the United Nations in 2009 called for an end to criminal laws against gays. And the Roman Catholic Catechism discourages prejudice by the faithful against GLBT people. True, it then appears to forbid GLBT people doing anything about their sexuality except to suppress it. We all know what that does to people. Mr. Abbott should be aware of this. And the Roman Catholic Church should know that better than most institutions in this world. Freud was right when he said that the 'one unnatural sexual conduct' was celibacy. If celibacy cannot operate in the case of a significant number of priests today, how can we expect it of ordinary folks? Especially of young people living in a world which today bombards them with sexual images, fantasies and temptations? We have all just got to get real about these things and measure 'the right order of things' against what is 'right' for a minority who, by nature, have a different range of sexual feelings than the majority. Do as you would be done by is the Golden Rule of Christianity and all the world's great religions.

Question 11: Now that you are no longer a High Court judge will you devote more time to social activism?

Despite my retirement from the judiciary, I still accept some limitations on what I can and should properly do and say. However, frankly, I think it was a good thing that, whilst I was still a Justice of the High Court, I was open about my sexuality. If every GLBT person in Australia stood up and "came out", the pathetic, sad and contemptible charade over homosexuality would collapse and disappear. To this extent, GLBT people conspire in their own oppression by continuing the personal secrecy. Yet they do so because of fear of stigma and disadvantage. Sadly, this course of conduct is often thrust on them by religious institutions. Astonishingly, by institutions of the loving religion of Jesus Christ.

Question 12: What are your views on gay surrogacy?

I do not believe in any legal discrimination against GLBTIQ citizens on the basis of their sexuality. Whether a particular couple, straight or gay, is mature enough and sufficiently responsible to bring children into the world, or adopt them and look after them (with the long-term and intimate, trusting commitment that that entails) is a decision that should be made by them and by the law on a case by case basis. There should be no preconceptions derived only from sexuality. I have known good and bad parents who are 'straight'. And the law books contain examples of good and bad parents who are gay. Down with stereotypes!

Question 13: Acceptance of GLBT people goes beyond law reform, what is the key to acceptance and understanding?

Education plays a big part in community acceptance of human sexual variation. This includes school education. And that presents difficulties in some religious schools whose pupils also have rights to information of the normality of sexual variation which they have been denied with talk of reflecting 'lifestyles' and inculcating the Church's 'moral ethos'. One day there will be a big apology for the continuation of this oppression and unkindness. It is like a form of sexual apartheid.

In some ways, education in the media is an even greater force for changed attitudes than education in schools. I have always thought that the soap opera *Number 96* in the 1970s did more to increase acceptance of the actuality of the lives of gay people based on the humdrum characters portrayed there, than a thousand university lectures by people like me. The internet and social networking are new ways by which the younger generation leap over the ignorance and prejudice and unscientific feelings of 'threat' and 'discomfort' that have for too long fuelled prejudice, criminal law and societal stigma in the past. Time and technology are on the side of a realistic acknowledgement of the reality of GLBT people's lives in the world. This is why, in Western countries, the edifice of prejudice and discrimination is gradually collapsing. However, in much of Africa, the Caribbean, parts of Asia and the Middle East, prejudice still reigns. Australians, gay and 'straight', must be more engaged with the predicament of sexual minorities in developing countries. They are our brothers and sisters. They feel pain and fear. There is an awful alchemy of religious ignorance that presents a stubborn obstacle to progress which is all the more urgent in the face of the AIDS epidemic. All rational people have a duty to rid their own minds, social attitudes, conduct and laws from the relics of this outmoded and ignorant teaching from the past. If some religious people respond: 'But the Bible tells me so', the answer must be given: 'Science teaches the contrary. Go back and read your texts again. And take a candle whose flame burns bright with love which is, or should be, the great force of all spiritual inclinations'.

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Equity for Taxpayers within Australia's Retirement Savings Regime: A Dissenting Opinion*

Kerrie Sadiq

This article asks the question whether Australia's retirement savings regime, specifically the superannuation component and the attached taxation concessions, is a regime which is equitable to all taxpayers. In a dissenting opinion, it is argued that the current regime, along with the changes proposed by the Federal Government in its response to the Henry Review, does not result in a retirement savings regime which benefits all taxpayers equally. As such, it is suggested that the only way to ensure an equitable regime is to incorporate a gender perspective into public finance analysis to determine how the retirement savings policies affect women and men differently. In doing so, a specific tax policy which provides for additional, fiscally significant concessions for taxpayers who do not fit the criteria of a 'normal' taxpayer, that is a taxpayer working as an employee in a full time position for an uninterrupted 35 years, should be incorporated into Australia's current fiscal policy.

Introduction

The latest tax review, publically released by the Federal Government on 2 May 2010, was the subject of intense speculation prior to its release and fiery debate following. Known as the Henry Review, the Report contains 138 recommendations.¹ The Federal Government in its response adopted only a small percentage of those recommendations, with most either rejected outright or deferred for consideration at a later date. The Government response to the Henry Review led with the mantra 'Stronger, Fairer, Simpler' and an embodiment of the premise that 'Everybody has a stake in the tax system - a tax system where everybody pays their fair share, so all benefit.' The response continued by stating that the Government is striving to achieve a 'tax system that builds a stronger economy with more jobs and a higher standard of living. A fairer system with fewer loopholes and better rewards for work. And simpler taxes, so families and businesses spend less time bound up in red tape.'²

The Government response to the Henry Review contains proposed changes to the retirement savings regime. This article examines the proposed changes, in particular the increase in the superannuation guarantee, and asks whether those changes lead to a stronger, fairer and simpler tax regime for all taxpayers, with all taxpayers benefiting. The dissenting opinion expressed in this article is that, rather than aid in the improvement of the inequities in the current retirement savings regime as suggested by the Federal Government, the changes exacerbate those existing inequities to further disadvantage many taxpayers in their retirement years.

The Retirement Savings Regime in a Revenue Law Context

One of the key features of the Government's response to the Henry Review is the changes to Australia's retirement savings regime, and in particular what is known as the superannuation scheme. The superannuation scheme cannot be thought of in isolation, as Australia's retirement savings regime is much broader and consists of three pillars: the Age Pension; compulsory saving through the superannuation guarantee; and voluntary superannuation savings. However, in line with the current trend towards self-funded retirement, the Government response to the Henry Review focused primarily on superannuation proposals. Specific superannuation proposals include an increase in the superannuation guarantee from its current rate of nine percent to twelve percent by the year 2019-20. The superannuation guarantee will also be extended to taxpayers aged 75, increasing the previous limit by five years. Further, low income earners, that is, taxpayers

* Associate Professor Kerrie Sadiq, TC Beirne School of Law, The University of Queensland and Research Fellow, Taxation Law and Policy Research Institute, Monash University.

¹ <http://taxreview.treasury.gov.au/Content/Content.aspx?doc=html/home.htm>

² http://www.futuretax.gov.au/documents/attachments/Glossy_B5_final.pdf

with an income up to \$37,000, will benefit from a direct Government contribution of up to \$500 annually. Of the six substantive recommendations in the Henry Review in relation to the retirement savings regime, none proposed the three changes listed above and provided in the Government response. And, none of these changes are particularly novel or innovative, as assistance for self-funded retirement in Australia has always been part of the superannuation regime, with the form of assistance generally being by way of tax concessions. However, the proposed changes continue to place greater emphasis on this aspect of the retirement income system. This is being driven by a shift in the Australian Federal Government's approach to retirement income, with a greater emphasis on self-funded retirement and a move away from reliance on the Age Pension.

The fact that the Government response included changes to superannuation that were not recommended in the Henry Review is more likely to pose questions for political scientists as to Government motive and ideological aims rather than assist in a debate as to the affect of those changes from a taxpayer perspective and, as such, is merely bought to the reader's attention rather than examined in any detail. Of more significance is the debate as to whether there is greater taxpayer equity with the changes proposed. The proposition put forward by the Government in its response is that these changes will result in a retirement savings regime that is stronger, fairer and simpler. These aims can be translated into and evaluated within the framework of the design criteria of an income tax system with the key features of equity, efficiency, and simplicity.³ Generally, these criteria are applied to a tax regime which aims to serve the purpose of raising revenue to provide social and merit goods, support those for whom a free market would not otherwise provide, and correct free market imperfections. However, increasingly the tax regime is used for social engineering or social steering purposes. The retirement savings concessions fall within this latter purpose and are indicative of a tax regime which is moving from the taxation of a comprehensive tax base to one which is social welfare driven. If we accept the premise that the retirement savings initiatives implemented through the tax regime are driven by social welfare considerations, we are then able to consider the design criteria of equity, efficiency and simplicity in light of those considerations, rather than within a comprehensive tax base design. While efficiency and simplicity are ideal characteristics, equity in this context becomes crucial to ensure that all taxpayers are supported by the regime.

Generally, within a comprehensive tax base design, questions as to equity are directed to both horizontal fairness, that is, taxpayers with the same income pay the same amount of tax, and vertical fairness, that is, taxpayers with higher income pay more tax than those with lower incomes. The debate as to what then constitutes horizontal and vertical fairness when translated into broad and underlying tax policy is unlikely ever to be agreed upon, but it does at least provide a goal, albeit one which is unlikely to be achievable. However, equity in this sense within the tax regime aims at achieving fairness at the input stage of the revenue process, that is, when taxpayers are actually earning income and paying tax. A tax system which aims at achieving an equitable result from a social welfare perspective, particularly the retirement savings regime, tends to be output based. That is, while some of the concessions may be provided to, for example, superannuation contributions, due to age-based access criteria the retirement savings regime ultimately only affects taxpayers as an end product of the tax system. As such, it is arguable that equity considerations should not be undertaken at the input stage, but rather at the output or access stage of the retirement savings regime. Prior to an examination of the equity issues within Australia's retirement savings regime, the three separate pillars of the retirement savings regime need to be considered.

The Three Pillars of the Retirement Savings regime

The taxation concessions for retirement savings operate within what is referred to as the "three pillar architecture" of the Australian retirement income system.⁴ The three pillars are made up of the Age Pension, compulsory saving through what is known as the superannuation guarantee, and voluntary superannuation

³ *Reform of the Australian Tax System (Draft White Paper)*, Canberra, AGPS, 1984, 14.

⁴ For a more comprehensive discussion of the three pillar architecture of Australia's retirement savings regime see: K Sadiq, 'Tax Expenditures in Australia: The Elevation from 'Disguised' Expenditures to Architectural Pillars of the 21st Century', presented at the conference entitled *Tax Expenditures and Public Policy in Comparative Perspective*, Toronto 11-12 September, 2009. Parts of that conference paper are reproduced in this article.

savings. While the three pillars are seen as part of one system, they have developed independently and are, therefore, not seamlessly integrated.

The first of the pillars, the Age Pension, provides a guaranteed minimum income stream which is means tested on income⁵ and assets.⁶ Provided the means tests are met, it has universal coverage for residents and is payable for life, with wage indexation. It ensures support for the aged once they are no longer able to work, with eligible individuals receiving the Age Pension from 65 years of age.⁷ The maximum level of benefit is dependent on marital status: currently \$569.80 per fortnight for singles, and \$475.90 each for a couple. Additional benefits such as a Pharmaceutical Allowance, Rent Assistance, Telephone Allowance, Utilities Allowance, Remote Area Allowance, and a Pension Concession Card may also be available to qualifying age pensioners. The cost of the pension for the 2007-08 year in terms of direct expenditure was \$24.67 billion. The budgeted expenses for income support for senior pensioners for the 2008-09 year is \$28.59 billion, increasing to \$36.18 billion by 2012-13.⁸

The second pillar, the superannuation guarantee, is a compulsory scheme currently requiring employers to contribute to a fund on behalf of employees at a rate of 9 per cent. It is this second pillar which is subject to proposed amendment, increasing the contribution to 12 per cent, as a result of the Government response to the Henry Review. The key feature of the superannuation guarantee is that it is a defined contributions scheme rather than a defined benefits scheme, and as such, the level of benefit is dependent on an employee's salary or wages, the period in the workforce, and the returns on investment. The superannuation guarantee is not applied to business income, thus excluding self employed from the scheme. Also excluded from the scheme are employees with a wage of less than \$450 per month. The majority of the tax concessions apply to this pillar of the retirement income system. Specifically, contributions are taxed at a flat rate of 15 per cent, while earnings are also taxed at 15 per cent. Benefits paid from taxed funds to members who are 60 years or older are then exempt from tax. The superannuation funds themselves are entitled to dividend imputation credits as well as a one-third reduction on the capital gain from assets held for twelve months or more.

The superannuation guarantee, first introduced in 1992 with a requirement of a 3 per cent⁹ tax deductible contribution by employers on employees' wages or salary, gradually increased over a ten-year period to the current rate of 9 per cent. The government motivation driving the introduction of the guarantee was the so called life-cycle 'myopia' of the population in failing to save adequately for retirement because it was too far in the future.¹⁰ However, there are clearly age-pension implications as well as flow on effects on decisions to save due to the tax treatment of those savings. While the cost of the superannuation guarantee is theoretically imposed on the employer, in practice it is the employee who bears the cost through lower take home remuneration. The program, with a contribution rate of 9 percent, will mature in 2037 when employees retire after a full working life of 35 years. It is predicted at this point that there will be a shift from a system where superannuation supplements the Age Pension, to one where the Age Pension supplements superannuation.¹¹ Given the proposed increase to a 12 percent guarantee levy will not commence until 2019-20, this program would not reach maturity until 2054.

The third pillar of the retirement income system is voluntary saving for retirement. This part of the system provides 'tax-assistance' to those who voluntarily save for their retirement. The tax concessions which apply to

⁵ The maximum pension is reduced where the pension recipient earns more than \$142 per fortnight.

⁶ The maximum pension is dependent on assets owned by the taxpayer/s. The asset test is dependent on various factors such as home ownership, and marital status.

⁷ Although this is set eventually to increase to 67 years, beginning in 2017.

⁸ Australian Government, *Portfolio Budget Statements 2009–10 Budget Related Paper No. 1.7 Families, Housing, Community Services and Indigenous Affairs Portfolio*, Canberra, 12 May 2009, p91.

⁹ This was increased to 4 per cent for employers with an annual payroll of more than \$1 million.

¹⁰ Although it is arguable that people are still disengaged with the retirement income system. As at 30 June 2008, there were 6.4 million lost accounts and approximately another 9 million inactive accounts: Australia's Future Tax System, *The Retirement Income System: Report on Strategic Issues*, May 2009, p21.

¹¹ *Australia's Future Tax System Retirement Income Consultation Paper*, December 2008, 7.

this third pillar range from a co-contribution scheme for low income earners and means tested offsets for contributions to spouse accounts, to deductions for contributions by self employed with the same tax rates applying under the second pillar. However, in practice, voluntary savings are usually made by higher income taxpayers, for example, through salary sacrifice. Access to salary sacrifice may in itself be limited to higher income earners as many low or middle income employees do not have employers who offer salary sacrifice. More broadly, this third pillar may also include non-superannuation savings such as deposits, share ownership, and real estate investments whether for rental or home ownership.

In summary, the Age Pension provides a guaranteed minimum income, while the second and third pillars provide an income dependent on the amount invested and returns from those investments. Already, many of the inequities in the current regime and proposed changes may be noticeable to the reader. These inequities are now considered within the context of an output based analysis.

An Output based Analysis and the Illogical Inequities

Some may perhaps argue that equality and, therefore, equity for women and other minority groups has been achieved in the taxation regime. After all, all taxpayers are taxed at the same rate on income, and in the context of the retirement savings regime all taxpayers have the same entitlement. Provided certain, arguably non-discriminatory, thresholds are met all taxpayers are entitled to the superannuation guarantee as well as any tax concessions that attach to both the guarantee and voluntary contributions. All taxpayers are entitled to the low income earners co-contribution and there is the specific proposal for a low income earners direct contribution of \$500. Further, all taxpayers are entitled to the pension as a safety net. However, arguing that these initiatives, by being available to all taxpayers results in equity, fails to take into account that the construction of these incentives is based on the *normal* taxpayer being the full time, lifetime, working male. Within a taxation framework, equity is assumed to be achieved by allowing the same concessions at the input stage. That is, all taxpayers are afforded concessions when earning income and paying taxes. However, when considering whether equity is achieved when undertaking an output based analysis a very different story emerges.

Previous studies into the gender affects of the retirement savings regime have all generally concluded that the policy shift from a reliance on the age pension to the superannuation regime has resulted in men receiving greater benefits than women.¹² Given the ultimate retirement savings is dependent on contributions and earnings, there are likely to be significant differences between a male and female superannuation fund with women on average having lower earnings than men as they are likely to have more career interruptions,¹³ and are more likely to work part-time. It is generally accepted that women are by and large economically unequal to men.¹⁴ Consequently, the ability of women to save and contribute to superannuation is limited compared to men and women, therefore, do not benefit from the concessions to the same extent as men. Added to this category of taxpayers who may not obtain the full benefit of the concessions are individuals with broken work patterns (intermittent workers, carers and individuals with disabilities), those with income less than \$450 per month and the self-employed.¹⁵

Despite equal pay requirements, studies indicate that Australian women in full-time paid work still earn on average only 83 percent of what men earn, with the average superannuation payout to a woman projected to be \$150,000, or half of the average payout to a man in 2010-11.¹⁶ This is generally due to the difference in pay between occupations and industry sectors. For example, the child care industry, which predominantly employs women, is a low paying industry sector, as is nursing and teaching. The proposed changes to the retirement

¹² See Sharp, R and Austen, S 'The 2006 Federal Budget: A Gender Analysis of the Superannuation Taxation Concessions' *Australian Journal of Labour Economics* (2007) 10(2) for a consideration of prior studies.

¹³ For a discussion of the affects of unpaid care work and superannuation see Smith, J, 'Time Use Among New Mothers, The Economic Value of Unpaid Care Work and Gender Aspects of Superannuation Tax Concessions' *Australian Journal of Labour Economics* (2007) Vol 10, No 2.

¹⁴ This is generally true of most jurisdictions. For example, see <http://womenscourt.ca/wp-content/uploads/2009/07/Symes.pdf> for the Canadian perspective.

¹⁵ *Australia's Future Tax System Retirement Income Consultation Paper*, December 2008, 16.

¹⁶ <http://www.equalpayday.com.au/>

savings regime, with an increase of 3 percent in the superannuation guarantee, no doubt means that many taxpayers will have increased retirement savings. This does not necessarily mean that all taxpayers will enjoy a *better retirement*, nor does it equate to equity within the retirement savings regime. The Federal Government suggests that the changes mean that an average worker now aged 30 will have an extra \$108,000 in their retirement superannuation balance. While a female aged 30 now on average weekly earnings with a broken work pattern will have an extra \$78,000 upon retirement.¹⁷ In essence, under the proposed changes, the *average* female worker will be \$30,000 worse off than the *average* male worker.

Gender based inequities are not the only inequities that exist. An alternative approach to considering retirement savings concessions is to evaluate them as spending programs. The superannuation concessions (reduced tax rates) are known as tax expenditures and can be contrasted with direct expenditures. Increased reliance on tax expenditures to fund retirement indicates less reliance on direct spending in the form of pensions and greater reliance on spending through the revenue process. Once retirement savings concessions are considered as spending programs, several obvious illogical consequences become apparent. Principally, it becomes apparent that low to medium wage earners will receive little or no assistance, while those in the top income bracket will receive on average, more than \$11,000 per annum.¹⁸ For those earning over \$180,000, which is the top marginal tax bracket, the concession is equivalent to a rebate of 31.5 per cent. For a low-income earner with earnings under \$34,000 per year and, therefore, in the 15 per cent individual tax bracket, there is no concession.

Studies indicate that based on the 2008-09 tax rates, it is estimated that around 2.4 million individuals do not receive a personal income tax benefit or receive minimal income tax benefit of 1.5 per cent from the tax rate applied to their concessional superannuation contributions.¹⁹ These numbers only take into account those who have a taxable income in the relevant year, and do not account for individuals out of the workforce. Further, many of the tax concessions on retirement savings flow to those who are on higher personal tax rates. This has been increasing in recent years as personal income tax rates have reduced. It is estimated that for the 2005-06 income year, that 5 per cent of individuals accounted for over 37 per cent of concessional superannuation contributions.²⁰ These 5 per cent of individuals have higher salaries with the subsequent superannuation guarantee contribution being larger, and they have greater capacity for voluntary contributions. These taxpayers are also likely to receive greater benefits from the concessions which apply to earnings as they have a larger pool of assets to which these concessions apply. Arguably, some of these benefits are mitigated by the Age Pension means test, co-contribution scheme and tax concessions aimed at low and middle income earners. However, the fiscal implications of the tax concessions would indicate that the higher income earners, generally men, still benefit considerably more.

To counter some of these effects, the government superannuation co-contribution was introduced.²¹ However, there is a low take-up rate with approximately 1.4 million individuals receiving a co-contribution, representing around 20 per cent of those individuals who would be eligible if they contributed.²² Further, the contribution is capped at \$1,000, an amount unlikely to significantly increase the retirement savings of taxpayers. This position is unlikely to improve in the near future as the government in the 2010-11 Federal Budget announced that, from 1 July 2010, the maximum co-contribution that is payable on an individual's eligible personal non-concessional super contributions would remain at \$1,000 and the thresholds would be frozen for 2010-11 and 2011-12 at \$31,920 (the lower income threshold) and \$61,920 (the higher income threshold).

¹⁷ <http://www.futuretax.gov.au/pages/FairerSuperannuation.aspx>

¹⁸ Spies-Butcher, B, and Stebbing, A, *Reforming Australia's Hidden Welfare State: Tax Expenditures as Welfare for the Rich*, Centre For Policy Development, Occasional Papers – Number 6, February 2009, p3.

¹⁹ Henry Review, *Architecture of Australia's Tax and Transfer System*, 6 August 2008, p244.

²⁰ *Australia's Future Tax System Retirement Income Consultation Paper*, December 2008, 22.

²¹ Post-tax contributions are matched at \$1.50 for every dollar up to a maximum contribution of \$1,500. The maximum contribution is available for individuals with total income below \$30,342 and phases out at the upper threshold of \$60,342 for the 2008-09 income year.

²² Henry Review, *Architecture of Australia's Tax and Transfer System*, 6 August 2008, p245.

The self-employed in Australia, representing approximately 12 per cent of the Australian population, are currently not included in the superannuation guarantee, and while they may voluntarily save for retirement,²³ thereby benefiting from the concessions through the deduction for contributions and concessional tax rate of 15 per cent on contributions and earnings, it is likely that their decisions will be influenced by factors such as earnings and capital flow. Further, while there are tax concessions upon the sale of a business these may not benefit those self employed who have minimal business assets to finance their retirement.

Conclusion

A suggested way to address these inequities is to ensure that there is a gender perspective in public finance analysis to determine how the retirement savings policies affect women and men differently.²⁴ Gender responsive budgeting, taking into account Australia's aging population, and the trend for women to have a longer expected life span than men would enable some of the issues raised above to be addressed. Incorporating these considerations with a specific tax policy which provides for additional, fiscally significant concessions for taxpayers who do not fit the criteria of a *normal* taxpayer, that is, a taxpayer working as an employee in a full time position for an uninterrupted 35 years, would enable many of the inequities raised in this article to be addressed. Unfortunately, the proposed changes announced by the Federal Government in its response to the Henry Review fail to do this.

²³ Approximately two thirds of owner-managers in unincorporated enterprises make superannuation contributions: *Australia's Future Tax System Retirement Income Consultation Paper*, December 2008, 17, quoting ABS 2008.

²⁴ See Sharp, R and Austen, S 'The 2006 Federal Budget: A Gender Analysis of the Superannuation Taxation Concessions' *Australian Journal of Labour Economics* (2007) Vol 10, No 2, for discussion on the integration of a gender perspective into public finance.

The Quiet Reality

Rod Morgan

Introduction

One of the greatest tragedies of our current criminal justice system is the extreme rate of over representation of Aboriginal and Torres Strait Islander people in correctional and detention centres.

With rates of Indigenous people in custody up to 50% in some parts of the country the ultimate aim of a justice system should be to reduce that to the proportion of the population our first Australians make up which currently stands at around 3%.

There is of course a significant historical and cultural background that underlies the present situation. The understanding of which is a crucial starting point for any reform that might effectively address it.

This paper does not propose to set out all the research and statistics in this area or explain the history and culture but instead sets out some ideas that at least might start to move the numbers in the right direction.

The Queensland government entered into a Justice agreement to reduce over representation by 50% by the year 2011. This has clearly and dismally failed in spite of a whole of government commitment to achieving this goal.

The current approach does not work and cannot be ignored while such high numbers of people in custody result in a self destructive cycle of dysfunction for individuals, their families, their communities and our society as a whole.

The current approach

One of the essential considerations for a justice system in sentencing offenders is the need to protect the community from offending behaviour. This is done by balancing the need to correct the underlying causes of the behaviour by a rehabilitative approach with the punishment or deterrence aspect.

The deterrence aspect of sentencing is adopted to send a message to the community and particularly potential offenders that such behaviour will result in significant suffering on their part usually by way of a term of imprisonment. This is intended to stop offenders and others from engaging in similar offending behaviour.

Unfortunately a critical component of this approach does not work namely that sentencing an offender to a term of imprisonment does not reduce recidivism as confirmed in a large number of studies and anecdotal experience. Instead a cycle of behaviour often results where offenders fall into the same patterns that existed prior to serving a term of imprisonment which results in them returning to prison for similar or sometimes more serious offences.

Prison does not work as a deterrent in this situation but in fact offenders often become institutionalised and cannot function properly in a community they no longer have any skills for surviving in. This is particularly so where a cycle of substance abuse addiction is a factor and the environment an offender is released into is one that is populated by friends and family that are also heavily engaged in offending behaviour.

Other cultural considerations are a significant factor for Aboriginal and Torres Strait Islander offenders where supporting and living with extended family members is a crucial part of people's identity. Turning your back on the negative influences of family members can be even more difficult because of the importance of connection with family which makes breaking the cycle even harder.

All too often exposure to a brutal prison system only results in offenders being released into the community with even more deeply entrenched problems and better knowledge of offending techniques with greater networks of people involved in offending behaviour.

The cost of constant supervision and maintenance of people in prison is also extreme. It would be hoped that for such an expensive outlay some benefit for the community would flow with better behaviour from offenders and reduced risk to the community of harm. This does not appear to be the case currently.

Of course there are situations where young offenders or offenders with limited criminal history receive a sentence of imprisonment. In this instance the risks of institutionalisation and a cycle of criminal behaviour developing is less. It is exactly in these circumstances that an intensive approach to divert offenders away from contact with prisons should be adopted.

A New Approach

The application of restorative justice principles focuses heavily on the rehabilitative aspects of sentencing. This is usually done with the participation of victims of crime in a mediation or conferencing process. Although this approach is a positive and effective way of identifying underlying causes of offending behaviour it does not specifically address those issues in the lives of the people subject to them.

An approach that utilises restorative justice principles in conjunction with intensive support to overcome the issues identified as a part of that process is potentially the most effective way of bringing about change and breaking the cycles of recidivism.

There will always still be circumstances where offending behaviour is so serious and dangerous to the community that individuals need to be incarcerated for the protection of innocent people. This does not mean to say that the time spent in custody cannot be effectively utilised to make progress overcoming the causes of criminal behaviour.

Exceptions will exist where rehabilitation is simply not effective and offenders will have exhausted all options to address their issues leaving no alternative but serving ever increasing terms of imprisonment.

What can be done however is that intervention can be commenced while an offender is in custody identifying issues and creating plans to address those issues that will be significantly in place upon the person's release.

Examples include arranging accommodation that is safe and avoids contact with negative influences. This is particularly so for someone struggling with homelessness.

Making contact with and meeting community mental health workers while in custody that will also provide support on the outside is another example. Making the same contact with drug and alcohol counsellors, building a rapport and trust based on respect that can be carried through to the community where the ultimate tests to sobriety will present themselves. These networks of support created in custody and applied in the community will give offenders the best possible chance of success in accessing help when they need it most.

Accessing men's or women's groups to work through issues of anger management and domestic violence is another critical step in the right direction. Men's and women's groups also play a massive role in awakening cultural identity and pride that can be carried through in positive community involvement by participants such as mentoring young people.

It is mentoring however that is at the core this new approach. A mentor is necessary to bring it all together. The mentor would start building a relationship in custody with an offender that continues upon release.

The mentor would assist a person released into the community to attend appointments with various agencies to access services as well as with filling out forms and making financial arrangements.

It is tasks such as these that seem simple to most people and are expected by most government agencies that are daunting for someone coming directly from a prison. Add to this significant learning difficulties with literacy and numeracy and the tasks become overwhelming.

For Indigenous people attending the offices of a government agency can in itself be an intimidating prospect. Efforts should be made to ensure that Indigenous workers are employed to work with offenders so that

cultural barriers can be broken down. A positive outcome of this approach is that offenders who have successfully integrated back into the community and achieved some success in their own rehabilitation could gain employment assisting others to overcome similar hurdles.

Essentially a mentor would be available to assist and guide an offender as required through the logistical maze of accessing services already available to them but that too often do not meet their target due to the easier option of falling back into old habits. Ideally a mentor would also be available after hours on an on call basis so that in times of crisis an offender has someone positive to rely on when they need it most.

A mentor could also identify the need for family or parenting counselling that potentially works with the whole extended family outside the parameters of the criminal justice system.

Finding effective ways of keeping young people engaged in education is probably the most crucial and effective way of preventing future anti social and ultimately offending behaviour. One option is to provide meals at school to young people which both encourages attendance as well as meets a fundamental need that is sometimes lacking.

Sentencing

For people charged with summary offences especially what are commonly described as street offences the option should exist for people to choose to attempt to resolve the matter by way of justice mediation.

If an offender is able to make up for the harm caused to the victim of an offence through a binding agreement the matter should not proceed further. This directly involves the victim of an offence in the process and allows for closure on their part as well as insight into the personal circumstances of the offender.

The offender will also gain insight into the impact of their behaviour on others and have to take responsibility for their actions by facing up to the victim of their crime in the cold hard light of day.

A police officer could represent the State where no specific victim exists and the damaging impact of anti social behaviour on the community can still be communicated clearly. Linking an offender with a mentor can still occur at this stage.

For more serious matters or where an offender is in prison video messages can be played to and from each party overcoming any concerns about a face to face meeting. Even this would be closely monitored for appropriateness by a trained mediator. The Court should have this sentencing option available to it even in the superior jurisdictions.

If the matter cannot be resolved or the person charged chooses to contest the charge it would proceed in the usual way. However, further sentencing options should be considered that emphasise linking the offender with a mentor to access services with prison being an option truly of last resort.

Terms of imprisonment should not be imposed for many summary offences at all especially where poverty and homelessness are underlying features of the offending behaviour.

An intermediate alternative option to imprisonment should exist such as an involuntary treatment camp where offenders are isolated in remote areas and intensive programs are applied to address underlying issues such as substance abuse. A mentor could also be linked with an offender at this stage either in person or by video conferencing from the centre where they intend to reside upon release.

This option could be particularly relevant and useful for Indigenous offenders where cultural issues can be addressed by implementing men's and women's groups. This also assists with spiritual and cultural healing that can be carried through back into the wider community.

A shift of focus away from traditional deterrence options to intensive rehabilitation options with the support of a mentor will still have a significant deterrent aspect for offenders. This is due to them having to confront

the extremely difficult task of facing up to their deeply entrenched demons without having the option of cycling through a system that demands no engagement or investment on their part.

Of course there will be offenders that refuse to engage with mentors who will leave the Court no option but to impose terms of imprisonment. Even these offenders can be engaged while in custody with compulsory programs that carry sanctions for non compliance.

Breaches of bail by failing to appear in court are another significant issue for the Aboriginal and Torres Strait Islander people. A cultural approach to time exists that is different than that of the wider community so that people will miss court dates without any deliberate intention of breaching a court order or fleeing the jurisdiction. These circumstances should not result in bail being refused but instead a circumstance of aggravation should exist where it can be proved that deliberate contempt of a court order occurred.

The Murri Court is another initiative that actually works in allowing offenders to engage in the process by involving elders who, through the presiding Magistrate, hold people responsible for their actions and link them with local justice groups to address issues in a culturally appropriate and effective way. This initiative should be wound out to wherever Indigenous Australian communities exist and elders are available to support it.

The Reality

The reality for Indigenous Australian communities is that a level playing field does not exist in that dysfunctional home environments are all too common. Trying to break free of past patterns of behaviour becomes a monumental task in that context.

Start with an understanding of why people are in the circumstances they find themselves in and then with compassion and relentless determination go about providing alternative options that have meaning in their lives.

Respect for individuals to choose and make their own destiny is the only way. Support when it is needed through mentors and education that promotes pride in a vibrant living culture bring about change.

Another reality is that rehabilitative options are not politically popular because there is a perception that it is soft on crime. The fact that it is massively more cost effective, achieves reduction in recidivism and protects the community from harm in the long run do not appear to be convincing to the electorate. An investment in correcting public perceptions would be to everyone's advantage.

A "what works" approach is essential as the legacy of generations of pain for Indigenous Australians continues to manifest in cycles of self destruction.

To do nothing and allow the current status quo to continue is un-Australian.

Judicial Integrity and Dissenting Court Opinion

Taiji Watanabe

I. Introduction

Society that appreciates democracy deeply rooted in freedom of speech cannot sustain its existence without independence of the judiciary. Although the Australian Constitution does not provide a right to freedom of speech expressly in writing, the High Court from time to time has assured its existence as implied rights.¹ When one relates freedom of speech to the judiciary, an important aspect emerges from the fact that judges unreservedly express individual judicial opinions concurring with or dissenting from the majority. There are no express provisions in the Australian laws to protect the free speech of judges. Free speech has been implicitly ensured by the doctrine of separation of powers in the Constitution that assures the judicial functionalities are independent of the legislative and executive branch of the government.² Although free speech where individuals express their own opinions without restraints may connote a utopian style ideal society, individual judicial opinions are not necessary harmless. Disharmony would overshadow the doctrine of stare decisis. Non-uniform court opinions may have costs by themselves by creating uncertainty in ascertaining a binding law, particularly when the majority opinions are so diverse, because of a strict rule of the doctrine of precedent followed in common law courts.³ As explained in *Garcia v National Australia Bank Ltd*,⁴ when judges are deciding a case, the ascertainment of the binding rule of a judicial decision should be derived from the reasons of the judges agreeing in the order disposing of the proceedings upon a matter in issue in the proceedings and upon which a decision is necessary to arrive at that order.⁵ Uncertainty would be less problematic for dissenting opinions since the opinions of judges who dissent from a court's orders are disregarded no matter how valuable their reasons may be.⁶ This rule of *ratio decidendi* makes us wonder why judges write dissenting opinions even though their opinions play no role in deciding on the issues presented in courts.

Writing of dissenting opinions is not a universal rule. A judge may dissent but not necessary write a dissenting opinion. Dissenting opinions are distinguished from an act of dissent that a judge is in disagreement with the majority of the court, in that dissenting opinions necessitate the formulation of disagreement and presentation of reasons.⁷ It is a well known fact that the Judicial Committee of the Privy Council had not provided dissenting opinions for a long time as the Privy Council was expected to provide an opinion to the king and the king could not be misled by different opinions.⁸ Chief Justice John Marshall during his tenure in the United States Supreme Court insisted on unanimous opinions among his colleagues in order to establish the authority of the United States Supreme Court.⁹

II. Dissenting Opinions and Jurisprudence

¹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1993-1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1993-1994) 182 CLR 211; *Cunliffe v The Commonwealth* (1993-1994) 182 CLR 272; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.

² *R v Kirby; Ex parte Boilermakers' Society of Australia* [1965] HCA 29; (1956) 94 CLR 254, *Grollo v Palmer* (1995) 184 CLR 348.

³ See, eg, *Paykel v Federal Commissioner of Taxation* (1994) 126 ALR 248 in which Heerey J expressed difficulty of ascertaining the ratio in *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 as a binding authority because of so diverging views in the majority judgments.

⁴ (1998) ALR 614.

⁵ *Garcia v National Australia Bank Ltd* (1998) ALR 614, [56] (Kirby J).

⁶ *D'orta-Ekenaike v Victoria Legal Aid and Another* [2005] HCA 12; (2005) 214 ALR 92, [245] (Kirby J).

⁷ Julia Laffranque, "Dissenting Opinion and Judicial Independence," (2003) VIII *Juridica International*.

⁸ Ibid.

⁹ Andrew Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia," (2003) 29 *Melbourne University Law Review*.

Now I ask the question again; why do judges write dissenting opinions? Functional analysis asserts that dissenting opinions facilitate progression and changes in the judicial branch of government through stimulating clearer judgment writing and majority views, providing an opportunity for the development of law and its advancement over time, and contributing to the integrity of judicial process and its independence in discharging the court's functions,¹⁰ and more importantly judicial opinions, particularly that of the High Court, always manifest political messages directly or indirectly. Among these functionalities, contributing to the integrity and independence of judicial process is the one I would like to explore in investigating how political messages are manifested. The presence of dissenting opinions ensures the validity of judicature in common law jurisprudence in that the authority of a judicial decision extends beyond the issues before the court and yet the doctrine of precedence does not depend on solely on the authoritative utterance of a general rule of the majority opinions.¹¹ The importance of authoritative utterance being beyond the majority opinions becomes apparent when we think of the development of policy-oriented judicial responses to discretionary statutory provisions where judicial interpretation of a statutory provision is required. Sir Owen Dixon pointed out that courts owe a duty to ensure unity in interpretation and application of law throughout Australia as governed by a single legal system.¹² Dissenting opinions sharpen the majority view and assist in bringing about more conscious and coherent administration of the law without creating too much uncertainty as may be created by different majority, and reflect the social value to which the community wishes to adhere. Issues in *Kable v Director of Public Prosecutions (NSW)* ("Kable") illustrate this point.¹³ The case involved issues of free movement of individuals and community protection under the Constitution of Australia.¹⁴ The majority ruled that State courts must not be incompatible with Chapter III of the Constitution for judicial independence when appeals from these State courts lie to the High Court.

Kable is a seminal case which limits a State Parliament's legislative power to interfere with Chapter III State courts, in particular, the judicial independence of the State Supreme Courts. Six judges of the High Court each wrote their own opinion. Brennan CJ and Dawson J dissented. The majority, Toohey, Gaudron, McHugh, and Gummow JJ wrote separate opinions. The point of law before the court was whether the provisions of Chapter III of the Constitution invalidate State courts when a State constitution allows investment of executive power on State courts and a State Parliament invests executive power in a State Supreme Court accordingly. The issue before the judges revolved on the proposition, "the Commonwealth must take a State court as it finds it", inferred from s 77 of the Constitution. The minority judges took a narrow view of the constitutional interpretation while the majority expanded the view to advance the integrity of a uniform legal system across States and Territories. Justice Dawson in dissent recognised that the New South Wales Constitution allows the State Parliament to vest non-judicial power in the State courts and concluded by reference to s 77 (iii) of the Constitution that there is no incompatibility with Chapter III of the Constitution because that chapter accepts those courts as existing institutions which may be invested with federal jurisdiction notwithstanding that they are not subject to any doctrine of separation of powers.¹⁵ Chief Justice Brennan expressed a similar view with reference to the incompatibility qualification of *Grollo v Palmer*,¹⁶ that it applies to judges of a Chapter III Court only and has no place in the context of possible limitations on the power of a State Parliament to invest State courts with non-judicial powers or the powers of the Commonwealth Parliament to select whichever State

¹⁰ Ibid.

¹¹ Bruce Chapman, "The Rational and the Reasonable: social Choice theory and Adjudication," (1994) 61 *University of Chicago Law Review*, 41 -122.

¹² Owen Dixon, "Sources of Legal Authority," (1965) 198 *Jesing Pilate*, 201.

¹³ *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.

¹⁴ Shortly before the appellant, Mr Gregory Kable, was released from the prison after serving the sentence for a manslaughter, the New South Wales Parliament passed the Bill for *Community Protection Act 1994 (NSW)* and its amendment that aimed to detain Mr Kable singlehandedly in a prison without commission of crimes on the application in the Supreme Court of New South Wales by the Director of Public Prosecutions (DPP) to protect the community by the preventive detention. The DPP successfully commenced proceedings and the appellant was incarcerated in a prison for further six months after his release. Mr Kable unsuccessfully appealed against the decision of the Supreme Court of New South Wales which was subsequently heard in the High Court.

¹⁵ Ibid n 12, [39] (Dawson J).

¹⁶ [1995] HCA 26; (1995) 184 CLR 348, 364-365.

courts it sees fit to invest with federal judicial power.¹⁷ Justice Gaudron clarified a misconception arising from an often-stated unqualified constitutional proposition, “the Commonwealth must take a State court as it finds it”, of s 77 of the Constitution by distinguishing the dictum of Griffith CJ in *Federated Sawmill, Timbryard and General Woodworkers’ Employers’ Association (Adelaide Branch) v Alexander*,¹⁸ a case involving federal jurisdiction and pointed out that his Honour said that “when the Federal Parliament confers a new jurisdiction upon an existing State Court it takes the Court as it finds it, with all its limitations as to jurisdiction, unless otherwise expressly declared” which does not refer to judicial power. Justice Gummow further refined the distinction between jurisdictional power and judicial power by contrasting the dictum of Justice Brennan (then at that time) in *Mellifont v Attorney-General (Qld)*,¹⁹ that the High Court assumes the appellant jurisdiction from orders made by the Court of Appeal on the matters arising from ss 73 and 74 of the Constitution and said:

[A]s was accepted in *Mellifont* ... if a State court be invested with ... a non-judicial power, no exercise of that power can found an appeal to this Court ... as this Court has no power to make a non-judicial order in place of any non-judicial order which the State court ought to have made at first instance. ... [A]s both a practical consideration and as a conclusion drawn from the structure of the Constitution, ... the institutional impairment of the judicial power of the Commonwealth inflicted by a [State] statute ... upon the judicial power of the Commonwealth is not to be confessed and avoided by ... segregation of the courts of the States into a distinct and self-contained stratum within the Australian judicature.²⁰

III. JUSTICE KIRBY’S DISSENT IN GYPSY JOKERS

10 years after *Kable*, the High Court was again asked to revisit the *Kable* doctrine in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police (“Gypsy Jokers”)* for which the Court was asked whether a “removal of fortification order” made under section 76 (2) of *Corruption and Crime Commission Act 2003 (WA)* (“Act”) is repugnant under Chapter III of the Constitution.²¹ The case was decided by 6 to 1 in favour of Commissioner of Police by affirming that s 76(2) of the Act was constitutionally valid.²² Attorneys-General of the Commonwealth, States²³, and Northern Territory have joined the proceedings as interveners. A peculiar nature of the Act is that s 76(2) restricts the release of information which has been determined as confidential by the Commissioner of Police of Western Australia and the court has to accept it without exercising its own decision about the matter of confidentiality. The appellant argued that no exercise of judicial power on determination of confidentiality would infringe the independence of the judiciary under the Constitution. The case also involved an issue of the effect of restriction on publication of information in reasons for judgment. A criticism advanced in dissent pointed out the inconsistent approach the members of the majority took by reading down s 76(2) of the Act so as to avoid inconsistency with the *Kable* principle,²⁴ and argued the *Kable* principle has not attracted a substantial application, having never been applied since *Kable* itself.²⁵ The function of the High Court in constitutional adjudication is to give the proper meaning to public values being

¹⁷ Ibid n12, [16] (Brennan CJ).

¹⁸ (1912) 15 CLR 308.

¹⁹ [1991] HCA 53; (1991) 173 CLR 289, 313-314.

²⁰ Ibid n 12, [68] – [71] (Gummow J).

²¹ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4.

²² Gleeson CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ formed the majority and Kirby J dissented. Gleeson CJ and Crennan J wrote separate concurring opinions. Gummow, Hayne, Heydon, and Kiefel JJ wrote a joint opinion.

²³ New South Wales, South Australia, Victoria, Queensland.

²⁴ See Ibid n 21, [79] (Kirby J).

Kirby J criticised the inconsistency of oral arguments and written submissions. The proceedings were preceded with acknowledgement that the interpretation of s 76(2) either expressly or implicitly obliged the Supreme Court to confirm to the decision of the Commissioner. However, the counsel for the respondent advanced a that s 76(2) renders unexaminable by the court of the confidentiality determination made by the Commissioner of Police (See [2007] HCATrans 550 at 63).

²⁵ Ibid n 21, [53] [83] (Kirby J).

derived from the constitutional text, read in the light of past authority, legal history and considerations of legal principle and policy, and a judge tests each case by reference to its possible implications for foreseeable future controversies and in the context of the overall operation of the system of government.²⁶ The *Kable* principle as drawn by the High Court from the Constitution demands judges give meaning and effect to public values.²⁷ This view clearly illustrates the role of dissenting opinions in drawing out the political elements implicitly contained within them. It is noted in the dissenting opinion that governments and parliaments in Australia occasionally attempt to use the judicial independence of courts in the pursuit of objectives which legislators deem to be popular and sometime conceal their decisions in the impartiality of judicial action that puts courts on a high alert when novel arrangements are introduced which may impinge on the judicial process.²⁸

VI. Conclusion

Judges adjudicate disputes among individuals, between individuals and governments, and between constituent parts of the federation.²⁹ And judicial power involves application of relevant law to facts as found in the proceedings conducted in accordance with the judicial process.³⁰ Fairness in judicial process requires the publication of dissenting opinions if judges disagree with the majority. As noted by Justice Kirby in *Gypsy Jokers*, an attempt by legislators in pursuant of popularity among constituents may lead to the conception that the law may lack currency and become obsolete or distant from reality. Judges as members of the community may be obliged to express their own opinions to keep the law and its operation intact with the wishes of the community but not that of the legislators.

“[R]eference to possible implication for foreseeable future controversies”³¹ indicates the important role of political statements implicitly or explicitly appearing in dissenting opinions to ensure the judicial independence for administration of fair and just justice. Thus dissenting opinions become a social device designed to protect democracy and the independence of the judiciary and provide an opportunity to voice under the doctrine of the separation of powers to governments.

²⁶ Ibid n 21, [46] – [47] (Kirby J).

²⁷ Ibid n 21, [74] (Kirby J).

²⁸ Ibid n 21, [51] (Kirby J). Footnotes omitted.

²⁹ Ibid n 12, [103] (Kirby J).

³⁰ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 (Gleeson CJ, Garudron, McHugh, Gummow, Hayne, and Callinan JJ).

³¹ Ibid n 12, [47] (Kirby J).

Queensland's planning law – a Lost opportunity to deliver justice to native title holders – or is it?

Paul Smith

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 - (a) Existing use rights under the *Local Government Act 1936*
 - (b) Existing use rights under the *Local Government (Planning and Environment) Act 1990*
 - (c) Existing use rights under the *Integrated Planning Act 1997* and the *Sustainable Planning Act 2009*
 - (d) Summary of existing use rights

1. Background

'Native title' describes the rights and interests of Aboriginal peoples and Torres Strait islanders derived from their traditional laws and customs.

The High Court, in *Mabo v Queensland [No. 2]*¹ (*'Mabo No 2'*), held that Australia's common law recognises a form of native title. The *Native Title Act 1993* (Cth) (*'NTA'*) was introduced with an expectation 'to do something real and material about a genuine basis of reconciliation.'²

NTA has been criticised by many, including the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, who in 2009 said; 'Every year, I write a Native Title Report which lays out the truths about how the system continues to grind along excruciatingly slowly and how courts consistently adopt a narrower and more limited interpretation of what native title is ...'³

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination says: 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... rights' including 'The right to equal treatment before the tribunals and all other organs administering justice.'

In this paper I identify, in general terms only, native title rights and interests that may have survived on particular State Crown land. I then discuss how those rights and interests may be affected by local government planning schemes and how, if at all, the *Sustainable Planning Act 2009* (*'SPA'*) assists in doing something real and material about a genuine basis of reconciliation, in promoting an understanding of what native title is, in promoting equal treatment of native title holders by local governments and before the Planning and Environment Court (Qld) and in administering justice to native title holders.

2. Summary and Conclusions

(a) Past Queensland planning schemes may have extinguished native title

Prior to NTA,⁴ native title was liable to be extinguished by local government planning schemes where there was a 'clear and plain intention'⁵ to do so.

If previously extinguished, native title cannot now be revived.⁶

A planning schemes made under legislation prior to the introduction of the *Integrated Planning Act 2009* (*'IPA'*)⁷ may have prohibited activities from being carried out on land or water. The activities prohibited may have included native title rights and interests.

¹ *Mabo v Queensland [No.2]* (1992)175 CLR 1.

² Commonwealth, Parliamentary Debates, House of Representatives, 22 December 1993, 4541 (Paul Keating, Prime Minister).

³ Calma, T, 2009, 'Native Title in Australia: Good Intentions, a Failing Framework?', Australian Law Reform Commission, Issue 93.

⁴ If the making, amendment or repeal of the planning scheme took place on or after 1 July 1993 and otherwise complies with the definition of "future act" in NTA s233 it will not have extinguished native title. Further if a planning scheme introduced after the commencement of the *Racial Discrimination Act 1975* (Cth) discriminated against Aboriginal Peoples or Torres Strait Islanders in breach of s10(1) of the Act, it will not have affected native title rights and interests.

⁵ *Mabo v Queensland [No. 2]* (1992) 175 CLR paras 63 – 64 (Brennan J). Also see *Wik People v State of Queensland and Others* (1996)141 ALR 129, per Toohey J at 190 where he said:

'Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. ...'

⁶ *Native Title Act 1992* s 237A: 'The word **extinguish**, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment, the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.'

Some planning schemes introduced under legislation prior the introduction of the *IPA* may have applied to State Crown land and, if so, they had the potential of extinguishing native title.

Most planning schemes introduced under *IPA* and *SPA* will have applied to all State Crown land. However such schemes will not have extinguished native title rights and interests⁸ but may have regulated them.

In short, but for the existing use right provisions of Queensland's planning laws, some past planning schemes may have had the effect of extinguishing native title rights and interests. However a planning scheme will not have extinguished native title rights and interests when the native title holders have lawfully exercise those native title rights and interests continuously from a time before the commencement of the planning scheme.

(b) Native title holders are not required to be consulted in the plan making process

Even though native title holders⁹ have an interest in the development and use of their traditional lands, there is no specific reference to native title holders in the plan making process of *SPA* or in any regulations or guidelines made under *SPA*.

Native title is not identified as a matter of State interest for the purposes of *SPA* nor is native title mentioned in the Queensland Planning Provisions released by the Minister in accordance with *SPA*.¹⁰

Local Governments are responsible for consultation with native title holders in the same way they are responsible for consultation with other members of the community. The State gives no direction of guidelines specifically relating to native title.

(c) Native title holders are not involved in the development application and approval process

SPA gives persons entitled to receive the rent for land, defined as an "owner"¹¹ the right to be involved in the development approval process on the land the subject of the application and on adjoining land.¹²

Because native title holders have an interest in land, derived from traditional laws and customs, which is different to the interest held by ordinary title holders, derived from the common law, native title holders are not owners for the purposes of *SPA*.

(d) The development application and approval process may be in conflict with the Racial Discrimination Act 1975

There is currently an undecided appeal in the Queensland Court of appeal¹³ which will consider whether, in the particular circumstances of that case, *IPA* development approval processes¹⁴ discriminated against native title holders in conflict with s10 of the *Racial Discrimination Act 1975*. It is arguable that while native title holders

⁷ Commenced 30 March 1998.

⁸ It is likely that the making of a planning scheme under both *IPA* and *SPA* will have passed the *NTA* s24MD freehold test. If so, the non-extinguishment principle will apply and native title holders will have the same procedural rights as ordinary title holders.

⁹ Including registered native title claimants.

¹⁰ *Sustainable Planning Act 2009* s63.

¹¹ First introduced into the *Local Government Act 1936* in 1966 but which in turn was derived from a definition to the same effect in the *City of Mackay and other Town Planning Scheme Act 1934*.

¹² For example an owner of land must give consent to the making of a development application on land; *Sustainable Planning Act 2009*, s263 and an owner of land adjoining land the subject of an impact assessable development application must be given a notice of the application. *Sustainable Planning Act 2009*, s297(1)(c).

¹³ *Don Baxter v QCM Pty Ltd and Others*, CA12616/09; An undecided appeal against the decision of the P&E Court in *QCM Pty Ltd v Redland Shire Council and Others* [2009] QPEC 85.

¹⁴ The same processes have been carried forward into the *Sustainable Planning Act 2009*.

are not 'owners' for the purposes of *IPA* and *SPA*, they must be afforded the same procedural rights afforded those 'owners', including the right to consent to a development application on their traditional lands and the right to be notified when an development application is made on land adjoining their traditional lands.

I am of the opinion that there is a reasonable argument in favour of native title holders having the same rights as other 'owners' and wait in anticipation the court's decision.

(e) The future act provisions of the Native Title Act 1993

In circumstances when development approved under *SPA* on, or adjoining native title holders' traditional lands, affect native title,¹⁵ *NTA*, s24MD(6A) will have the effect that such decisions are invalid to the extent that they affect native title, if they are made without following the future act provisions of *NTA*.¹⁶ *NTA*, s24MD(6A) will not have the effect of invalidating the act per se.¹⁷ For example, a development permit which is an invalid future act will be otherwise a valid development permit and the development may be commenced, completed and used.

This would, in my opinion, be an absurd result in some cases including, for example, where native title rights include a right to enter and camp on the land and the development approved was private residential accommodation.

(f) Indigenous land use agreements

The majority of Queensland native title determinations are made by consent, in reliance upon an Indigenous Land Use Agreement ('ILUA'). Some planning issues are probably dealt with in some ILUAs. However because ILUAs are not on the public record, what is dealt with therein is uncertain.

(g) Conclusion

There is an opportunity for *SPA* to play a role in doing something real and material about a genuine basis of reconciliation, in promoting an understanding of what native title is, in promoting equal treatment of native title holders by local governments and before the Planning and Environment Court (Qld) and in administering justice to native title holders.

This may be achieved in the plan making process by specifically identifying native title as being a matter of State interest and providing guidelines to local governments on appropriate consultation.

As far as the development application and decision making process is concerned, *SPA* may be amended to ensure native title holders are involved in the process in the same way as ordinary title holders who hold exclusive possession rights to the land are involved. Further *SPA* could mandate compliance with the future act provisions of *NTA* as a prerequisite for obtaining a valid development permit under *SPA*.

There may also be a role for *SPA* to play in giving effect to planning related issues agreed to in ILUAs.

3. Native Title Law - in Brief

(a) Native title is recognised and protected

NTA recognises and protects native title,¹⁸ provides that native title is not able to be extinguished contrary to *NTA*¹⁹ and that future acts that may affect native title will be valid only if covered by the future act provisions of *NTA*.²⁰

¹⁵ See *Native Title Act 1993* (Cth) s227.

¹⁶ *Native Title Act 1993* (Cth) s24AA (2) and (3).

¹⁷ *Fejo v Northern Territory* (1998) 195 CLR 96 at para [36].

¹⁸ *Native Title Act 1993* (Cth) s10.

(b) Future acts

The future act provisions of *NTA* are contained in Part 2, Division 3. In the absence of an ILUA, a planning scheme made under *SPA* will be valid, to the extent that it affects native title, if covered by a section that appears in the list in *NTA*, paragraphs 24AA(4)(a) to (k) and invalid, to the extent it affects native title, if not so covered.²¹

Generally²² both a planning scheme made under *SPA* and a development permit granted under *SPA* will validly affect native title if it passes the freehold test set out in *NTA*, Part 2, Division 3, Subdivision M and the non-extinguishment principle will apply.²³

Legislative acts, such as the making of a planning scheme, are dealt with differently to non-legislative acts, such as the granting of a development permit.

For legislative acts, the test is that native title holders must not be in a more disadvantageous position at law than they would be if they instead held ordinary title to the land.²⁴

For non-legislative acts, the test is:

- (a) the act could be done in relation to the land if the native title holders concerned instead held ordinary title; and
- (b) a Commonwealth or State law makes provision in relation to the preservation or protection of areas or sites²⁵ that may be, in the area to which the act relates and that may be of particular significance to the Aboriginal peoples of Torres Strait Islanders in accordance with their traditions.²⁶

NTA, s24MD(6A) will have the effect that such acts are invalid to the extent that they affect native title, if they are made without following the future act provisions of *NTA*.²⁷ However *NTA*, s24MD(6A) will not have the effect of invalidating the act per se.²⁸ For example, a planning scheme or development permit which is an invalid future act will be otherwise valid.

(c) Native title rights and interests

Native title rights and interests:²⁹

- (a) are rights and interests which are 'possessed under the traditional laws acknowledged, and the traditional customs observed', by the relevant peoples;
- (b) are possessed by the peoples who 'have a connection with' the land or waters in question; and

¹⁹ *Native Title Act 1993* (Cth) s11.

²⁰ *Native Title Act 1993* (Cth) s24AA.

²¹ The freehold test will apply only if the act is not covered by a Subdivision, higher in the list in *NTA*, paragraphs 24AA(4)(a) to (k).

²² There may be a planning scheme over land or water where procedures indicate absence of native title and which *NTA* Part 2, Division 3, Subdivision F applies. In other cases a Subdivision, higher in the list in *NTA*, paragraphs 24AA(4)(a) to (k), may apply.

²³ *Native Title Act 1993* (Cth) s24MD(3).

²⁴ *Native Title Act 1993* (Cth) s24MA.

²⁵ For example the *Aboriginal Cultural Heritage Act 2003*(Qld).

²⁶ *Native Title Act 1993* (Cth) s24MB.

²⁷ *Native Title Act 1993* (Cth) s24AA (2) and (3).

²⁸ *Fejo v Northern Territory* (1998) 195 CLR 96 at para [36].

²⁹ *Western Australia v Ward* (2002) 213 CLR 1 para 17; *Native Title Act 1993* (Cth) s223(1).

- (c) are of a character that is 'recognised by the common law of Australia'.

Native title rights and interests will continue to exist only if:

- (a) the peoples have retained their continued connection with the land; and
- (b) there have been no previous laws enacted by or with the authority of the legislature that expresses a clear and plain intention to extinguish those rights; and
- (c) there have been no previous acts of the executive³⁰ in the exercise of the powers conferred upon it that expresses a clear and plain intention to extinguish those rights,³¹

(d) Extinguishment of native title

To determine whether native title has been extinguished in the past it is necessary to identify and compare the rights derived from traditional law and custom with the rights derived from the exercise of the sovereign authority that came with settlement.³² The first must give way to the second. Native title rights are also to be seen as a bundle of rights, the separate components of which may be extinguished separately.³³

Native title was liable to be extinguished by laws enacted by or with the authority of the legislature where there was a 'clear and plain intention' to do so.³⁴

For example native title rights are vulnerable to extinguishment by local government planning schemes.

If a past planning scheme had the effect of prohibiting a native title right or interest from being carried out on land,³⁵ that native title right or interest may have been extinguished by the planning scheme.³⁶

A past development permit which approved development that was inconsistent with the continuation of a native title right or interest may also have extinguished native title.

Native title rights and interests may also be regulated, rather than extinguished by, for example, limiting the hours during which a particular activity may be carried out.³⁷ In *Mason v Tritton*,³⁸ Kirby P held; '... No doubt stringent regulation may reach the point where the ordinary rights and privileges associated with property are so curtailed that proprietary rights can no longer be enjoyed. Whether that is the case is ultimately a question of fact...'³⁹

If native title has been extinguished, it cannot now be revived.⁴⁰

³⁰ Such as the construction of a road or other public works.

³¹ *Mabo v Queensland [No.2]* (1992) 175 CLR paras 63 – 64 per Brennan J.

³² *Western Australia v Ward* (2002) 213 CLR 1 para.82.

³³ *Western Australia v Ward* (2002) 213 CLR 1 para.76.

³⁴ *Mabo v Queensland [No. 2]* (1992) 175 CLR paras 63 – 64 per Brennan J.

³⁵ Planning schemes made under planning laws prior to the introduction of the *Integrated Planning Act 1997* generally prohibited particular uses from being carried out on land included in particular zones.

³⁶ Under *Native Title Act 1992* s211(1), a prescribed class of native title rights, including hunting and fishing, will be lawful, notwithstanding that a law of the Commonwealth or State regulates those activities by prohibiting or restricting a native title holder from carrying on the prescribed class of activity other than in accordance with a licence or permit; *Yanner v Eaton* (1999) 201 CLR 351.

³⁷ *Western Australia v Ward* (2002) 213 CLR para 26; *Yanner v Eaton* (1999) 201 CLR 351 para 109.

³⁸ *Mason v Tritton* (1994) 34 NSWLR 572 (Gleeson CJ, Kirby P, Priestley JA).

³⁹ *Mason v Tritton* (1994) 34 NSWLR 572 p 593.

⁴⁰ *Native Title Act 1992* s 237A: 'The word **extinguish**, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment, the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.'

4. The Racial Discrimination Act 1975 ('RDA')

The RDA commenced operation on 31 October 1975. The *RDA* did not have retrospective effect.

S10 of the *RDA* provides as follows:

"Rights to equality before the law

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
- (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.⁴¹
- ..."

Article 5 of the Convention includes"

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

2. The right to equal treatment before the tribunals and all other organs administering justice;
- ...
- (d) Other civil rights, in particular:
- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit;
- ..."

In *Mabo No.1*⁴² the majority⁴³ of the High Court decided that the *Queensland Coast Islands Declaratory Act 1985* (Qld), which declared that, upon their annexation to Queensland, the Torres Strait Islands "were vested in the Crown in right of Queensland freed from all other rights, and became waste lands of the Crown", without compensation being paid, was inconsistent with s10 of the *RDA*, and invalid due to s109 of the *Constitution*.

In *Mabo No 1* Brennan, Toohey and Gaudron JJ concluded that s10(1) of the *RDA* "clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their human right to own and inherit property as it clothes other persons in the community".⁴⁴

In *Western Australia v Ward*⁴⁵, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:

113 The operation of s 10(1) was considered further in the *Native Title Act Case*.⁴⁶ It was said in the joint reasons of six members of the Court that:⁴⁷

⁴¹ *The International Convention on the Elimination of All Forms of Racial Discrimination*.

⁴² *Mabo v Queensland [No 1]* (1988) 166 CLR 186.

⁴³ Leading judgment of Brennan, Toohey and Gaudron JJ.

⁴⁴ *Ibid* para [249].

⁴⁵ *Western Australia v Ward* [2002] 213 CLR 1.

"Where, under the general law, the indigenous 'persons of a particular race' uniquely have a right to own or to inherit property within Australia arising from indigenous law and custom but the security of enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, *the persons of the particular race are given, by s10(1), security in the enjoyment of their property* 'to the same extent' as persons generally have security in the enjoyment of their property.⁴⁸ Security in the right to own property carries immunity from arbitrary deprivation of the property.⁴⁹ Section 10(1) thus protects the enjoyment of traditional interests in land recognised by the common law." (emphasis added)

Of the operation of s109 of the Constitution in relation to s10(1) of the RDA, it was said in the joint judgment in the *Native Title Act Case* that:⁵⁰

"If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to authorise expropriation of property characteristically held by the 'persons of a particular race' for purposes additional to those generally justifying expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s10(1) of the [RDA]."

Again it will be seen that the conclusion that the State law provided for differential treatment of land holding according to race, colour, or national or ethnic origin was critical. This was because it is that understanding of the legal operation of the State law which underpins the conclusion that there is direct inconsistency between that law and the relevant federal law, the RDA.

114 ...

115 In determining whether a law is in breach of s10(1), it is necessary to bear in mind that the subsection is directed at the enjoyment of a right;⁵¹ it does not require that the relevant law, or an act authorised by that law, be "aimed at" native title, nor does it require that the law, in terms, makes a distinction based on race. Section 10(1) is directed at "the practical operation and effect" of the impugned legislation and is "concerned not merely with matters of form but with matters of substance"⁵². Mason J in *Gerhardy* put the matter this way:⁵³

"[Section] 10 is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour or origin, or do not enjoy that right to the same extent." (original emphasis)

116 Some care is required in identifying and making the comparison between the respective "rights" involved. In *Mabo [No 1]* the "right" referred to was "the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property)".⁵⁴ "Property" in this

⁴⁶ *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

⁴⁷ (1995) 183 CLR 373 at 437.

⁴⁸ *Mabo [No 1]* (1988) 166 CLR 186 at 218-219, 230-231.

⁴⁹ *Mabo [No 1]* [1988] HCA 69; (1988) 166 CLR 186 at 217, 230.

⁵⁰ (1995) 183 CLR 373 at 437.

⁵¹ *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70 at 97, 99 per Mason J; *Mabo [No 1]* [1988] HCA 69; (1988) 166 CLR 186 at 198-199 per Mason CJ (dissenting), 216-219 per Brennan, Toohey and Gaudron JJ, 231-232 per Deane J.

⁵² *Mabo [No 1]* [1988] HCA 69; (1988) 166 CLR 186 at 230 per Deane J.

⁵³ [1985] HCA 11; (1985) 159 CLR 70 at 99.

⁵⁴ *Mabo [No 1]* [1988] HCA 69; (1988) 166 CLR 186 at 217 per Brennan, Toohey and Gaudron JJ. See also at 229-230 per Deane J; *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 436-437.

context includes land and chattels as well as interests therein⁵⁵ and extends to native title rights and interests.

117 It is because native title characteristically is held by members of a particular race that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour, or national or ethnic origin.⁵⁶ In *Mabo [No 1]* the Court, by majority, rejected the argument that, as native title has different characteristics from other forms of title and derives from a different source, it can legitimately be treated differently from those other forms of title.⁵⁷ It was said that:⁵⁸

"s 10(1) of the [RDA] clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community."

...

In short s10(1) requires the rights of a person of one race, colour, or national or ethnic origin to be compared with the rights of a person of another race, colour, or national or ethnic origin and to the rights enjoyed generally by persons in Queensland. If that comparison reveals, by reason of the law's practical operation and effect, inequity, s10(1) operates to give the person discriminated against because of race etc the same rights enjoyed by another race etc or enjoyed generally by persons in Queensland.

It appears to me that such a comparison is unlikely to reveal discrimination against native title holders because of race etc in the plan making process adopted by *SPA*.⁵⁹

It may also be argued that as far as the development approval process under *SPA* is concerned there is also no inequity or discrimination because of race etc, because the comparison, required by *RDA*, must be made between native title rights and the rights of ordinary title holders with a similar interest in the land.

While each case must be assessed on its own facts, native title characteristically is held by Aboriginal peoples and Torres Strait Islanders as a group or community title and in all cases, including when the native title rights includes a right to exclusive possession, native title rights characteristically may not be sold or otherwise granted to others in consideration of the payment of rent.

An ordinary title holder with an interest similar to the interest held by native title holders would also not enjoy the benefits of an 'owner' under *SPA*. Therefore, it may be argued, there is no inequity or discrimination because of race, colour, or national or ethnic origin.

However there are probably no native title holders with an interest in land sufficient to give them the benefits that 'owners' have under *SPA*. In my opinion, to deprive native title holders of fundamental rights afforded ordinary title holders under *SPA* is, by reason of the law's practical operation and effect, inequity and capable of amounting to discrimination on the basis of race, colour, or national or ethnic origin.⁶⁰

5. Some Land over which Native title may Continue to Survive

⁵⁵ *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 437.

⁵⁶ *Mabo [No 1]* [1988] HCA 69; (1988) 166 CLR 186 at 218 per Brennan, Toohey and Gaudron JJ, 230 per Deane J; *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 437.

⁵⁷ [1988] HCA 69; (1988) 166 CLR 186 at 218 per Brennan, Toohey and Gaudron JJ, 230-232 per Deane J.

⁵⁸ [1988] HCA 69; (1988) 166 CLR 186 at 219 per Brennan, Toohey and Gaudron JJ.

⁵⁹ Or previous Queensland planning law.

⁶⁰ *Mabo [No 1]* [1988] HCA 69; (1988) 166 CLR 186 at 218 per Brennan, Toohey and Gaudron JJ, 230 per Deane J; *Native Title Act Case* [1995] HCA 47; (1995) 183 CLR 373 at 437.

About 71% of the State is State Crown land over which both exclusive and non-exclusive leases have been granted.⁶¹ About 20% of the State is in freehold title. The balance, 9% of the State, includes Unallocated State Land ('USL') and other grants.⁶²

In this paper I will discuss the affect of Queensland's planning law on the about 49% of Queensland⁶³ which is State Crown land over which has been granted a form of non-exclusive term lease for pastoral purposes⁶⁴ and on the about 2% of Queensland which is Unallocated State Land.

(a) Non-exclusive term leases for pastoral purposes

In Queensland there have been a number of uncontested determinations including, for example *Wik Peoples v Queensland*⁶⁵ ('the Wik 2004 Federal Court consent determination'), which involved a native title claim over land subject to pastoral term leases.⁶⁶

For example, in the Wik 2004 Federal Court consent determination Cooper J determined that the native title rights confer possession, occupation, use and enjoyment of the determination area on the native title holders. Those rights included a right to:

(d) make use of the Determination Area by:

- (i) engaging in a way of life consistent with the traditional connection of the Native Title Holders to the Determination Area;
- (ii) hunting and gathering on, in and from the Determination Area;
- (iii) living on and erecting residences and other infrastructure on the Determination Area;
- (iv) conducting ceremonies on the Determination Area;
- (v) being buried on, and burying Native Title Holders on, the Determination Area;
- (vi) maintain and protect by lawful means those places of importance and areas of significance to the Native Title Holders under their traditional laws and customs in the Determination Area; and
- (vii) use and enjoy the Determination Area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the Native Title Holders in relation to the Determination Area.⁶⁷

In the *Wik* 2004 Federal Court consent determination the native title rights and interests are subject to and exercisable in accordance with the laws of the State and the Commonwealth, including any relevant planning scheme, and do not extend to a right to control access to or a right to control the use of the determination

⁶¹ Department of Environment and Resource Management Land management
<<http://www.derm.qld.gov.au/land/state/index.html>> at 13 March 2010.

⁶² Claims to common law recognition of native title rights and interests can only apply to certain kinds of unalienated Crown land; *Mabo v Queensland [No 2]* (2002) Brennan J pp 69-70; Deane J and Gaudron J pp 89-90, 110; Toohey J p 196.

⁶³ Geoscience Australia Department of Resources, Energy and Tourism
<<http://www.ga.gov.au/education/geoscience-.basics/dimensions/area-aus-states-territories.jsp>> at 20 March 2010; Queensland's area is 173,064,800 ha.

⁶⁴ Queensland Department of Natural Resources 1998 *A Guide to land tenure in Queensland* Schedule 1; Pastoral Holdings, Preferential Pastoral Holdings and Pastoral Development Holdings comprise a total of about 86,000,000 ha.

⁶⁵ *Wik Peoples v Queensland* [2004] FCA 1306

⁶⁶ There have been no contested Queensland native title determinations over non-exclusive pastoral term leases. *Neowarra v Western Australia* [2003] FCA 1402 is an example of a contested determination in which a non-exclusive pastoral leases in Western Australia was the subject of a claim.

⁶⁷ *Wik Peoples v Queensland* [2004] FCA 1306 p14.

area and must co-exist with the rights and interests of the lessee and others under the term lease for pastoral purposes.⁶⁸

For present purposes native title over land subject to a term lease for pastoral purposes may include a right for native title holders to enjoy specific rights but will not include a right to exclusive possession or a right to transfer possession to others in consideration of the payment of rent.

(b) Unallocated State land

Native title rights and interests derived from traditional law and custom may have included a right of possession, occupation, use and enjoyment to the exclusion of all others and a right to live on the land.⁶⁹

However by their very nature native title rights do not include the right to transfer possession in consideration of the payment of rent.

(c) Summary of native title rights and interests on State Crown land

For about 49% of Queensland covered by non-exclusive term leases for pastoral purposes, native title rights, including rights to live on and to access traditional lands to hunt, fish, and camp and conduct ceremonies, if they existed in accordance with traditional laws and customs, may coexist with the rights of pastoralists. However native title rights will not include a right of possession, occupation, use and enjoyment to the exclusion of all others over the lands.

For Unallocated State Land native title rights may include a right of possession, occupation, use and enjoyment to the exclusion of all others and a right to live on the land.

6. Indigenous Land Use Agreements (ILUAs)

ILUAs⁷⁰ are not on the public record. However, it is reasonably clear from the following National Native Title Tribunal media release that the agreements may deal with activities regulated by a planning scheme.

‘The National Native Title Tribunal registered the legally binding agreement on 11 February between the Jangga People, Charters Towers Regional Council, Isaac Regional Council and Whitsunday Regional Council over the Jangga People’s traditional country centred on the township of Mt Coolon, 120km west of Mackay and 150km south of Townsville.

Tribunal Member Graham Fletcher, who mediated between the groups, said the ILUA recognised the Jangga People as the traditional owners of the area and established how they would work with the three local governments in the future.

“The agreement gives the groups certainty about the protection of their rights and clarity about how they will carry out their business on a day-to-day basis,” he said.

The Jangga People are assured their cultural heritage will be protected as the councils have agreed to include the Jangga People in their decision-making processes about matters that could impact on their rights.

Clear terms about access have been developed for the councils to follow when developing infrastructure, such as roads and buildings, and providing services to the communities.’⁷¹

⁶⁸ Ibid.

⁶⁹ See for example *Timothy James Malachi on behalf of the Strathgordon Mob v State of Queensland* (2007) FCA 1084.

⁷⁰ See *Native Title Act 1993* (Cth) part 2 div 3 subs B, C and D.

⁷¹ National Native Title Tribunal 16 February 2010 *ILUA binds Jangga People and councils* <http://www.nntt.gov.au/news-and-communications/media-releases/pages/ilua_binds_jangga_people_and_councils.aspx> at 20 March 2010.

7. The Affect of State Planning Laws on Non-exclusive Pastoral Term Lease Land and on Unallocated State Land

(a) Planning schemes made under the Local Government Act 1936

Local governments were first empowered to prepare planning schemes by the *City of Mackay and other Town Planning Scheme Act 1934*, the provisions of which were, in 1966, incorporated into the *Local Government Act 1936* to apply to local governments throughout the State.⁷²

The planning provisions of the *Local Government Act 1936*⁷³ remained in force until the *Local Government (Planning and Environment) Act 1990* commenced 15 April 1991. *IPA* commenced 30 March 1998. *SPA* commenced 18 December 2009.

Under s13 of the *Acts Interpretation Act 1954*, no 'Act passed after the commencement of this Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included in the Act for that purpose.'⁷⁴

There are two limbs of s13. The first is that the Crown itself is not bound by an Act unless express words to the contrary are included in the Act. The second is that an Act shall not derogate from any prerogative rights of the Crown, including for example, its right of ownership of land, unless express words to the contrary are included.

What the executive does upon and in respect of Crown lands will be done by virtue of the prerogative and not by virtue of proprietorship.⁷⁵

In short it is not only the Crown that, in the absence of express words to the contrary, that is not bound by an Act but also its instrumentalities or agents acting with express or implied executive authority, on behalf of the Crown.⁷⁶

In *Brisbane City Council v Group Projects Pty Ltd*,⁷⁷ the High Court considered whether a planning scheme made under the *Local Government Act 1936* had legal affect on State Crown land. Wilson J, with whom Gibbs C.J. and Mason J. agreed,⁷⁸ said; '... in my opinion, the Plan cannot validly restrain the use of Crown land, other than in relation to land which is leased from the Crown, and the mere zoning of such land is without any legal effect. To speak of Crown land being zoned under a Plan which has the force of law yet in respect of which no legal consequences arise is to speak of an abstraction, a meaningless fiction.'⁷⁹

Group Projects was applied in *Queensland Heritage Council v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* (2001).⁸⁰

On the face of *Group Projects* and *Queensland Heritage Council* it appears clear enough that a planning scheme made under the 1936 Act which purports to regulate the use of Unallocated State land will have had no effect.

On the face of *Group Projects* it is also reasonably clear that a planning scheme will have effect on leasehold interests, as known to the common law, granted over Crown land. The common law recognizes the grantee

⁷² In 1952, Brisbane was excluded from the planning provisions of the *Local Government Act 1936* and instead was subjected to its own planning provisions in the *City of Brisbane Act 1924*.

⁷³ Sections 32 and 33.

⁷⁴ *Acts Interpretation Act 1954* s13.

⁷⁵ *Johnson v Kent* (1975) 132 CLR 164 p170, 174. See also *Century Metals v Yeomans* (1988) 85 ALR 29 at 52.

⁷⁶ *Bropho v State of West Australia* (1990) 171 CLR 1 p 22-23.

⁷⁷ *Brisbane City Council v Group Projects Pty Ltd* [1979] 145 CLR 143 (Gibbs, Stephen, Mason, Murphy and WilsonJJ).

⁷⁸ Murphy J disagreed; para 28 p 170, while Stephen J did not need to decide the issue.

⁷⁹ *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 pars 28 – 30.

⁸⁰ 2 Qd R 504 - in the joint judgment of McPherson J.A. and Williams, with whom de Jersey CJ agreed.

will be entitled to exclusive possession of the property, the subject of the lease. It is arguable that planning schemes that were in force prior to the granting of a lease were void ab initio. Accordingly only those planning schemes that came into force at the time, or after, the lease was granted would have effect.

The High Court in *Wik*⁸¹ held that Queensland pastoral term leases were not the same as leases recognised by the common law and the grantees were not entitled to exclusive possession of the property.⁸²

Group Projects was decided in 1979 prior to the *Mabo No 2*, *NTA*, and *Wik*⁸³ and native title was not an issue in *Queensland Heritage Council*. In my opinion the question of whether past planning schemes apply to the native title holders on Crown land and to grantees of the Queensland pastoral term leases remains unanswered by the High Court.

In conclusion whether there was extinguishment by past planning schemes and past executive acts, including the granting of development permits, should, in an abundance of caution, be considered on a case by case basis to determine whether previous planning schemes expressed a clear and plain intention to extinguish native title rights, taking into account the following:

- (a) the particular native title rights and interests as may be asserted and established;
- (b) the prohibitions said to be provided in a particular planning scheme (until the 1990s many of the State's planning schemes did not exercise planning controls outside the boundaries of towns and cities.)⁸⁴;
- (c) the provisions of the relevant planning law, including the existing use right provisions; and
- (d) the effect, if any, of the *RDA*.

However, as will be seen later in this paper, notwithstanding what provisions were included in a planning scheme, the existing use right provisions of all Queensland planning law will prevail over the otherwise extinguishing effect of a scheme.

(a) Planning schemes made under the Local Government (Planning and Environment) Act 1990

The *Local Government (Planning and Environment) Act 1990* provided that a planning scheme 'made or continued in force under this Act does not bind the Crown'⁸⁵ and excluded 'Crown land' from the operation of local government planning schemes.⁸⁶

In my opinion a planning scheme made under the Act will not bind native title holders when carrying out activities on State Crown land.

(b) Planning schemes made under the Integrated Planning Act 1997 and the Sustainable Planning Act 2009.

Planning schemes made under *IPA* and *SPA* bind 'all persons, including the State...'⁸⁷

⁸¹ *Wik Peoples v State of Queensland and others* 141 ALR 129.

⁸² *Wik Peoples v State of Queensland and others* 141 ALR 129 at 279.

⁸³ *Ibid.*

⁸⁴ In October 2003 Croydon and Mt Morgan continued to operate under an Interim Development By-law.

⁸⁵ *Local Government (Planning and Environment) Act 1990*, s2.21 (2)(a).

⁸⁶ *Local Government (Planning and Environment) Act 1990* s2.21(2)(b): "Crown land" as defined in s1.4 includes: land that is not alienated by the Crown as to any estate or interest therein, land for which a permit to occupy has issued under the Land Act 1994, land that is held by any person representing the Crown or by a trustee in trust for the Crown and any other land, or any building or other structure or part thereof, that is occupied by the Crown or any person representing the Crown.

⁸⁷ *Integrated Planning Act 1997* s1.5.1(1). *Sustainable Planning Act 1999* s14(1).

In *Brisbane City Council v Group Projects Pty Ltd*,⁸⁸ Wilson J held that 'The mere legislative prescription in section 4 of the City of Brisbane Town Planning Act that a Town Plan approved by the Governor-in-Council shall have the force of law cannot result in the Crown being bound by the provisions of a Plan unless such an intention appears from the Act itself.'⁸⁹ In *Group Projects* a provision binding all persons was found in the planning scheme⁹⁰ but not in the Act.

A provision binding all persons is found in *IPA* and *SPA* and a planning scheme made under the Acts will, in my opinion, bind native title holders when carrying out activities on State Crown land.

(c) Summary of the affect of State planning laws on non-exclusive pastoral term lease land and on unallocated State land

Planning schemes introduced under planning legislation in force prior to 15 April 1991⁹¹ may have applied to Crown land including Unallocated State Land and to State Crown land that is subject to the grant of a pastoral term lease and to native title holders when carrying out activities on that land.⁹²

Planning schemes introduced under planning legislation in force in the period from 15 April 1991 to 29 March 1998⁹³ did not apply to Unallocated State Land or to State Crown land that was subject to the grant of a pastoral term lease or to native title holders of that land and did not bind native title holders when carrying out activities on that land.⁹⁴

Planning schemes introduced under *IPA* and *SPA* applies to all persons⁹⁵ including native title holders carrying out activities on State Crown land.

8. Native Title and the Sustainable Planning Act 2009

(a) Background

IPA first made reference to *NTA* in 2003 with the introduction of s 3.1.11 to provide that, if a local government takes action under *NTA*, s24HA⁹⁶ and s24XA,⁹⁷ the deciding of a development application must not start until the *NTA* action is completed.⁹⁸ *SPA* includes the same provisions.⁹⁹

The *Acts Interpretation Act 1954* (Qld) also provides 'An Act enacted after the commencement of this section affects native title only so far as the Act expressly provides.'¹⁰⁰ There is no such express provision in *SPA*.

⁸⁸ *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143.

⁸⁹ *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 para 25.

⁹⁰ A planning scheme is a statutory instrument under the *Statutory Instruments Act 1992* and must be made under an Act or under power conferred by an Act or statutory instrument or under power conferred otherwise by law: *Statutory Instruments Act 1992*, s7(2).

⁹¹ When the *Local Government (Planning and Environment) Act 1990* came into force.

⁹² *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 (Gibbs, Stephen, Mason, Murphy and Wilson JJ).

⁹³ Immediately prior to when the *Integrated Planning Act 1997* came into force.

⁹⁴ *Local Government (Planning and Environment) Act 1990* s 2.21(2)(a).

⁹⁵ *Integrated Planning Act 1997* s 1.5.1(1).

⁹⁶ Relating to management or regulation of water and air space.

⁹⁷ Relating to facilities for services to the public.

⁹⁸ *Integrated Planning Act 1997* was amended in 2007 by the introduction of s2.5B.52 to provide the same requirement relating to the master plan application.

⁹⁹ *Sustainable Planning Act 1999* ss 188, 310 and 416.

¹⁰⁰ *Acts Interpretation Act 1954* (Qld) s13A.

Under *IPA* a planning scheme could not prohibit development¹⁰¹ whereas under *SPA* a planning scheme may prohibit development.¹⁰² There are presently no planning schemes made under *SPA*. However as a general observation unless the future act provisions of *NTA* are followed, those planning scheme will not extinguish native title rights and interests.¹⁰³

(b) Native title in the development assessment process.

The relationship between State planning laws and native title has arisen only once in Queensland in *Queensland Construction Materials Pty Ltd v Redland City Council*¹⁰⁴ in which Wilson DCJ decided that it was not necessary for the development application to be supported by the written consents of the registered native title claimants nor was it necessary for notice to be given to them. The decision partly turned on the definition of 'owner' found of *IPA*, namely '... owner, of land, means the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent.'¹⁰⁵ The definition in *SPA* is to the same effect.

Queensland Construction Materials Pty Ltd v Redland City Council is on appeal to the Queensland Court of Appeal but no decision has been handed down at the date of submitting this paper for publication.

If the Court of Appeal finds that *RDA* does require native title holders to have the same rights as 'owners' under *SPA*, there will be no need to amend *SPA* to give the same result. However if the Court of Appeal does not make such a finding it nevertheless remains open for the State to amend *SPA* to give the same result.

(c) Native title in the plan making process

SPA makes no reference to native title in the plan making process, nor is there any reference in the plan making guidelines given statutory effect by *Sustainable Planning Regulation 2009*,¹⁰⁶ said to be as 'procedural and best practice guideline of the process for making or amending a planning scheme under *SPA*.'¹⁰⁷

(d) Native title is not a State Interest

The Minister has wide powers under *SPA* where a State interest is involved. For example all planning schemes must undertake a State interest review before they become law. The Minister may make or amend a planning scheme or other local planning instrument without notice to the relevant local government if the Minister is satisfied urgent action is necessary to protect or give effect to a State interest.¹⁰⁸ The Minister may 'call in' a development application 'only if the development involves a State interest.'¹⁰⁹ The Minister may also elect to be a co-respondent in any appeal if the Minister is satisfied involves a State interest¹¹⁰ and may publish a State planning policy about a matter of State interest.¹¹¹

'State Interest' is defined in *SPA*¹¹² as:

¹⁰¹ *Integrated Planning Act 1997* s 2.1.23(2).

¹⁰² *Sustainable Planning Act 1999* s 21(a)(iv) and sch 1.

¹⁰³ *Native Title Act 1993* (Cth) s 24AA; *Native Title Act 1993* (Cth) s 227: 'An act **affects** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.'

¹⁰⁴ [2009] QPEC 85.

¹⁰⁵ The same definition appears in the *Sustainable Planning Act 1999* sch 2.

¹⁰⁶ *Sustainable Planning Regulation 2009* s 5.

¹⁰⁷ Department of Planning and Infrastructure, 25 November 2009.

¹⁰⁸ *Sustainable Planning Act 1999* s129.

¹⁰⁹ *Sustainable Planning Act 1999* s424(a).

¹¹⁰ *Sustainable Planning Act 1999* s489.

¹¹¹ *Sustainable Planning Act 1999* s40.

¹¹² *Sustainable Planning Act 1999* schedule 2; Also ss 18 and 25.

State interest means—

(a) an interest that the Minister considers affects an economic or environmental interest of the State or a part of the State, including sustainable development; or

Example of an interest the Minister might consider for paragraph

(a)— a tourism development involving broad economic benefits for the State or a part of the State

(b) an interest that the Minister considers affects the interest of ensuring there is an efficient, effective and accountable planning and development assessment system.

Arguably under the definition a State interest is anything the Minister considers is a State interest. However there are no State Planning Policies or any other indication that the Minister considers native title to be a State interest.

(e) Summary of How the *Sustainable Planning Act 2009* deals with native title

There is no requirement for native title holders to be involved in the plan making process under *SPA*. It is unlikely that many, if any, native title holders would meet the definition of owner derived from the *Local Government Act 1936*¹¹³ which now appears in *SPA* so as to be required to be involved in any development assessment process.

Further native title is not identified as a State interest which would authorize the State to intervene in the local government plan making processes or to call in a development application.

9. Existing Use Rights

(a) Existing Use Rights under the *Local Government Act 1936*.

Section 33(1A) (b)¹¹⁴ of the *Local Government Act 1936* provided that if a prohibited use in the relevant zone 'is discontinued for a period of at least six months or for such longer period as is prescribed in the scheme applicable to the site of such use ... shall cease to be a lawful use unless the local authority consents to that use.'

(b) Existing rights under the *Local Government (Planning and Environment) Act 1990*

Section 3.1 of the *Local Government (Planning and Environment) Act 1990* relevantly provided:

3.1 Existing lawful uses.

(1) A lawful use made of premises, immediately prior to the day when a planning scheme or an amendment of a planning scheme commences to apply to the premises, is to continue to be a lawful use of the premises for so long as the premises are so used notwithstanding -

(a) any provision of the planning scheme or amendment of the planning scheme to the contrary (other than a provision to which subs(1A) applies); or

(b) that the use is a prohibited use.

(1A) ...

(2) A local government upon application being made to it in respect of a lawful use to which subs(1)(b) applies, may consent -

¹¹³ *Local Government Act 1936* s 3.

¹¹⁴ Sections 32 and 33 were introduced in 1966. The existing use right provisions of s33(1A) were not introduced until 1977. However by operation of s33(1A)(a), they had both prospective and retrospective effect back to 1966.

(a) (b) ...; or

(c) to the re-establishment of a use where the use has been discontinued (whether through the destruction of a building or structure or otherwise) and where the application is made to the Local Authority within six months (or such longer period as may be prescribed in the planning scheme) from the day the use is discontinued.

(3) ...

Brabazon DCJ in *Boral Resources (Qld) Pty Ltd v Brisbane City Council* (1997) QPELR 321¹¹⁵ observed:

...that section [section 3.1] continues the distinction between lawful permissible uses and lawful non-conforming uses. The more elaborate provisions in s 3.1(2) apply to non-conforming uses, which would otherwise be prohibited - see that usage in s3.1(1)(b). Otherwise, a lawful use of premises, immediately before the impact of a new planning scheme, continues to be a lawful use of the premises for so long as the premises are so used. The definition of "premises" includes land, buildings and other structures and any part thereof.

(c) Existing rights under the Integrated Planning Act 1997 and the Sustainable Planning Act 2009

Under *IPA*, the commencement of a planning instrument, or an amendment thereof, cannot stop the continuance of a lawful use.¹¹⁶ Provisions to the same effect are found in *SPA*.¹¹⁷

If an existing lawful use is abandoned, and a new scheme required a development permit for the abandoned use, a re-establishment of the use would require a material change of use permit.

In brief,¹¹⁸ the lawful existing use right principles under *IPA* and *SPA* are:

1. Council has the onus of proving abandonment;
2. Whether there has been abandonment is a question of fact to be determined having regard to all of the circumstances;
3. A finding as to whether there has been abandonment should be made by reference to the view that would be taken by a reasonable person with knowledge of all of the relevant circumstances;
4. Relevant circumstances include the subjective intention of the relevant person;
5. Unlike what was the case under previous Queensland planning law, discontinuance of a use does not, by itself, result in the loss of existing use rights. A use must have ceased, not merely be interrupted or suspended. For it to have been abandoned, it must have been ceased finally and unconditionally.

¹¹⁵ The declaration of Brabazon DCJ that the use of premises as a concrete batching plant was an existing lawful use pursuant to s33(1A) Local Government Act 1936 was upheld on appeal in *B.C.C. v Boral Resources (Qld) P/L* (1998) QPELR 530.

¹¹⁶ *Integrated Planning Act 1997 s1.4.1:*

Lawful uses of premises on 30 March 1998

(1) To the extent an existing use of premises was lawful immediately before 30 March 1998, the use is taken to be a lawful use under this Act on 30 March 1998.

(2) To remove any doubt, it is declared that subsection (1) does not, and has never, affected or otherwise limited a requirement under another Act to obtain an approval for the existing use.

(3) In this section—

approval includes an environmental authority under the Environmental Protection Act 1994, as in force from time to time from 30 March 1998.

¹¹⁷ *Sustainable Planning Act 2009* chapter 9 part 1.

¹¹⁸ *Benter Pty Ltd v Brisbane City Council* [2006] QPEC 007 para [4] p 3; *William McKenzie Pty Ltd v Leichhardt Municipal Council* (1964) 10 LGRA 137 p 143.

(d) Summary of existing use rights

There was a period from 1966 until 1991 when a lawful use of land, immediately before the impact of a new planning scheme, continued to be a lawful use for so long as the use was not discontinued for a period of 6 months.

From 1991 until the introduction of *IPA* in 1998 a lawful use of land, immediately before the impact of a new planning scheme, continued to be a lawful use for so long as the land was so used, unless the re-commencement of the use was approved within 6 month of its discontinuance.

IPA introduced a new abandonment test. *SPA* has the same test.

Under all planning legislation the lawful use of land, immediately before the impact of a new planning scheme, continued to be a lawful use for so long as the use continued.

Post-script

This decision of his Honour Alan Wilson SC, DCJ *Queensland Construction Materials Pty Ltd v Redland City Council* [2009] QPEC 85, referred to in this paper, was appealed to the Queensland Court of Appeal. (*Queensland Construction Materials P/L v Redland City Council & Ors* [2010] QCA 182). The appeal was heard on 26 March 2010. The decision of the Court of Appeal was handed down on 23 July 2010, after the submission of this paper for publication.

The Court of Appeal upheld his Honour's decision to the extent that his Honour found that the *Racial Discrimination Act 1975* did not operate to require the applicants, who are registered native title claimants, to be notified of QCM's development application under s. 3.4.4(1)(c) *IPA* nor require their consent be obtained under s3.2.1(3).

In their joint reasons for judgment Chesterman JA and Applegarth J said, when referring to the above referred sections of *IPA*;

[52] The distinction made by these sections of the *IPA* is not based on race but upon different proprietary interests in land. A native title holder entitled, by that right, to receive rent from land is as much protected by the *IPA* in terms of notice and consent as the registered proprietor of an estate in fee simple. If an ordinary title holder whose rights do not extend to the receipt of rent may be ignored by an applicant for a development permit, s 10 does not oblige an applicant to treat a native title holder not entitled to rent any differently.

[53] The *IPA* does not discriminate between holders of interests in land on the basis of race, or because one holds native title and one holds ordinary title, but on the basis of the incidence of the interest held. If the title held confers a right to receive rent the *IPA* insists that notice be given to the holders of that title and that they consent to the application, regardless of the type of title held.

[54] For these three reasons the applicants have failed to demonstrate that the *RDA* made them owners of the land.

In his separate reasons McMurdo P said,

[14] But what can be said, in my view, is that, until the nature and content of any native title rights held by those applicants who were registered native title claimants under the *Native Title Act* over the land the subject of QCM's development application are determined, it is impossible to deal with the applicants' argument under the *Racial Discrimination Act*. If those rights, once identified, are such as to bring them within the definition of "owners" under *IPA*, the provisions of *IPA* (were it not repealed) would apply equally and without discrimination to them as it would to other "owners", so that the *Racial Discrimination Act* would not apply.

[15] I note that the Redland City Council submitted to the Planning and Environment Court that those applicants who are registered native title claimants should have been notified of QCM's development application under s. 3.4.4(1)(c) IPA and their consent obtained under s3.2.1(3) IPA. If I am wrong and the Council was correct about the legislative intent under IPA, it will be a simple matter for the parliament to clarify this through legislative amendment.

In my opinion this decision demonstrates that it is not *NTA* or *RDA* that is preventing justice being delivered to native title holders - it is SPA's reliance on a 1936 definition of 'owner'.



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Protecting Procedural Fairness in Mainstreaming Problem-Solving Courts

Tracy Lau

Each year, the Justice and the Law Society organises a work experience programme at the Brisbane Magistrates Court. Participants in the programme each write an essay based on their experiences in the programme. The essays are then judged by an academic, with the best essay being published in Pandora's Box. In 2010, Ms Lau won the essay competition. Her essay is below.

Introduction

Over the past two decades, the paradigm of therapeutic jurisprudence has emerged as the dominant rationale behind the push for changes in our response to crime. The increasing recognition of therapeutic and social solutions has been manifested in the implementation of various diversionary and restorative mechanisms in both formal institutions of criminal justice and the community-based agencies. Among these mechanisms are the innovative, problem-solving courts.

The seemingly alien concept of problem-solving justice first found its way into the criminal justice system as a drug court in Florida in the United States in 1989. Since then, it has been developed and employed in various other contexts, such as mental health and domestic violence, as well as in other jurisdictions, including Australia.

There are now a whole variety of problem-solving courts in Australia including drug courts, alcohol court, mental health courts and domestic violence courts. The expansion is significant, given that problem-solving courts have only been in Australia for a little over a decade. As Jeffries observes, '...Australia will continue to follow current trends particularly America's movement toward the extension and diversification of problem-solving courts'¹.

However, mainstreaming these courts into the bigger and broader criminal justice system involves more consideration. There are two main categories of obstacles; operational and philosophical. Operational concerns are about the practical problems with implementing the approach. One example of this is the lack of resources available². Philosophical criticisms challenge mainstreaming on the basis that problem-solving courts are inconsistent with the fundamental values of the judicial system. The latter will be the focus of this essay.

This essay aims to explore the role of problem-solving courts in the criminal justice system and argue that certain qualities of such specialty courts can and should be mainstreamed. In discerning the role of problem-solving courts, there will be a discussion about the rationales behind their implementation, the different forms they currently operate in and their common features. An appreciation of the position held by problem-solving courts is imperative in evaluating whether they should be mainstreamed. Additionally, the following will be considered as a part of the evaluation; the importance of traditional procedural protections afforded by our legal system, the philosophical barriers with mainstreaming and possible modification ideas to overcome these barriers.

Role of Problem-Solving Courts in the Criminal Justice System

¹ Jeffries, Samantha, *Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change* (2002), Technical Report Criminology Research Council Funded Research Report, Australian Institute of Criminology, <<http://eprints.qut.edu.au/8613/1/8613.pdf>> at 30 May 2010.

² For a discussion on this, see Lorana Bartels, *Challenges in Mainstreaming Specialty Court*, Trends and Issues Series No. 383, Canberra: Australian Institute of Criminology, <<http://www.aic.gov.au/documents/5/0/8/%7B5082B5A4-B181-430E-B114-1460D8395C7B%7Dtandi383.pdf>> at 30 May 2010.

Rationale for the Emergence of Problem-Solving Courts

The criminal justice system is the system of governmental institutions that enforces the criminal law and exercises social control. It operates within a wider societal framework and is subject to influences driven by social, political and economic forces. In recent years, there is strong public demand to get tough on crime on the one hand and increasing recognition of non-coercive alternatives in sentencing on the other³. The recognition of non-coercive alternatives stemmed from frustration with the current criminal court and prison system which is costly and appears to be ineffective in curing the 'revolving door syndrome'. The growing discontentment and criticisms of the criminal justice system from various directions indicate that reform is inevitable.

In the midst of social, political and economic pressures to improve the practical legitimacy of our criminal justice system, the new focus on problem-solving courts is a refreshing call. In essence, problem-solving courts are courts where 'judicial authority is used to compel offenders to undergo treatment – where the role of the judge does not finish at the time of sentencing, but continues as the offender undergoes treatment'⁴. Principles and practices of these courts are underpinned by the notions of therapeutic jurisprudence, restorative justice and diversionary justice.

Problem-solving courts are a promising idea because they address the underlying problems that are driving criminal behaviours. Their popularity seems to be backed up by generally positive and consistent results in evaluation of the drug court programs⁵. At least at an individual level, the short-term benefits are clear to see as evident in the comment of a recent graduate of Perth Drug Court, 'the Magistrate Courts don't seem to care as much, your [sic] just another number. Where Drug Court is focused on helping you and that's [sic] all some people need, a bit of positive encouragement'⁶.

This comment is a good demonstration of how the theoretical underpinnings of problem-solving courts can impact on both the process and outcome of a case. Therapeutic jurisprudence argues for law reforms that centre on rehabilitation and enhancement of individual wellbeing. Applying this to a drug offender means that the response should focus on treatment to help remedy his/her addiction. Related to this concept is the idea of diversionary justice which recognizes that in certain circumstances, 'mainstream criminal justice system is potentially destructive and those who can be diverted from it, should be'⁷. Adopting diversionary justice, a drug offender would also be treated for other issues or problems he/she might have given its holistic focus. A third, overlapping notion is restorative justice. In effect, it includes the victim and/or the wider community into its response equation.

Variation in problem-solving courts

As mentioned earlier, there are a whole variety of problem-solving courts in Australia that differ in the 'problem' they deal with. The structure and governance of each type of problem-solving courts are tailored accordingly to address the specific 'problem'. For example, the Murri Courts (courts for Indigenous offenders in Queensland) focus on a less formal approach where the defendant can have meaningful input into the whole process. Contrasted with this, the emphasis of the drug courts is the offender's undertaking to abide by the rehabilitation program conditions. The mental health courts, while sharing some similarities with the drug courts, differ again in the methods of treatment, sanctions and reward because of the different nature of the

³ Rob White and Santina Perrone, *Crime, Criminality and Criminal Justice* (2009) 283-4.

⁴ Phelan, Andrew, 'Solving Human Problems or Deciding Cases? Problem Solving Courts', (Paper presented at INNOVATION: Promising Practices for Victims and Witnesses in the Criminal Justice System Conference, Canberra, 23-24 October 2003) 1, <<http://www.victimsupport.act.gov.au/res/File/Andrew%20Phelan.pdf>> at 30 May, 2010.

⁵ See Michael King, *What can Mainstream Courts Learn from Problem-Solving Courts?*, Monash University Research Paper No. 2007/20, <<http://ssnr.com/abstract=1349412>> at May 30, 2010.

⁶ Ibid.

⁷ Clare Cappa, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monsh Law Review* 145, 159.

underlying problems⁸. It is important to bear in mind that problem-solving courts are set up to target specific social problems and thus their procedures and sentencing focus will differ accordingly. What might work in drug courts may be a complete disaster when applied in the mental health courts and vice versa.

The people involved in these courts also differ depending on the underlying problem and desired outcome. Unique to the Murri courts is the active participation of Indigenous Elders and Respected Persons. The aim for their inclusion is to provide the court with useful insights into a defendant's family background. Contrasting with this, there are specialized personnel in drug courts and mental health courts. The aim of their inclusion is to provide expert opinions on the addiction/illness of the defendant and the appropriate treatment for him/her.

Common Features

Despite the differences in problem-solving courts, they share some common features including case outcomes, system change, judicial monitoring, collaboration and non-traditional roles⁹. Therapeutic jurisprudence can be seen as the driving force behind these elements.

Conclusion

Problem-solving courts represent a timely response to the current demands of our society. Their existence is still relatively new and they occupy a position alongside the traditional courts, operating whenever they are activated. It is important to be aware that 'criminal justice fads and fashions come and go, often at the expense of dealing with the real issues that underlie crime'¹⁰. Underlying the problem-solving courts are the notions of therapeutic jurisprudence, diversionary justice and restorative justice. When considering whether they should be mainstreamed into the traditional courts, it is important to remember that they are tailored to answer to different 'problems'. It is undesirable to take any specific problem-solving court and replicate them 'off-the-shelf' in other context. Despite this, there are common elements all problem-solving courts share and it is these we turn to when considering whether problem-solving justice should be mainstreamed.

Evaluation – mainstreaming problem-solving courts

Philosophical concerns – threat to procedural protections

The concern that problem-solving courts are inconsistent with the traditional protections afforded by our legal system is philosophical in nature rather than operational. Will the fundamental procedural protections in our legal system be abandoned in the process of mainstreaming problem-solving courts? In order to provide an informed answer, it is necessary to look at why we have protections of impartiality, transparency and due process in our legal system.

The underpinning of Australian legal system is liberalism, a philosophical framework that privileges individual rights above all else. Flowing from this, we have government through and by the laws which are constitutionally based. The liberalism underlying our legal framework guarantees rights and protections through certain due process rights¹¹.

⁸ Michael King et al, *Non-Adversarial Justice* (2009) 150.

⁹ Lorana Bartels, *Challenges in Mainstreaming Specialty Court*, Trends and Issues Series No. 383, Canberra: Australian Institute of Criminology, <<http://www.aic.gov.au/documents/5/0/8/%7B5082B5A4-B181-430E-B114-1460D8395C7B%7Dtandi383.pdf>> at 30 May 2010.

¹⁰ Samantha Jeffries, *Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change* (2002), Technical Report Criminology Research Council Funded Research Report, Australian Institute of Criminology, <<http://eprints.qut.edu.au/8613/1/8613.pdf>> at 30 May 2010.

¹¹ For background to this, see Rob White and Santina Perrone, *Crime, Criminality and Criminal Justice* (2009) 350-2 and 371-2.

The system of due process encompasses formal means to guarantee the impartiality and neutrality of the tribunal¹². Unlike the United States, this mean is not guaranteed by the Constitution in Australia. As a result, Australian due process principles have been mainly preserved in the traditions and conventions of common law and parliamentary democracy¹³. Traditions and conventions that preserve due process and impartiality in the court include the notion of innocence until proven guilty and unbiased judgment and the requirement of full voluntary consent in providing testimony. Transparency is manifested in the notion of open court where justice is seen to be done in public eyes.

In essence, impartiality, transparency and due process in the court system are integral procedural protections that affect how things are done in court and how judicial laws are made. They are there to ensure fair hearing, which is fundamental to protection of individual rights. Given the lack of constitutional enshrinement of these concepts and their paramount importance in protection of rights, it is imperative that Australian courts rigorously protect them through preservation of traditions and conventions.

Barriers to mainstreaming problem-solving courts

While problem-solving courts have received wide support, the process of mainstreaming them has not been without controversy. Judge Hoffman from County Court Denver Colorado has warned against mainstreaming because it would allow judiciary to actively intervene in the lives of individuals 'in an infinite variety of non-traditional ways'¹⁴. He commented, 'I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to "do good" rather than to apply the law'¹⁵. While his concerns serve as a caution against overhasty and careless mainstreaming, some features of specialty courts can and should be mainstreamed without compromising the traditional protections afforded in our legal system.

Certain aspects of problem-solving courts are more problematic and at odds with the traditional protections while other aspects are more easily mainstreamed. Indeed, the question is not so much about whether specialty courts can or should be mainstreamed but rather to what extent the common features of these courts should be incorporated.

Impartiality issues

The most contentious issue of problem-solving justice in relation to impartiality is the proactive role of judge. Judges in problem-solving courts are expected to play a proactive role both inside and outside of court. Inside the courtroom, judges are expected to ask question and inquire into the problem underlying the offence. After the conclusion of the case, they are expected to sanction or praise defendant in ongoing treatment.

A distinction should be made between encouraging judicial interaction and requiring judges to take on the role of social workers. The former may involve the judge to clarify questions and interact directly with the defendant¹⁶. It may also include a certain degree of sanctioning or praising defendant provided that this is carried out in a formal forum. This can be and should be implemented because it does not fundamentally endanger impartiality. It is more about changing the attitude of judges and making them realize that their traditional role is changing to meet community needs¹⁷.

However, this should not be taken too far in making the court system too informal. A certain degree of formality in court should be upheld to emphasize the seriousness of the issue involved and protect the transparency of court proceedings¹⁸. A judge sanctioning or praising defendant in ongoing treatment outside a

¹² Ibid, 371.

¹³ Ibid.

¹⁴ Morris Hoffman, 'Commentary: The Drug Court Scandal' (2000), 78 *North Carolina Law Review* 1437, 1440.

¹⁵ Ibid.

¹⁶ Michael King, *What can Mainstream Courts Learn from Problem-Solving Courts?*, Monash University Faculty of Law Legal Studies Research Paper No. 2007/20, <<http://ssnr.com/abstract=1349412>> at May 30, 2010.

¹⁷ Ibid.

¹⁸ Jelena Popovic, 'Court Process and the Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?', <https://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf> at 30 May 2010

formal context may be taking his/her role too far. It would start to cross over to the situation Judge Hoffman has envisaged, where judges become 'amateur psychiatrists poised to "do good" rather than to apply the law'.

Due process issues

1. Coercion

Defendant must meet certain eligibility criteria before he/she can access problem-solving court and the treatment from that. In Queensland, both the Murri courts and drug courts require the defendant to plead guilty. It is argued that this requirement severely undermines due process because the presumption of innocence is gone. There is a counter argument that the admission is voluntary and self-determination should be encouraged¹⁹. However, there is a danger that defendants will be coerced into pleading guilty to avoid the formal court²⁰. This is, in effect, an abrogation of the defendant's right to fair hearing.

The eligibility criteria can be modified to deal with this problem. Firstly, there should be a distinction between 'serious' and 'less serious' offences. A plea of guilty should still be required for 'serious' offences while the trigger for 'less serious' offences can be lowered to an 'acceptance of responsibility'. With an 'acceptance of responsibility', the defendant remains free to plead not guilty at a court hearing²¹. This will allow for more flexibility and wider applicability of restorative treatment without compromising due process. Further, there should be multiple entry points for referral so that the defendant is given maximum opportunity to a fair hearing²². The different entry points can be at pre-charge, post-charge and pre-sentence. However, it should stop at pre-sentence because if referral is allowed post-sentence, it may effectively amount to an election of sanction by the offender.

The framework concerning how problem-solving justice is to be triggered requires careful consideration. It cannot be a clear-cut plea of guilty before trial if due process is to be upheld in mainstream courts.

2. Non-adversarial nature

The problem-solving practices and principles encourage judge and lawyers to work as a team in resolving cases. This is problematic in the wider court system because it endangers both impartiality and due process. It is the opposite of adversarial traditions where judge is impartial and prosecution and defendant lawyer are expected to zealously advocate their case. It has been suggested that this approach should only be adopted in limited forums such as family and juvenile cases²³. It will be inappropriate in violence crime where more weight should be given to retribution and deterrence in sentencing.

In order to effectively implement this approach in mainstream courts, there must be clear guidelines limiting the availability of teamwork to cases that require problem solving. Teamwork should really only kick in post adjudication²⁴. Restorative justice can still be served if the judge, prosecutor and defendant lawyer come together after the trial to discuss the appropriate treatment for the offender.

¹⁹ Michael King, *What can Mainstream Courts Learn from Problem-Solving Courts?*, Monash University Faculty of Law Legal Studies Research Paper No. 2007/20, <<http://ssnr.com/abstract=1349412>> at May 30, 2010.

²⁰ Clare Cappa, 'The Social, Political and Theoretical Context of Drug Courts' (2006) 32 *Monsh Law Review* 145, 162.

²¹ This modification draws ideas from the *Crimes (Restorative Justice) Act (2004) ACT* model. This model was discussed in Tony Foley, 'Restorative Justice and Due Process Protections' (Paper presented at the VAJR 'Restorative Justice: Bringing Justice and Community Together' Conference, Melbourne, 14 May 2008) 1, <http://www.varj.asn.au/pdf/08_FoleyT_RJandDueProcessProtections.pdf> at 30 May 2010.

²² This modification draws ideas from the Canadian Nova Scotia Restorative Justice Protocol. This protocol was discussed in Tony Foley, 'Restorative Justice and Due Process Protections' (Paper presented at the VAJR 'Restorative Justice: Bringing Justice and Community Together' Conference, Melbourne, 14 May 2008) 1, <http://www.varj.asn.au/pdf/08_FoleyT_RJandDueProcessProtections.pdf> at 30 May 2010.

²³ Donald Farole et al, *Can Innovation be Institutionalized?* (2004) Center for Court Innovation 1, 7-8.

²⁴ Greg Berman and John Feinblatt (2001), 'Problem-Solving Courts: A Brief Primer', *Law and Policy*, 23, 2, 13-4.

Transparency issues

The degree of transparency varies amongst problem-solving courts. It has been found that there is a clear contrast in the openness of process between drug courts and the Koori Court (Indigenous court in New South Wales). There are specific procedures set out for the Dandenong Drug Court prohibiting the presence of participant at case conferences while every aspects of the Koori Court are held openly at the table in the courtroom²⁵.

The divergence in transparency may be due to the different nature of the problems and the different aims of the courts. The Indigenous Courts aim to provide a more culturally appropriate sentencing environment. Opinions of the Elders may be sought to assist in understanding the cultural background of the case. The involvement of the wider Indigenous community means that the proceedings are more likely to be open. On the other hand, there is no explanation in the drug court manual as to why conferences must be conducted in the absence of the defendant. It may be due to the sensitive nature of the issue and the addiction problem of the defendant.

Transparency and openness in court process are more evident in some problem-solving courts than in others. When mainstreaming problem-court justice, open justice should not give way to practices 'designed to expedite hearings and make them more therapeutic for the participants'²⁶ except in circumstances where it is in the public interest to do so. Open justice not only promotes public confidence in judicial process but also promotes integrity of judges and appropriate conduct of legal representatives²⁷.

Conclusion

The concepts of impartiality, transparency and due process protections traditionally afford by the legal system are of paramount importance in protecting individual's right to fair hearing. The various key features of problem-solving courts differ in how readily they can be mainstreamed without undermining impartiality, transparency and due process in the legal system. Some features like judicial interaction should be encouraged in the mainstream. Other aspects such as the team-based approach should be limited to specific contexts only and activated post adjudication. The trigger for problem-solving justice and proactive judicial role should be modified to suit the wider context of mainstream courts. Overall, certain aspects of problem-solving courts can and should be mainstreamed. The process of separating the wheat from the chaff involves careful consideration of the context and aims of problem-solving justice within the wider criminal justice system.

Limitations

Our understanding of the actual, long-term effectiveness in mainstreaming problem-solving courts is limited because Australia is still at a transitional stage. It is useful to observe the progress and findings of the United States, where mainstreaming has been put to action since 2000. An exploratory study has been conducted by the California Administrative Office of the Courts in collaboration with the Center for Court Innovation where a diverse group of judges with experience in problem-solving courts were interviewed²⁸. The study focused on the opportunities and barriers to applying problem-solving principles and practices in conventional courts. It has been found that while there are barriers that might prevent or limit mainstreaming of problem-solving courts, most principles can be mainstreamed if they are modified to suit the general courts²⁹. These findings have resonance in the research paper conducted by King³⁰, where it has been suggested that judicial

²⁵ Popovic, Jelena, 'Court Process and the Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?', <https://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf> at 30 May 2010

²⁶ Ibid.

²⁷ Ibid.

²⁸ Donald Farole et al, *Can Innovation be Institutionalized?* (2004) Center for Court Innovation 1.

²⁹ Ibid.

³⁰ See Michael King, *What can Mainstream Courts Learn from Problem-Solving Courts?*, Monash University Faculty of Law Legal Studies Research Paper No. 2007/20, <<http://ssnr.com/abstract=1349412>> at May 30, 2010.

interaction, self determination and community outreach should be encouraged in mainstream. Continuous research and data collection in this area is necessary to confirm this in the Australian context.

The Justifiability of Criminal Responsibility for Negligent Conduct

David Birch

David Birch was the winner of the Australia Legal Philosophy Students' Association's essay competition for 2010.

Introduction

One night, Robert drives home in his car at night after work. Unfortunately, he forgets to turn on his headlights. Failing to recognise the danger, he hits and kills Georgia, a pedestrian. Robert is subsequently prosecuted and convicted for manslaughter by criminal negligence.¹ This essay will seek to demonstrate that it is justifiable to punish Robert for his criminally negligent conduct.

Negligence has long been viewed as a problematic ground for criminal responsibility. Although every major Western legal system imposes criminal punishment for negligent as well as intentional and reckless violations of specific interests,² the practice still evokes a lingering sense of unease amongst some legal theorists and jurists alike. Indeed, while negligence is the basic standard of liability in tort law, it only has a marginal existence in the criminal law. In this essay, I will present two rivalling justifications for the criminalisation of negligent conduct and argue that either is sufficient to dispel the lingering doubts over the practice.

What is Criminal Negligence?

The basic principle of responsibility in criminal law is that "no one is to be found guilty for conduct of the sort the law prohibits unless he or she is to blame or is morally at fault for such conduct."³ This standard is expressed in the basic criminal law maxim, '*actus non facit reum, nisi mens sit rea*', which may be loosely translated as "an act does not make a person guilty of a crime unless that person's mind be also guilty."⁴ The prosecution must not only prove that the accused performed the specified form of conduct (*actus reus*), but prove certain facts about the defendant's mental state which demonstrate that the defendant was at fault (*mens rea*).

¹ Many jurisdictions have legislative provisions to make specific offences for death caused by driving as alternatives to common law criminal negligence. For instance, in New South Wales it is likely that Robert would be prosecuted under s 52A(1) of the Crimes Act 1990 (NSW), which creates a specific offence of dangerous driving occasioning death. For the sake of simplicity, it will be assumed that Robert is charged under the common law offence of manslaughter by criminal negligence (See *Nydam v R* [1977] VR 430, *R v Lavender* (2005) 222 CLR 67).

As we shall see, the common law test for manslaughter by criminal negligence requires that Robert's conduct involve a "great falling short of the standard of care", so as to constitute "gross negligence". In this case it is perhaps unlikely that a court would find Robert grossly negligent. For the purposes of this essay, Robert's conduct will be assumed *arguendo* to constitute criminal negligence.

² Fletcher, G. (1971), "The Theory of Criminal Negligence: A Comparative Analysis". *University of Pennsylvania Law Review*, 119(3), p. 401. [Fletcher (1971)].

³ Baker, B. M. (1987), "Mens rea, Negligence and Criminal Law Reform". *Law and Philosophy*, 6(1), p. 53. [Baker (1987)].

⁴ Translation from *Haughton v Smith* [1975] AC 476 at 491-492. The maxim originates with Coke (1644), *Institutes of the Laws of England*, Part 3. London: Lee & Pakeman, 3 Inst 6.

The elements sufficient to demonstrate the *mens rea* requirement vary depending on the offence in question, depending upon the analysis of precedent in common law offences,⁵ or upon the interpretation of legislation for statutory offences.⁶ The basic *mens rea* elements of serious offences are “intention”,⁷ “knowledge”,⁸ and “recklessness”.⁹ These requirements can be contrasted with the requirement of negligence, which is sufficient to ground criminal liability in a small range of offences.¹⁰ Negligence is proved where the accused fails to comply with the standard of care required of a reasonable person. Unlike the fundamental *mens rea* requirements of “intention”, “knowledge” and “recklessness”, negligence does not require that the individual have any awareness of the danger that they are creating. Negligence thus differs from the traditional foundations of criminal liability in that no proof of a particular subjective psychological state is required. Instead, negligence arises when a person fails to foresee potentially adverse consequences to their actions and proceeds anyway, in circumstances in which the reasonable person would have foreseen the risk and would have acted to prevent the danger from manifesting.

I will first deal with a preliminary objection against the assignment of criminal responsibility for negligence. Some legal theorists have claimed that the basic criminal law requirement of “*mens rea*” or “guilty mind” precludes punishment for negligence.¹¹ It is claimed that negligence cannot be a form of *mens rea* since the term *mens rea* refers to subjective mental elements which are by definition absent in criminal negligence. George Fletcher attempts to refute this argument by establishing that the common law term “*mens rea*” refers “not to a specific subjective state, but to the actor's moral culpability in acting as he does.”¹² Interpreted in this way, Fletcher concludes that negligence is a form of *mens rea*. However, this issue of nomenclature is unimportant to the justification of criminal liability for negligence. As H. L. A. Hart notes:

... the substantial issue is not whether negligence should be called “*mens rea*”; the issue is whether it is true that to admit negligence as a basis of criminal responsibility is eo ipso to eliminate from the conditions of criminal responsibility the subjective element which, according to modern conceptions of justice, the law should require.¹³

⁵ *DPP v Morgan* [1976] AC 182.

⁶ *He Kaw Teh v R* (1985) 157 CLR 523.

⁷ *R v Crabbe* (1985) 156 CLR 464. Although “intention” has evaded precise legal definition, it is commonly accepted that the prosecution must prove that the purpose of the accused was to bring about the results or consequences of the conduct.

⁸ See *He Kaw Teh v R*.

⁹ *R v Crabbe*. “Recklessness” describes the state of mind of a person who, whilst performing an act, is aware of an unjustifiable risk that a particular consequence is a probable or possible result of their conduct.

¹⁰ For instance, manslaughter can be committed negligently, while under the common law the offences of battery and larceny cannot.

¹¹ Hart, H. L. A. (1968), “Negligence, *Mens rea* and Criminal Responsibility” in Hart, H. L. A. (ed.) *Punishment and Responsibility*. Oxford: Clarendon Press, pp. 139-140 [Hart (1968a)]; Fletcher (1971), pp.409-414.

¹² Fletcher (1971), p.414.

¹³ Hart (1968a), p. 140.

Latin maxims aside, the issue at stake is whether negligence constitutes a justifiable ground for criminal conviction and punishment. This substantive question cannot be resolved by “the procedural or linguistic device” of claiming that negligence cannot be *mens rea*.¹⁴

Why is criminal negligence in need of justification?

Criminal negligence is not “an invariable or inextricable part of the criminal law.”¹⁵ Indeed, negligent manslaughter has continued to phase in and out of the common law since the nineteenth century.¹⁶ It would be possible for the courts or the legislature to overrule precedent and reject negligence as a sufficient fault element. If it can be demonstrated that it is unjustifiable to hold defendants criminally responsible for negligence, the common law should be changed to reject negligence as a ground for criminal responsibility.

A persistent minority of legal theorists have continued to claim that criminal negligence is unjustifiable. Despite the widespread acceptance of the justifiability of the extension of criminal liability to negligent acts, negligent conduct continues to be relegated to the fringes of criminal responsibility in two ways.¹⁷ Firstly, the common law has adopted a stringent criterion for criminal negligence in order to limit its application. The courts have been concerned to distinguish criminal negligence from the standard applied in tort law, emphasising that the former must be “gross” or “aggravated”, and involve a “great falling short of the standard of care.”¹⁸ The second element of the “general reluctance” to employ negligence in the criminal context is the limited scope of offences in which negligence is sufficient to ground liability.¹⁹ The common law tradition criminalises a wide range of intentional or reckless conduct. However, only a small minority of these crimes can be committed negligently. These two factors of negligence’s relegation in criminal law demonstrate that negligence continues to be viewed as “an inferior, almost aberrant ground for criminal liability”,²⁰ notwithstanding the strong arguments made in favour of its justifiability. I will argue that these arguments support the extension of negligence as a condition for criminal responsibility to a larger selection of criminal offences.

One particular cause of concern is that the only case of negligently causing harm clearly subject to criminal sanctions under the common law is negligent homicide.²¹ It is somewhat concerning that the foremost example of criminalised negligent conduct is homicide. If negligence really is “a suspect basis of liability”,²² it seems somewhat disturbing that it would apply to homicide, “the most serious offence in the criminal calendar.”²³ However, if the justifications for criminal negligence are sound, it appears inconsistent not to also penalise negligence for other offences where serious injury or suffering are caused.²⁴

¹⁴ Ashworth, A. (1999), *Principles of Criminal Law* (3rd Ed). Oxford: Oxford University Press, p. 189 [Ashworth (1999)].

¹⁵ Weinreb, L. L. (1986), “Desert, Punishment, and Criminal Responsibility”. *Law and Contemporary Problems*, 49(3), p. 72 [Weinreb (1986)].

¹⁶ See Ashworth (1999), pp.303-304 for a history of the offence of negligent manslaughter.

¹⁷ See Simester, A. P. & Sullivan, G. R. (2000), *Criminal Law: Theory and Doctrine*. Oxford: Hart Publishing, pp. 144-145. [Simester & Sullivan (2000)].

¹⁸ Kirby J in *R v Lavender*, Hart (1968a), p. 137.

¹⁹ Bronitt, S. & McSherry, B. (2005), *Principles of Criminal Law* (2nd Ed). Pyrmont, NSW: Thomson Lawbook, p. 185 [Bronitt & McSherry (2005)].

²⁰ Fletcher (1971), p. 402.

²¹ Fletcher, G. (1998), “Intention versus Negligence” in Fletcher, G. (ed.) *Basic Concepts of Criminal Law*. Oxford: Oxford University Press, p. 117 [Fletcher (1998)].

²² Fletcher (1998), p. 117.

²³ Ashworth (1999), p. 263.

²⁴ Ashworth (1999), p. 197.

There are therefore two reasons why the criminalisation of negligent conduct needs to be justified. Firstly, it is conceptually important to ensure that the criminal law develops in a coherent, defensible way. Secondly however, the punishment of negligent conduct has much broader implications. If negligence does not constitute a fair basis for the imposition of criminal sanctions, then the suffering of those convicted according to the current practice of the common law is unjustified. This is a particularly pressing issue in the context of criminally negligent manslaughter. Defendants convicted of criminally negligent manslaughter face the severe penalty of penal incarceration and also the moral opprobrium associated with a conviction for manslaughter.

Why Is Negligence Widely Accepted In Tort Law But Not Criminal Law?

Of course, criminal law is not the only context in which the common law courts impose liability for negligent conduct. Negligence is also the “primary basis of tort liability in Anglo-American legal systems.”²⁵ One might therefore wonder why negligence is treated with such persistent suspicion in criminal law while forming the cornerstone of tort law. The reason for this distinction is fairly straightforward. In all cases of tort, the primary issue is one of compensation, and liability is generally only imposed “to the extent necessary to compensate a victim for the injury he has suffered.”²⁶ Liability for negligence in tort law requires that the defendant, whether intentionally or not, performed an action which the reasonable person would not have performed. Tort law is merely concerned with the efficient distribution of costs following the infliction of harm.

Once injury has occurred, someone must necessarily bear the cost of the damage. Liability in tort law is imposed to ensure that the costs of such accidents are borne by the appropriate party. The suitability of the party who will bear the costs is not always determined by an examination of their moral fault. As Arthur Ripstein notes, even in situations in which nobody could have controlled the outcome, the bad luck must be borne by someone due to “the binary structure of adjudication”.²⁷ For instance, the doctrine of “joint and several liability” protects victims from being undercompensated for their injury by allowing plaintiffs to recover all their damages from any of the defendants, regardless of the defendants’ individual share of the liability.²⁸ This doctrine leads to cases in which a defendant with “deep pockets” is forced to pay all the damages despite only bearing a minor part of the responsibility for a plaintiff’s injury. A further example of the relative indifference in tort law towards moral culpability can be seen in the fact that the “[c]ourts have generally held the mentally ill defendant to the same objective standard of tort liability as an average defendant.”²⁹

By contrast, criminal law does not function to distribute costs. Criminal liability can still be imposed in cases where compensation is impossible or has already been made.³⁰ A determination that a person is guilty of criminal negligence does not lead to compensation to the victim. Instead, the sole purpose of criminal proceedings is to impose sanctions on the accused. The criminal law therefore requires some form of justification for this practice of punishment for negligence which goes beyond the explanation provided for the role of negligence in tort law.

Two Justifications

In the remainder of this essay, I will present utilitarianism and retributivism as two mutually exclusive families of theories which attempt to justify for the criminalisation of negligent conduct. I will argue that either family of theories can provide arguments which are sufficient to address the persistent concerns over the ascription of criminal responsibility for negligence.

²⁵ Ripstein, A. (1999), *Equality, Responsibility, and the Law*. Cambridge: Cambridge University Press, p. 48 [Ripstein (1999)]. See also The Yale Law Company, Inc. (1972), “Negligence and the General Problem of Criminal Responsibility”. *The Yale Law Journal*, 81(5), p. 977 [Yale (1972)].

²⁶ Yale (1972), p. 978. Emphasis in original.

²⁷ Ripstein (1999), p.84.

²⁸ Rogers, A. (2000) “Fairness or Joint and Several Liability”. *Torts Law Journal*, 8, p. 107.

²⁹ Splane, S. (1983), “Tort Liability of the Mentally Ill in Negligence Actions”. *The Yale Law Journal*. 93(1), p. 153. See *Carrier v Bonham* [2002] 1 Qd R 474, particularly at 479 where McMurdo P notes that the criterion for liability in tort “is not so much culpability, but on whom the risk should fall.”

³⁰ Yale (1972) p. 978.

Utilitarian Justification

I will first address one approach to justifying the criminalisation of negligence. Consequentialist theories hold that the practice is to be judged solely in terms of the value of its consequences. Assignment of criminal responsibility for negligence does not therefore pose a particular conceptual problem for consequentialist legal theorists, as the question is resolved by empirical investigation into the likely consequences of such a practice, and an assessment of the value of these consequences.

It must be noted that there are many possible consequentialist theories. For the purposes of this essay, I will focus on utilitarianism, which I take to be the most popular and defensible consequentialist theory.³¹ According to utilitarianism, the legal practice is justified if and only if the practice maximises overall utility throughout society. The question of whether the legal system should criminalise and punish negligent conduct therefore simply hinges upon the empirical matter of whether such a practice in fact promotes social utility. It is instructive to note that negligence in tort law is “generally considered to be a utilitarian concept” by legal theorists.³² I will argue that a similar utilitarian justification can be provided for punishment for negligence in criminal law.

The first step in a utilitarian analysis of criminal negligence is to appreciate that the practice of conviction and imprisonment inflicts, and indeed seeks to inflict, a great deal of suffering.³³ The experience of incarceration in a prison is by design burdensome and painful and poses elevated mental and physical health risks.³⁴ However, there are serious ongoing negative consequences even for released prisoners or for offenders who are convicted but never incarcerated. A criminal record presents a major barrier for those seeking employment, housing or financial support.³⁵ From a utilitarian perspective, this suffering inflicted upon those convicted of criminal negligence is *ceteris paribus* morally wrong. A utilitarian seeking to defend the practice of punishing defendants for criminal negligence must demonstrate that it brings consequential benefits sufficient to outweigh the offenders’ hardship and pain.³⁶

The leading utilitarian argument for criminal punishment is the role of punishment in the prevention of harms caused by future crime. Utilitarians claim that the presence of criminal sanctions serves as a deterrent for potential offenders. The threat of punishment discourages those who are considering breaking the law by providing a powerful disincentive: the risk of conviction and incarceration.

However, according to this analysis of the benefits of deterrence, it seems that there can be no deterrent value in punishing negligence.³⁷ Glanville Williams rhetorically asks “Even if a person admits that he occasionally makes a negligent mistake, how, in the nature of things, can punishment for inadvertence serve to deter?”³⁸ The threat of punishment can clearly deter intentional or reckless conduct, since the potential offenders are aware of the risks they are creating at the time of offending. However, criminally negligent action by definition involves a failure to foresee possible risks. If a person has simply not adverted to the possible consequences of their actions, critics claim, punishment cannot make that person either more likely to advert to the possibility of danger in the future or more likely to actually avoid the danger, since “mere

³¹ It must also be noted that a variety of significantly different moral theories have been developed within a broadly utilitarian approach. For the purposes of this essay, I adopt R. G. Frey’s analysis in Miller, D. (1987) *The Blackwell Encyclopaedia of Political Thought* (Ed.) Oxford: Basil Blackwell, p. 531. As Frey notes, “the term ‘utilitarianism’ refers not to a single theory but to a cluster of theories which are variations on a theme” and identifies four unifying components of all utilitarian theories. My analysis applies to any view which satisfies Frey’s four criteria. The fine-grained distinctions between utilitarian theories will not be relevant to this essay.

³² Weinrib, E. J. (1983), “Toward a Moral Theory of Negligence Law”. *Law and Philosophy* 2(1), p. 43.

³³ Duff, A. (2008), “Legal Punishment”. In Zalta, E. N. (Ed.) *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition). Retrieved October 11 2008, from <<http://plato.stanford.edu/archives/fall2008/entries/legal-punishment/>> [Duff (2008)].

³⁴ See however Bonta, J. & Gendreau, P. (1990), “Reexamining the Cruel and Unusual Punishment of Prison Life”. *Law and Human Behaviour*, 14(4), pp. 347-372.

³⁵ Pager, D. (2003). “The Mark of a Criminal Record”. *The American Journal of Sociology*. 108(5), pp. 937-975.

³⁶ Duff (2008).

³⁷ See Hart (1968a), pp. 156-157.

³⁸ Williams, G. (1961), *Criminal Law: The General Part* (2nd ed.). London: Stevens & Sons, p. 123

failure to live up to a duty of care may not be deterred.”³⁹ Therefore, if the threat of punishment for criminal negligence cannot deter potential offenders, a utilitarian justification of criminal negligence can no longer rely on the positive consequentialist value of deterrence. Since this is the most plausible beneficial result of criminal punishment, the utilitarian justification of criminal negligence is doomed to failure.

Criminal Negligence as Deterrent

Fortunately for the utilitarian justification however, there is a persuasive argument that punishment can in fact deter negligence. As Hart notes, punishment for negligence will supply offenders with “an additional motive to take care before acting, to use their faculties, and to draw upon their experience.”⁴⁰ Punishment for negligence cannot by definition affect the rational reflection of an inadvertent actor, since the very problem with inadvertent negligence is that the defendant has failed to think. However, punishment for negligence can certainly “exert a general deterrent effect” by encouraging those who engage in risky conduct to think about their actions in the future.⁴¹ In this way, people can be reminded of the need to take care in dangerous situations, thereby exercising their capacity to advert to the possible dangers and discouraging them from acting inadvertently in the first place.

Furthermore, it must be emphasised that the utilitarian arguments for the deterrent value of criminal punishment for negligence do not depend upon an exaggeration of “the part played by calculation of any sort in anti-social behaviour”.⁴² For some people engaged in inherently risky or dangerous conduct, punishment for criminal negligence may indeed create a conscious awareness of illegality and the risk of prosecution and conviction. However, this is not the only deterrent benefit to flow from the criminalisation of negligent conduct. The content of the criminal law has a prominent role in the creation or reinforcement of general social norms.⁴³ The criminalisation of negligence can establish or augment the internalised perception that negligent conduct is morally wrong. In turn, this increases the social stigma of those who cause unreasonable risks to others and discourages negligent conduct.

Therefore, it is clear that punishment can in fact deter negligent conduct. There are two ways in which this deterrent value can support a utilitarian justification for criminal negligence.

Firstly, punishment for grossly negligent conduct can deter the individual offender from committing further negligent acts in the future. If Robert were convicted and punished for his criminal negligence, it is highly likely that he would be more careful to ensure his headlights were on before driving at night in the future and would thus be less likely to kill another person. Indeed, it seems likely that Robert’s experience would induce him to always take more care before engaging in any dangerous conduct.

Secondly and more importantly, the threat of punishment for negligent conduct provides a wider deterrent across society generally. The knowledge that gross negligence may result in criminal prosecution will not only serve to deter a particular offender from engaging in future negligent conduct, but will also deter others in the community who engage in the creation of unjustified risk. Hart notes that there is “plenty of empirical evidence” that punishment for negligence can influence the future behaviour of the community at large by encouraging potential offenders to advert to possible risks before acting.⁴⁴

Therefore, there is a strong utilitarian argument in favour of criminal negligence on the basis that it is likely to deter negligent lack of care, preventing the future harms which would flow from this negligent conduct.

³⁹ R. D. L. (1926), “Crimes: Negligence and Criminal Negligence”. *Michigan Law Review*. 24(3), pp. 285-287.

⁴⁰ Hart (1968a) p. 157.

⁴¹ Ashworth (1999), p. 200.

⁴² Hart, H. L. A. (1968), “Prolegomenon to the Principles of Punishment” in Hart, H. L. A. (ed.) *Punishment and Responsibility*. Oxford: Clarendon Press, p. 1 [Hart (1968b)].

⁴³ See Wenzel, M. (2004), “The Social Side of Sanctions: Personal and Social Norms as Moderators of Deterrence”. *Law and Human Behavior*. 28(5), pp. 547-567.

⁴⁴ Hart (1968a), p. 157.

Ease of Conviction

It is easier for the prosecution to prove that a defendant failed to meet an objective standard than it is to prove that the defendant actually intended their conduct or knew of its risks.⁴⁵ This simplifies the task of the prosecution, saving valuable time and cost to the court system. From a utilitarian perspective, this increased efficiency is a beneficial consequence, and needs to be considered in the total evaluation of the practice.

Indeed, it could be argued that removing negligence as a ground for criminal liability would lead to deleterious consequences for the criminal justice system. If negligence is eliminated from the criminal law, the prosecution must prove elements of the defendant's actual psychological states. In this case, defendants may be tempted to fabricate false claims that they lacked an intention to do harm or an appreciation of the risk of harm in order to escape conviction.

However, this concern does not carry much weight. As I have already noted, the majority of offenses in the criminal law already treat negligence as insufficient to sustain conviction. The requirement for proof of subjective psychological states has historically not prevented successful prosecutions for such offenses. Even among offenses like manslaughter in which negligence can ground liability, negligence is a relatively new sufficient criterion for prosecution. The fact that negligence is only a recent addition to the sufficient conditions for a small selection of offenses indicates that it could easily be removed from the criminal law without serious negative consequences.

Therefore, offenses which require proof of the defendant's actual states still have a valid role to play in the criminal justice system. As Colvin points out, "a very severe tactical burden already faces an accused who has engaged in high-risk conduct and then claims that he was unaware of that risk without reasonable cause or deficient mental capacity."⁴⁶ A claim by the defendant that they were never aware of the risk in their conduct will not automatically establish that they were not reckless or did not intend the act. On a practical level, the jury will naturally assess whether a reasonable person would have foreseen the existence of an unjustifiable risk in order to determine whether the defendant's assertion is credible. If the defendant is unable to establish the presence of reasonable grounds for their failure to foresee the risk, the jury is likely to simply conclude that the defendant is lying about their absence of awareness of the risk. Therefore, in practice, the tests for recklessness and negligent conduct will likely produce similar results in the majority of cases.

Other Arguments for the Utilitarian Justification

Finally, criminal punishment for negligent conduct can have broader value beyond deterrence and increased efficiency in the legal system. There is instrumental value in ensuring that the law conforms to popular conceptions of justice. The failure to recognise community values in the criminalisation of conduct risks causing widespread public dissatisfaction in the legal system. More importantly, if there is no appropriate sanction available for conduct which officials and juries believe is culpable, they may express their moral indignation at the negligent action by holding the defendant liable for a more serious offence if negligence is not available. The danger of defendants being convicted for inappropriately serious offences is a good reason to ensure that negligence is an available alternative. Finally, punishment for negligent conduct can reassure the wider community by suggesting that the state is protecting innocents from becoming the victims of negligence.

Conclusion for the Utilitarian Justification

A utilitarian seeking to justify criminal negligence cannot simply disregard the very real suffering of those convicted under such a practice. However, there are persuasive reasons which utilitarians can offer to

⁴⁵ Honoré, T. (1988), "Responsibility and Luck: The Moral Basis of Strict Liability". *The Law Quarterly Review*, 104, pp. 534-535 [Honoré (1988)].

⁴⁶ Colvin, E. (1982), "Recklessness and Criminal Negligence". *The University of Toronto Law Journal*, 32(4), p. 359.

demonstrate that the broader benefits to society do indeed outweigh the disutility of the suffering of those found to be criminally negligent.

As with all other utilitarian arguments for practical conclusions, the case for the criminalisation of negligence is entirely contingent upon empirical facts about the probable consequences of such a practice. This conclusion is of course dependent upon hypotheses regarding the foreseeable consequences of holding negligence to be a sufficient ground for criminal responsibility. If reliable data were to show that the criminalisation of negligence in fact leads to worse consequences than the alternatives, then this would cause a consistent utilitarian to revise their conclusion. However, the combination of the factors considered above indicates that there is a strong utilitarian case for the assignment of criminal responsibility for negligent conduct.

There is a reason that utilitarianism is so easily able to provide a moral justification for the criminalisation of negligence. The approach is entirely forward-looking, since the justification for the practice lies entirely in its consequences. This allows utilitarians to justify the criminal punishment of negligence by demonstrating that the practice promotes the welfare of society by discouraging further negligent conduct and providing some measure of reassurance to the community. Utilitarianism places no intrinsic weight upon the desert of the accused in assessing whether they should be punished. J. J. C. Smart suggests that attempts to assign the responsibility for a particular negligent act are “metaphysical nonsense”.⁴⁷ Instead, the relevant question is: “Whom would it be useful to blame?”⁴⁸ Of course, utilitarians do not deny that the nature of what the negligent actor has done is relevant in the appraisal of what should be done to them. For the utilitarian, the defendant’s act is an important symptom of the defendant’s disposition.⁴⁹ This information assists in the consideration of how the future good to society can be best promoted. However, the nature of the defendant’s crime “cannot by itself dictate the kind or severity of punishment.”⁵⁰ The utilitarian approach places no intrinsic moral weight upon the defendant’s desert. This means that the utilitarian justification for criminal negligence is in principle no different to the justification for the criminalisation of any other conduct. For the utilitarian, the question of whether negligent actors deserve conviction is equally as irrelevant as the question of whether intentional actors deserve conviction. The only relevant issue at stake is whether conviction and punishment in either case will promote good consequences for society at large.

Therefore, a utilitarian approach can justify the practice of holding people criminally responsible for negligence solely on the basis of the consequences of such a practice. Such a justification is indifferent to any notion of moral desert.

Of course, this is precisely the feature of utilitarianism which its critics use to reject the theory as a justification for the practice of conviction and punishment. Opponents argue that punishment for its utility alone is unjust.⁵¹ Since the utilitarian completely disregards the question of the defendant’s desert, the utilitarian must be committed to punishing innocents or the insane if doing so would maximise the general welfare. While utilitarians may reply by pointing to the instrumental value of punishing only the guilty and those who are thought able to comply with the law, their critics can specify ever more specific hypothetical situations in which even this instrumental value is outweighed by the value of punishing an innocent. The fact that utilitarianism is willing to even contemplate the sacrifice of an innocent for the collective gain is treated by its critics as a *reductio ad absurdum* of the position.⁵²

While utilitarians have persuasive responses to these objections,⁵³ the ultimate resolution of this issue is beyond the scope of this essay. Although I believe that the utilitarian approach provides an exhaustive justification for criminal negligence, I note that it clashes with many “commonsense. views which require that

⁴⁷ Smart, J. J. C. & Williams, B. (1973), *Utilitarianism: For and Against*. Cambridge: Cambridge University Press, p. 54 [Smart & Williams (1973)].

⁴⁸ Smart & Williams (1973), p. 54.

⁴⁹ Hart, H. L. A. (1968), “Punishment and the Elimination of Responsibility” in Hart, H. L. A. (ed.) *Punishment and Responsibility*. Oxford: Clarendon Press, p. 160 [Hart (1968c)].

⁵⁰ Hart (1968c), p. 160

⁵¹ Weinreb (1986), p.79. See also Hart, H. L. A. (1968), “Murder and the Principles of Punishment” in Hart, H. L. A. (ed.) *Punishment and Responsibility*. Oxford: Clarendon Press pp. 75-83 [Hart (1968d)].

⁵² Weinreb (1986), p.47.

⁵³ See for example Smart & Williams (1973), pp. 69-72.

the defendant should not be held criminally responsible for an act unless they are in some sense morally culpable. I will therefore set aside the utilitarian approach *arguendo* and discuss whether rival theories can also justify the practice of criminal negligence.

Retributivist Justification

I will now consider whether the assignment of criminal responsibility for negligent behaviour can be justified according to any theory on which at least some intrinsic moral weight is assigned to the moral desert of the defendant. I propose to refer to any theory which deviates from the unrestricted consequentialist approach by placing at least some moral weight on the desert of the accused as “retributivism”. My discussion will therefore pertain to traditional retributivist theories which treat the moral desert of the wrongdoer as both a necessary and a sufficient reason for the infliction of punishment. However, the arguments presented will also apply to composite theories which employ notions of moral desert in order to justify side-constraints on punishment within a consequentialist framework.⁵⁴ All such theories face the more problematic question of explaining exactly how negligent defendants may be said to deserve conviction and punishment if they neither intended to bring about harm nor foresaw it as a possible consequence of their actions.

A fundamental concern of the criminal law in the common law tradition is that a person should not be held criminally responsible for an act unless they are in some sense morally culpable.⁵⁵ In order to ensure that only those who are considered “blameworthy” are convicted and punished, the common law treats *mens rea* as a fundamental requirement for serious offences. However, as we have seen, there is a clear distinction in the common law between negligence and the traditional principles of *mens rea* which require proof of the defendant’s actual mental states. For negligence, there is no need to prove that the defendant chose the harm or was even aware of the risk.

The Importance of Subjectivity in Criminal Law

This difference between negligence and the established mental requirements for criminal responsibility is the cause of the continued uneasiness regarding the justifiability of criminalising negligent conduct. A number of writers have placed such a high degree of importance on the defendant’s subjective mental states that they have argued that “people should never be subject to criminal liability on the basis of negligence.”⁵⁶ I will refer to such a position as “subjectivism”. Such writers claim that a “voluntary harm-doing is the essence of [culpability].”⁵⁷ Tony Honore comments that “in criminal law we think that it is only those who have consciously made a wrong choice whom we can treat ... as fair game.”⁵⁸

However, a negligent actor has not made a choice to do something wrong, and may not even be aware of the possibility that they are doing something wrong.⁵⁹ It is intuitively plausible that a person should only be held criminally responsible, and hence exposed to imprisonment and the accompanying disgrace and stigma, if they are morally culpable. Since culpability requires choice or at least subjective awareness of risk, subjectivists argue, it is morally objectionable to hold a person criminally responsible for negligence.

⁵⁴ Hart (1968b). See critique of Hart in Galligan, D (1981), “The Return to Retribution in Penal Theory” in Tapper, C. H. (ed.) *Crime, Proof and Punishment*. Oxford: Butterworths p. 144.

⁵⁵ Bronitt & McSherry (2005), p148.

⁵⁶ Simester & Sullivan (2000) p. 144. See Hall, J. (1963), “Negligent Behaviour Should be Excluded from Penal Liability” *Columbia Law Review*, 63(4), p. 632 [Hall (1963)]; Turner, L. J. (1948) “The Mental Element in Crimes at Common Law” in Radzinowicz, L. & Turner, L. J. (eds), *The Modern Approach to Criminal Law*, London: Macmillan & co, pp. 195, 207-211; Hall, J. (1960), *General Principles of Criminal Law* (2nd Ed.) Indianapolis: Bobbs-Merrill, p. 138 [Hall (1960)].

⁵⁷ Hall (1963), p. 635.

⁵⁸ Honore (1988), p. 534.

⁵⁹ Yale (1972), p. 956.

The basis for such a strong subjectivist requirement for criminal responsibility is “respect for individuals as rational, choosing persons.”⁶⁰ Andrew Ashworth grounds the requirement of *mens rea* in the principle of autonomy:

...individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices.⁶¹

To hold people criminally responsible for the consequences of their inadvertent actions, subjectivists claim, is to ignore the fundamental importance of the defendant’s actual state of mind in an assessment of culpability.

These strong subjectivist sentiments from legal theorists are also reflected in the importance placed upon of the defendant’s actual intention or awareness of risk in the common law. For the vast majority of offences, the existence of such a state is treated as a necessary condition for the ascription of criminal responsibility, despite the obvious inherent difficulties in proving the defendant’s actual state of mind.

The common law’s emphasis on the importance of subjectivity is most vividly illustrated in the case of *DPP v Morgan*,⁶² in which the House of Lords held that the *mens rea* requirement for rape was subjective knowledge of lack of consent or recklessness as to whether the other person consents. This requirement demanded the acquittal of a defendant who had a genuine belief in the consent of the victim, regardless of how unreasonable that belief may have been. *DPP v Morgan* exemplifies the exceptionally high importance that the criminal law places upon the presence of certain subjective psychological states.

Retributivist Arguments against Subjectivism

Any theory of criminal negligence which places at least some weight on the moral desert of the accused therefore requires a plausible explanation of why negligent defendants can be considered morally worthy of punishment. Retributivist proponents of criminal punishment for negligent conduct require a response to the subjectivist challenge that only those who choose wrongful conduct are culpable and worthy of punishment.

However, there is a strong argument against the subjectivist claim that only those who choose or are aware of the risks of their actions can be culpable and deserving of punishment. H. L. A. Hart provides the most famous and forceful example of the response to subjectivism. Indeed, jurists seeking to justify the practice of criminal negligence have explicitly adopted Hart’s analysis.⁶³ Hart’s strategy is to accept that the negligent actor is inadvertent, but to look beyond the inadvertence to find a mental failure capable of grounding a finding of culpability. The failure Hart identifies is the negligent actor’s failure to take reasonable precautions when they have the capacity to do so. It is the “unexercised capacity, to exercise caution and avoid risk which provides a basis for moral blameworthiness and justifies punishment.”⁶⁴ As Fletcher argues, “the culpability of negligence is not the culpability of choice, but rather of failing to bring to bear one’s faculties to perceive the risks that one is taking.”⁶⁵

According to Hart’s analysis, therefore, Robert can indeed be held morally culpable for his negligence in hitting and killing Georgia. Robert has brought about harm without realising what he is doing or advertent to the possible danger of his actions. However, what makes the harm caused by Robert’s negligence blameworthy,

⁶⁰ Ashworth (1999), p. 87.

⁶¹ Ashworth (1999), pp. 160-161’see also Bruder, A. (1993), “Agency and Welfare in Criminal Law., in Shute, S., Gardiner, J. & Horder, J. (eds), *Action and Value in Criminal Law*, p. 35.

⁶² *DPP v Morgan* [1976] AC 182. *DPP v Morgan* was adopted in Australian law in *R v McEwan* [1979] 2 NSWLR 926 and was reflected in legislation in New South Wales until 2007 in the *Crimes Act 1900* (NSW), s 61R . Recent legislative reform has repealed s 61R and enacted s 61HA, which imputes knowledge of lack of consent if there are no reasonable grounds for consent, effectively adopting an objective test.

⁶³ See for example Kirby J in *R v Lavender* at 107-108.

⁶⁴ See Moore, M. (1997) *Placing Blame*. Oxford: Clarendon Press, pp. 588-592

⁶⁵ Fletcher (1971), p. 415.

according to Hart, is “his failure to examine the situation he is in before acting and to assess its risks while acting”.⁶⁶

Hart argues that the requirement of *mens rea* in the criminal law should attempt “to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it.”⁶⁷ Therefore under Hart’s retributivist response to subjectivism, if negligence is adopted as part of the criminal law, it is crucially important that the standard of the reasonable person be sufficiently nuanced so that no one is found to be negligent for failing to meet a standard of care which they were incapable of reaching. Hart suggests that conviction for criminal negligence be subject to the requirement that the defendant could actually have reached the objective standard demanded by the law. As Ashworth argues, “[t]his preserves the principle of autonomy by ensuring that no person is convicted who lacked the capacity to conform his or her behaviour to the standard required by law.”⁶⁸

It appears, then, that a retributivist framework can indeed plausibly accommodate criminal punishment for negligence, as long as the test considers whether the defendant could actually have reached the standard of the reasonable person. Unfortunately, however, the common law test for criminally negligent manslaughter does not have this capacity-based exception to the objective test. The criminal law recognises a set of standard defences like insanity which are available to all offences. However, there is no guarantee that everyone who is unable to reach the objective standard will be reliably protected from liability by these defences. As Justice Kirby notes in *R v Lavender*:

It is true that, in extreme situations, a person may be exposed to criminal liability for being objectively at fault in circumstances where no one would regard that person as culpable. For instance, it would not be rational to impute blame to a person who is physically or mentally incapable of achieving the standard of care expected by the criminal law.⁶⁹

One approach that the criminal law takes to address this potential injustice is to adjust the objective standard of the reasonable person by incorporating specific characteristics of the accused. However, there is a danger in modifying the standard of the reasonable person in such a way. As Fletcher notes, if the “reasonable person. is adjusted to include all the individual characteristics of the accused, “the standard for judging would collapse into the object to be judged.”⁷⁰ Therefore, the criminal law needs some consistent method of judging which characteristics should be used to modify the objective standard and which characteristics are vices which should be excluded from consideration of what the reasonable person in the defendant’s position would have done. Unfortunately, such a scheme has thus far eluded the common law.⁷¹ Any retributivist justification which seeks to use a Hartian “unexercised capacity” account of criminal responsibility must insist that the common law position change. If criminal negligence is to be justified to retributivists, the prosecution should have to prove beyond a reasonable doubt that the accused was physically and mentally capable of meeting the standard of care of a reasonable person in cases of criminal negligence.

I will now consider three objections against the Hartian account of “unexercised capacity”. While none of these responses are sufficiently persuasive to refute Hart’s theory, they may help explain why lingering doubts remain for retributivists seeking to justify criminal negligence.

Firstly, a critic of the Hart’s position could question whether it is apt to use the “mythical standard of the reasonable person” in criminal law.⁷² Whether or not inadvertent harm is negligent is determined by the degree of deviation from what the “reasonable person. in the same position would do. This appeal to the standard of the reasonable person lends the proceedings a veneer of impartiality. However, this “reasonable person. test may be an implicit way of smuggling in a raft of assumptions about hypothetical “reasonable.

⁶⁶ Yale (1972), p. 958.

⁶⁷ Hart (1968c), p. 174.

⁶⁸ Ashworth (1999), p. 201

⁶⁹ Kirby J in *R v Lavender* at 108.

⁷⁰ Fletcher (1998), p. 119.

⁷¹ See for example Brown, D., Farrier, D. et al (2006), *Criminal Laws* (4th Ed.). Sydney, The Federation Press, pp. 486-488

⁷² Fletcher (1998), p. 117.

behaviour without ever having to justify why such behaviour is morally preferable to the actual behaviour of the defendant.⁷³ By suppressing the justification of what makes conduct “reasonable”, critics might claim, the law invites judges and jurors to import their own prejudices into the assessment of the defendant’s conduct. The critics’ lingering disquiet is not dispelled by the fact that the overwhelming majority of judges are male, wealthy, elderly, former barristers. Fletcher, for instance, refers to feminist criticism that “the standard of the reasonable person has a male bias built into it”.⁷⁴ However, this objection does not provide sufficient grounds for rejecting negligence as a ground for criminal responsibility. It rather serves to reinforce the importance of ensuring transparency in judicial reasoning and diversity amongst judges and jurors. This should ensure that the risks of injustice to particular defendants are minimised. In any case, the risk of prejudice in the finder of fact is a problem which affects not only negligence but also all other standards of criminal liability.

Secondly, it could be argued that the thesis of causal determinism, if it were true, would rule out this Hartian “unexercised capacity” model. In a deterministic world, the negligent act is necessitated by antecedent conditions, so that the negligent actor could not have done otherwise. However, as Hart points out, determinism has no relevance to criminal negligence that it does not also have to reckless or intentional acts, which are just as much a product of preceding circumstances.⁷⁵ If determinism is indeed a problem for the ascription of criminal responsibility, it does not have any special significance to the justification of criminal negligence.

Thirdly, a critic could argue against the sufficiency of the Hartian justification for criminal negligence. The method of analysis adopted by Hart is “to identify the standards of responsibility employed by ordinary men in everyday social life.”⁷⁶ At the core of Hart’s argument is the observation that: “a hundred times a day persons are being blamed outside the law courts for not being more careful, for being inattentive and not stopping to think.”⁷⁷ Even if Hart’s analysis shows that negligence can be culpable, a critic might wonder, does it show that negligence can be culpable enough to ground criminal responsibility? While Hart may show that negligence is blameworthy in ordinary life, it does not follow that negligent actors can warrant criminal conviction and punishment.

However, this objection can be answered. If we accept the Hartian argument that negligence can be culpable, then it straightforwardly follows that “some cases of negligence manifest greater culpability than some cases of subjective recklessness.”⁷⁸ It seems plausible that *ceteris paribus* intentionally committing a harmful act is morally worse than committing it negligently. If an actor knows about a risk of a given harm and decides to run it anyway, they display greater contempt for the interests of others than if they had never learned of the risk at all. However, it does not follow that no negligent acts are worthy of criminal censure. Negligent acts causing great danger to others are much more culpable than minor intentional wrongs, as Baker notes:

Carelessly handling loaded firearms in a crowded area, or speeding through a school zone at lunch hour oblivious to the dangers to others because one is absorbed in an interesting conversation, is more culpable ... than deliberately taking a \$0.50 store item without payment or than many other knowing offences against property.⁷⁹

If it is acknowledged that negligence can be morally culpable, it follows that at least some examples of negligent conduct are sufficiently culpable to provide a basis for the ascription of criminal responsibility.

⁷³ See for discussion: Gardner, J. (2001) “The Mysterious Case of the Reasonable Person”. *The University of Toronto Law Journal*, 51(3), pp. 273-308; Green, E. (1968), “The Reasonable Man: Legal Fiction or Psychosocial Reality?”. *Law & Society Review*, pp.241-258.

⁷⁴ Fletcher (1998), pp. 117-118.

⁷⁵ Hart (1968a), p. 156.

⁷⁶ Yale (1972), p. 973.

⁷⁷ Hart (1968a), p. 151.

⁷⁸ Ashworth (1999), p. 199.

⁷⁹ Baker (1987), p. 81.

Conclusion for the Retributivist Justification

It is commonly accepted that “one cannot be morally responsible for occurrences over which one had no control.”⁸⁰ In order to be considered to be in control over one’s behaviour, it seems one must in some sense choose one’s actions or advert to their consequences. However, one can be negligent in a state of complete inadvertence. This appears to pose an insurmountable obstacle for retributivists seeking to justify criminal punishment for negligent conduct.

Hart’s argument manages to reconcile negligence with a commonsense notion of moral responsibility. This allows retributivists to hold that the ascription of criminal responsibility for negligent acts is indeed justified. Indeed, Hart’s position demonstrates the excessive narrowness of subjectivism. It is simply implausible to hold that only intentional or advertently reckless conduct is capable of grounding moral responsibility. As Ashworth plausibly notes, “[a]n approach that focuses solely on advertence fails to capture moral distinctions and to satisfy social expectations.”⁸¹

Conclusion

Therefore, both utilitarian and retributivist approaches can give us strong reasons to view the ascription of criminal responsibility for negligence as justified. However, these two views address the issue in completely different ways.

Retributivist approaches which allocate moral weight to the desert of the accused need to explain how negligent defendants may be held morally responsible for their actions if they are to justify criminal negligence. However, retributivists do indeed have a convincing ground for assigning moral blameworthiness to negligent actors. The negligent actor’s culpability arises from their failure to take reasonable precautions where they have the capacity to do so. This means that retributivists can defend the criminalisation of negligent conduct. However, retributivists should insist that the common law test for criminal negligence be modified to ensure that people are not convicted and punished if they could never have met the objective standard required.

In contrast, the utilitarian approach circumvents the issue which plagues retributivist accounts by completely ignoring conventional retrospective notions of moral desert and responsibility. Instead, utilitarians focus entirely on the consequences of holding people criminally responsible for negligent conduct. Utilitarians hold that the total net good of the consequences is both a necessary and a sufficient justification for the practice of punishing criminal negligence. As we have seen, there are persuasive reasons for holding that the consequential benefits to society of punishing seriously negligent conduct outweigh the costs.

Thus, the current place of criminal negligence in the common law is justified. Indeed, as we have seen, the role of negligence in criminal law is largely limited to criminally negligent manslaughter. However, the arguments presented in this essay provide a justification for extending the range of offences for which negligent conduct is sufficient to ground liability. Negligence should no longer be considered an aberrant ground for criminal liability.

⁸⁰ Zimmerman, M. J. (1986), “Negligence and Moral Responsibility”. *Noûs*, 20(2), p. 199.

⁸¹ Ashworth (1999), p. 201.