



Canberra Law Review

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The Canberra Law Review is the peer-reviewed scholarly journal of the Faculty of Law at the University of Canberra. It is edited by students and contains articles from academics and practitioners from across Australia. This special issue of the journal contains some of the papers that were presented at the Justice Connections Symposium on 3 June 2010.

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FOREWORD

This special issue of the *Canberra Law Review* contains papers from the Justice Connections Symposium, convened on 3 June 2011 by the ANZSOG Justice (Access and Administration) Group at the University of Canberra as an opportunity to showcase the justice-related research projects of the University of Canberra's Faculty of Law and stimulate engagement among a wider community of legal academics and practitioners. The theme of the Symposium, 'Justice Connections', was designed to facilitate discussion of common themes and problems relating to justice in diverse fields and explore solutions that may transcend traditional categories of law and institutional divides. There were four sessions, each examining a different sub-theme: Justice Behind the Scenes; Justice in the Workplace; Justice, the Individual and the Courtroom; and Justice in a Comparative Context.

The Symposium was opened by University of Canberra Vice Chancellor, Professor Stephen Parker, and featured contributions from former High Court Judge Michael Kirby AC, CMG; Professor Rosalind Croucher, President of the Australian Law Reform Commission; Dr Helen Watchirs, ACT Human Rights Commissioner; Professor Margaret Thornton, ARC Australian Professorial Fellow at the Australian National University; and Associate Professor Simon Rice OAM, Chair of the ACT Law Reform Advisory Council. The Symposium was attended by over 100 people from the ACT, interstate, and overseas. It was described by those present as a day of thought-provoking and stimulating discussion and plans are underway to convene a second Justice Connections Symposium on 30 November 2012.

Consistent with the theme of the Symposium, the articles in this special issue span a broad range of topics across multiple fields of law, including taxation (resource rent tax), sexual harassment, legal issues surrounding dementia, and more.

John McLaren
Special Editor

INTRODUCTION: JUSTICE BEHIND THE SCENES

PROFESSOR ROSALIND CROUCHER—DISCUSSANT*

I REFLECTING ON THREADS

I take my task as ‘discussant’, as noted in the program for the proceedings, to bring together the intellectual ‘threads’ of the three papers in this session. Having read the papers diligently prior to the day and then listening intently through their presentation, it seems to me that there are two key ‘justice’ threads in their subject matter: first, access *to* justice at a high level; and, secondly, justice *solutions*—through change in the law itself; through change in court practice; and through change in government policy. I will draw these out a little further after adding my own reflections on a critical thread in ‘justice behind the scenes’—the theme of this first set of papers. That thread is the power of people, in which serendipity and accidental meetings can play an intriguing part.

II OF SERENDIPITY AND ACCIDENTAL MEETINGS

To illustrate this idea I want to take you to a meeting on a campus much like this, some 37 years ago. It was a meeting between a gardener and a couple of academics. The gardener’s name was Koiki or ‘Eddie’ as he was known. In 1974 Koiki had a conversation with James Cook University academics Professor Noel Loos and Henry Reynolds about his land on Mer (Murray Island) that started a ball rolling that ended up, nineteen years ago today, on 3 June 1992, in the High Court’s decision in *Mabo & Ors v Qld (No 2)*, upholding the continuity of Koiki Mabo’s title to his land on Murray Island and with it, signalling the end of *terra nullius*. It was a fortuitous—serendipitous—meeting, combining principle, passion and champions.

The ‘happenstance’ of history, of propelling moments that can bring about change to the law can be found in many stories. I would like to add just one more. When Dora Montefiore’s husband died she went, as one would, to see the family solicitor. He—as they were all ‘hes’ at the time—said something to the effect that she was fortunate that her husband had not appointed a guardian of the (*her*) children, so she would be their guardian, otherwise he could have willed them away from her.¹ From that moment, she said, she became ‘a suffragist’. She became the first secretary of the NSW Womanhood Suffrage League.² And the efforts of women like Mrs Montefiore propelled the law reform energies that led to the introduction of female suffrage and also to changes in the laws that affected women—including the guardianship of children. Some of their stories I have told elsewhere.³ For today it is enough

* President, Australian Law Reform Commission (ALRC) and Professor of Law, Macquarie University (on leave for the term of appointment at the ALRC). The observations in this summary are my own and do not represent views of the ALRC.

¹ D Montefiore, *From a Victorian to a Modern* (1927), 30–31.

² See H Radi, ‘Whose Child? Custody for children in NSW 1854–1934’, in J Mackinolty and H Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788–1979* (1979) 119–138.

³ See, eg, R Atherton, ‘New Zealand’s Testators’ Family Maintenance Act of 1900—the Stouts, the Women’s Movement and Political Compromise’ (1990) 7 *Otago Law Review* 202–221; R Atherton, ‘The Testator’s

to say that researching their stories when I undertook my own doctoral research impressed upon me how extraordinarily idiosyncratic and *individual* were the stories in law reform moments. And how very much it is the story of the power of people.⁴

III THE POWER OF PEOPLE

In researching for a series of presentations in 2008 to mark the sesquicentenary of the introduction of the Torrens system of land title in South Australia,⁵ I came across two observations that resonated with me. They are particularly pertinent today in the context of a session that is looking at justice ‘behind the scenes’.

I was to give the Alex Castles Memorial lecture, named in honour of a fine and very much lamented late legal historian, Professor Alex Castles, of Adelaide law school and later a Professorial Fellow at Flinders University. Alex had also been one of the founding Commissioners at the ALRC, under the Chairmanship of the Honourable Michael Kirby. In writing a tribute to Alex in the *Australian Journal of Legal History*,⁶ Kirby cited a passage quoted by Sir Victor Windeyer in an article published in the *Alberta Law Review* in 1973, on the topic of ‘History in Law and Law in History’. (As he retired in February 1972, this signalled Sir Victor’s transition into the very thoughtful ‘post-retirement’ phase).⁷ It was a comment from Professor Cecil HS Fifoot (of ‘Cheshire and Fifoot on Contracts’ fame) in his Selden Society Lecture in 1956, entitled ‘Law and History in the Nineteenth Century’:

Legal history, as has often been said, is the history of ideas. But ideas are not self-sown. They are coloured by environment and conditioned by the climate of opinion; but they are, after all, the creatures of men’s minds and to isolate them from the pressure of personality, even if it were desirable, is impossible.⁸

Following along this excellent track I delved into Windeyer’s article and found another marvellous quote. Sir Victor referred to Thomas Carlyle’s description of history as ‘the essence of innumerable biographies’,⁹ but distinguished it, saying rather that ‘it is the essence of the lives of innumerable men, not all of whom have had biographies’.¹⁰ This really struck a chord with me. In my legal historical excursions in the past, I have been singly affected by how much the stories of individuals lie behind the story of law—and particularly of law reform through legislation.

Family Maintenance and Guardianship of Infants Act 1916 (NSW): *Husband's Power v. Widow's Right* (1991) *Australian Journal of Law and Society*, 97-129. (Note, before 2004 I published under the surname ‘Atherton’).

⁴ This was a theme I addressed specifically in R Croucher, ‘Law Reform as Personalities, Politics and Pragmatics—the *Family Provision Act 1982* (NSW), A Case Study’ (2007) 11(1) *Legal History* 1–30.

⁵ Published as: ‘150 years of Torrens—Too much, Too Little, Too Soon, Too Late?’ (2009) 31 *Australian Bar Review* 245–278 (the Forbes lecture on Legal History); ‘*Delenda est Carthago!* Sir Robert Richard Torrens and his Attack on the Evils of Conveyancing and Dependent land Titles: A Reflection on the Sesquicentenary of the Introduction of his Great Law Reforming Initiative’ (2009) 11 (2) *Flinders Journal of Law Reform* 197–262 (the Alex Castles Memorial Lecture); and ‘Inspired Law Reform or Quick Fix? Or, “Well, Mr Torrens, What do You Reckon Now?”’ A Reflection on Voluntary Transactions and Forgeries in the Torrens System’ (2009) 30(2) *Adelaide Law Review* 291–327 (from the Sesquicentenary forum on Torrens Title held by Adelaide University Faculty of Law).

⁶ M Kirby, ‘Alex Castles, Australian Legal History and the Courts’ (2005) 9(1) *Australian Journal of Legal History* 1.

⁷ I note that his own son, William Victor Windeyer, has recently retired from the Supreme Court of New South Wales.

⁸ V Windeyer, ‘History in Law and Law in History’ (1973) 11 *Alberta Law Review* 123, 137.

⁹ T Carlyle, ‘On History’, *Critical and Miscellaneous Essays* (1838).

¹⁰ Sir Victor Windeyer, above n 8, 135.

When one looks at legislation at many times removed, the need for the introduction of, or change to, the law may seem self-evident—hindsight and retrospect tend to generate judgments like that. But looking at it, in its time and space, often reveals an entirely different and delicately woven story—and it is a story of people; and sometimes quite a few of them. How law changes, and particularly how new legislation is born, is very much a story of personalities. And where Thomas Carlyle described history as ‘the essence of innumerable biographies’, Windeyer preferred to say that ‘it is the essence of the lives of innumerable men not all of whom have had biographies’.¹¹ To that I would add at least one caveat—and *women*. At times there are other quirky factors that come into play. One worth mentioning is the quirk of weather and timing.

IV THE ACCIDENT OF TIMING

To illustrate another element of the power of people combined with climate—both climate of opinion and climate as in weather—I want to take you to Adelaide in the January of 1858.¹² South Australia in the 1850s was a place of intense speculation in land, but land titles were in *serious* disarray and conveyancing cost a fortune in searching fees.¹³ The situation was ‘like a time bomb—threatening to destroy what for many was their main source of wealth and status in the community’.¹⁴

Robert Richard Torrens provided the solution in a land title system that bears his name: the ‘Torrens system’. He was elected to the first House of Assembly in South Australia after it became self-governing in 1856,¹⁵ on the strength of his platform of land law reform. ‘The hour for action seemed to have arrived’, he said,¹⁶ and at the conclusion of moving the first reading of the Real Property Bill, having railed against the ills of land law, lawyers, conveyancing, search fees, and the problems of derivative title, he declared that ‘*Delenda est Carthago*’ must be the motto.¹⁷

The second reading took place in the early heat of an Adelaide summer,¹⁸ on Wednesday 11 November 1857, and on its third reading it was passed 19 to seven.¹⁹ On January 6 it had

¹¹ T Carlyle, ‘On History’ in *Critical and Miscellaneous Essays* (1838) cited by Windeyer in V Windeyer, above n 8, 135.

¹² See ‘*Delenda est Carthago!* Sir Robert Richard Torrens and his Attack on the Evils of Conveyancing and Dependent land Titles: A Reflection on the Sesquicentenary of the Introduction of his Great Law Reforming Initiative’ (2009) 11 (2) *Flinders Journal of Law Reform* 197–262 (the Alex Castles Memorial Lecture).

¹³ The distinguished historian of South Australia, Professor Douglas Pike, estimated that it was probable that the documents for three-quarters of the titles had been lost: D Pike, ‘Introduction of the *Real Property Act* in South Australia’ (1960) 1 *Adelaide Law Review* 169, 172, relying on South Australian Register, 8, vii, 1856; 23, vii, 1856; *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parliamentary Paper No 192, South Australia (1861) [102].

¹⁴ A Castles and M Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1836–1986* (1987), 175.

¹⁵ *Statistical Record of the Legislature 1836–2007*, Parliament of South Australia, 49.

¹⁶ Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859), vi.

¹⁷ ‘Carthage must be destroyed!’: South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, 4 June 1857, [206].

¹⁸ The heat of Adelaide summers at this time is recalled in R Harrison, *Colonial Sketches: Or, Five Years in South Australia, with Hints to Capitalists and Emigrants* (1862), chapter ii and 125. For example, for November 1860, 5 days exceeded 90° F.

¹⁹ South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, [706].

its second reading in the Legislative Council, and on 26 January, with a majority of five, and the summer heat unbearable—the mercury reaching over 100° Fahrenheit every day from 22 January till 30 January²⁰—the Bill was passed.²¹ The next day, on 27 January 1858, the Real Property Bill received the Royal Assent and Parliament was prorogued.²²

The history of ideas that is the Torrens system is coloured in all the ways that Professor Fifoot so rightly deduced. The environment that gave birth to Torrens title was one of aspiration—that the wealth of nations is built upon the ideal that every man should have, and be secure in, his own castle. It is also one of a colony of speculators, of chaos in surveying, and of *heat*—the overbearing unrelenting hot summer of 1857–58.

V PULLING THE THREADS TOGETHER

The threads that I would like to pull together from the three presentations concern principle, people and personalities, pragmatism and the coalescing power of institutional law reform bodies. When the Vice-Chancellor, Professor Stephen Parker, opened the conference this morning he emphasised the importance of ensuring that deep theoretical reflections underpinned our various topics throughout the day. For me this means, in the context of the three papers in this particular session, locating ‘justice behind the scenes’ within a sound conceptual or theoretical framework. That framework of principle provides the foundation upon which justice behind the scenes, as translated into law reform, is soundly based. Without it, there is a danger that justice outcomes may be confused or ad hoc or short-sighted.

A Principle

Each of the three papers has a distinct thread that can be labelled ‘principle’. The paper of Anne Wallace and Leisha Lister, on reforms in Indonesian Religious Courts, illustrates this point well. There is a consideration of the different kind of models that may be used in devising a law reform strategy; a discussion of the importance of building an appropriate evidence-base on which to support reform proposals; the identification of a key conceptual structure, based on access to justice, to drive the reforms and to ensure their ongoing support in practice; and a consideration of the value of reflective partnerships in court reform, in this case involving the Family Court of Australia in conjunction with the Indonesian Religious Courts.

Understanding the rationale behind legislation is identified as a crucial premise in driving law reform in the first of the session’s papers, by Professor Patricia Eastal and Jessica Kennedy, exploring the contextual background to the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT). Examining the relationship between the policy of access to information in contemporary democratic societies—the ‘information lens’—and its translation into practice forms a focus of the ‘meditation’ of Bruce Arnold in the third of the presentations.

²⁰ R Harrison, above n 18, 13. 22 January: 103.0; 23 January: 110.0; 24 January: 109.0; 25 January: 113.0; 26 January: 116.3; 27 January: 112.2; 28 January: 107.8; 29 January: 109.0; 30 January: 107.1. While Harrison dubbed temperatures over 90° as ‘intensely hot’, those over 100° he described as ‘a struggle for life’: 12.

²¹ No 15 of 1857–58.

²² South Australia, *Parliamentary Debates*, House of Assembly, 1860, [794].

The power of principle as rhetoric, and particularly one that relates to ‘access to justice’, is woven into Wallace and Lister’s paper, noting ‘the strong emphasis in national rhetoric and policy on access to justice’. Arnold reflects on the rhetorical nature of the assertion of a ‘right to information’ and also focuses on the ideas of ‘access to justice’ incorporated in the *Strategic Framework for Access to Justice in the Federal Civil Justice System*, a report of the Australian Government Attorney-General’s Department’s Access to Justice Taskforce, released in September 2009.

B People and personalities

A second very strong thread concerns the role of individuals in propelling the law reform initiatives under consideration—a potent dynamic in ‘justice behind the scenes’. It is here that I felt a great resonance with my own work over the years, as I have described in the opening part of this summary contribution. In Wallace and Lister’s paper it is seen in the strong leadership of the ‘dedicated and specialist court administrator’ of the Indonesian Religious Court, that was crucial to effecting and embedding the reforms in that Court discussed by them. For Easta and Kennedy, what ensured the translation of reform recommendations in relation to sexual assault proceedings into law were ‘influential people, with a vested interest in the area’. The role of such people was a crucial aspect of the story behind the ‘birth’ of the amending legislation featured in their presentation.

C Pragmatism

The third thread is one of pragmatism—of the nature of the process of translating principle into practice and the dangers and tensions inherent in having to navigate the shoals of government policy-making and parliamentary processes. Easta and Kennedy illustrate this process in a blow-by-blow description of the introduction of an amending law, expressed aptly in the main title of their paper: ‘The Conception, Gestation and Birth of Legislation’. Their exploration of the ‘history and politics’ behind the legislation in the focus of their paper demonstrates these tensions admirably. Wallace and Lister analyse the stages in building an evidence base and utilising, in a very practical way, what they describe as ‘grassroots organisations’ and suggest the value of the model of forging ‘a useful operating partnership’ in other contexts, such as in relation to the delivery of court services to Indigenous Australians. Arnold’s paper takes us into the field of access to information and access to justice to meditate on, amongst other things, ‘public policy conundrums’ and questions about ‘rights and responsibilities’ in this context. He focuses on the practical difficulties of accountability without sufficient ‘teeth’, when he describes the limitations on the role of the Ombudsman, being reliant on a ‘naming and shaming’ approach. Arnold makes a tough judgment that also poses a broad challenge within the theme of ‘justice connections’:

Substantive rather than merely procedural justice requires understanding, an understanding of legal principles and processes by members of the public and an understanding (informed by consultation) by legislators and official decisionmakers.

Such a judgment led Arnold to lament the ‘serious cutbacks’ to the funding of the Australian Law Reform Commission that may have a detrimental impact on the ability to be sufficiently ‘informed by consultation’. At this point I have to declare an obvious interest, as the President of that body. My feelings on this particular subject were also made public in giving evidence in the Senate inquiry in to the resources and funding of the ALRC instigated by

Senator Barnett, and which reported in March 2011.²³ I likened the impact of the budget cuts to the image of the Black Knight in the film, Monty Python and the Holy Grail—a ridiculous, but fitting image, as I described it. The point of Arnold’s observation was, however, to underscore the vital role that institutional law reform bodies can play as a coalescing force in ‘justice behind the scenes’ and that their ability to do so needs to be preserved.

D The coalescing force of institutional law reform bodies

Observations similar to Arnold’s on the value of an institutional approach to law reform are found in the two other papers presented in this session. Easteal and Kennedy note the force of the report of the inquiry conducted by the ACT Office of the Director of Public Prosecutions and the Australian Federal Report in 2005 concerning responding to sexual assault,²⁴ in leading to the legislative changes that are the focus of Easteal and Kennedy’s paper. Wallace and Lister identify the role of non-government organisations in the reform process.

While affirming the utility of an institutional approach to law reform, Arnold found it ‘perplexing’ that the *Strategic Framework*, for example, was not supported by appropriate funding to the ALRC. He argued that reduced funding may jeopardise the ability of such bodies to conduct the kind of consultation—and one not solely reliant on electronic contact—that can lead to the substantive justice Arnold described. In the context of his discussion of access to information as being pivotal to access to justice, he argued that:

it is important in a liberal democratic state for bodies such as the ALRC to be seen to be accessible and committed to public consultation with people who live on the disadvantaged side of the information highway.

I agree with Arnold wholeheartedly about the *importance* of public consultation—as broadly as the subject matter requires and which an inquiry timeline will accommodate. Where budget is limited, however, something has to be affected, even if the commitment remains as strong as ever. But in this context it is interesting to add in the observations in Wallace and Lister’s paper about the use of ‘information highway’ solutions, to adopt Arnold’s phrase. They note that SMS mobile phone technology is widely available in Indonesia, offering an ‘easy to use tool that can be mobilised quickly’ and that it has been deployed as such through the development of a system called ‘SMS Gateway’. Their information highway caveat, however, concerns the simplistic dropping of ‘pre-defined solutions’ into developing countries without thoroughly considering the local situation:

These solutions sometimes provide unsuitable for adaption to the local system, for a range of reasons, including lack of supporting infrastructure, adequately trained personnel, ongoing budget for technical support and, critically, a failure or inability to adapt or adjust them to the needs of the local court system.

Returning, then, to Arnold’s challenge about the need to maintain the commitment to, and practice of, consultation through a variety of means and recognising the strengths and weaknesses of the ‘information highway’ solutions, I should also point to the challenge

²³ A transcript of my evidence is on the ALRC website: *Senate Committee Inquiry into the ALRC* (16 March 2011) Australian Law Reform Commission <<http://www.alrc.gov.au/publications/alrc-brief-february-2011/senate-committee-inquiry-alrc#statement>>. It is also in the Hansard for 11 February 2011, included in the Senate Committee’s webpage: *Australian Law Reform Commission (ALRC): Public Hearings and Transcripts* (9 March 2011) Parliament of Australia: Senate <http://www.aph.gov.au/senate/committee/legcon_ctte/law_reform_commission/hearings/index.htm>.

²⁴ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, ‘Responding to Sexual Assault: The Challenge of Change’ (March 2005).

inherent in the final part of his paper, and it is one I direct to the audience today, largely coming from the academic world. It is an ‘over to you’ challenge; or rather ‘why aren’t you?’ challenge. Institutional law reform bodies, and other public bodies that are engaged in law reform projects, such as parliamentary committees, are committed to building an evidence base that is drawn in large measure from community contributions in the form of submissions and consultations. Academics can play a critical role through participation in the ‘justice (not quite behind) the scenes’ work that law reform projects in such contexts can achieve. I share some sympathy with Arnold’s edgy conclusion that:

The disengagement of academia from providing advice, offering ideas and questioning pieties through public consultation processes such as parliamentary committee hearing and responses to calls from government agencies for submissions is striking. An in-progress tabulation of submissions to parliamentary committees demonstrates that few people are contributing and that submissions by academics, including law academics, are rare.

Rather than ending in this rather solemn tone, I would prefer to pick up what I consider to be the overarching thread in a conversation about justice behind the scenes, and that is what I described at the beginning of this summary contribution as the power of people. Standing in front of a room filled with eager students, academics and other interested parties of great standing, enthusiasm and commitment—evidenced by your very presence today—I conclude by saying that you, too, can perform a role in law reform and play your part. The coalescing force of institutional law reform draws upon the power of people: many individuals—like you—contributing your ideas, suggestions, criticisms and inspiration, to connect, to forge, and to achieve ‘justice connections’ through your own ‘justice behind the scenes’.

3 June 2011

THE CONCEPTION, GESTATION AND BIRTH OF LEGISLATION: THE SEXUAL AND VIOLENT OFFENCE LEGISLATION AMENDMENT ACT 2008 (ACT)

JESSICA KENNEDY AND PATRICIA EASTEAL AM*

ABSTRACT

This paper examines the historical antecedents and political processes behind the *Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)*. The process by which this Act came to be provides a fascinating case study of the importance of individuals in institutional law reform. This Act was the product of the work of many ACT government and non-government organisations; however, in the end, what was necessary for these recommendations to translate into law were influential people, with a vested interest in the area of sexual assault law reform. In addition, the process of enactment illustrates how the final product of law reform can differ greatly to the original cognitive conception behind the reforms, which can result in the reforms not achieving their aims.

I INTRODUCTION

The *Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) (SVOLAA)* took effect on 1 June 2009. This was an important piece of legislation that amended the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* and the *Magistrates Court Act 1930 (ACT)*.¹ It provided some major modifications to the committal hearing process by allowing a transcript of an audio or visual recording between police and a witness to be admissible as evidence for all sexual assault victims at the committal hearing.² The *SVOLAA* also introduced the concept of a 'pre-trial hearing' for non-disabled, adult victims of sexual assault whom are considered as especially vulnerable,³ thereby proposing to reduce the amount of cross-examination in these cases. Other new sections included the use of CCTV, as well as amendments which restrict the victim's view of the accused,⁴ prohibit cross-examination by a self-represented accused,⁵ allow support people for witnesses to be present,⁶ and ensure closure of the court to the public in certain circumstances.⁷

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¹ Further changes were also effected by the *Crimes Legislation Amendment Act 2009 (ACT)* in order to ensure that the changes made by the *Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)* operated as intended. See: Revised Explanatory Statement, Crimes Legislation Amendment Bill 2009 (ACT) 2.

² *Magistrates Court Act 1930 (ACT)*, s 33-34.

³ *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*, s 40P(1)(c).

⁴ *Ibid*, s 38C.

⁵ *Ibid*, s 38D.

⁶ *Ibid*, s 38E.

⁷ *Ibid*, s 39.

How did such a major piece of legislative reform come about? ‘Policy-making and law reform processes are of course “dynamic and multi-sourced”’.⁸ It is recognised that the world of policy and law reform ‘is populated by a range of players with distinct concerns, and that policy making is the intersection of these diverse agendas, not a collective attempt to accomplish some known goal’.⁹ ‘there are many players and they are not all reading from the same script’.¹⁰ Law reform is ‘shaped by social, institutional, political, [and] economic ... contexts’,¹¹ and is ‘assessed for [its] emotive fit as much as - and often rather than - against criteria of logic, consistency, intellectual rigour or political coherence’.¹² In Australia, there is often a law reform body at the fulcrum of these processes.¹³ However, in reflecting upon the nature of law reform, Professor Croucher, current President of the Australian Law Reform Commission, emphasises the ‘accident of timing’ and the ‘power of people’ or of specific individuals:

How law changes, and particularly how new legislation is born, is very much a story of personalities.¹⁴

Given that in the years leading up to the enactment of the *SVOLAA* there was no law reform body, active or otherwise, operating in the territory, we wondered where the driving force for this piece of law reform lay. We wanted to see if, as in Croucher’s view, there was a certain degree of what she refers to as ‘serendipity’¹⁵ in what transpired. Were there in fact certain personalities or forces behind what ultimately became the *SVOLAA*? Thus, we aimed to obtain an understanding of the events and processes that preceded its enactment, and to identify some of the ‘behind the scenes’ activities, timing and players. The overarching goal was to highlight one example of how law reform may be conceived, nurtured and brought forth. In reference to ‘brought forth’, we wanted to explore the possible diluting effect of the various reform stages, and see to what extent the amendment that was enacted in fact resembled the original cognitive conception.¹⁶ The ‘dilution’ of policy through various stages of enactment does occur, and is evidenced by the introduction of the *Family Provision Act 1982* (NSW). That Act, as finally passed, was much wider in form than that initially proposed by the Law Reform Commission, and was ‘very much the result of confrontation, negotiation and reconciliation between Parliamentary Counsel, the Law Reform Commission and the Department of the Attorney-General’.¹⁷

⁸ Interview with participant no. 9, victim support worker (Canberra, 2011).

⁹ Hal K Colebatch, ‘Mapping the Work of Policy’ in Hal K Colebatch (ed), *Beyond the Policy Cycle: the Policy Process in Australia* (Allen & Unwin, 2006) 1.

¹⁰ *Ibid.*

¹¹ Thomas A Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making* (M.E. Sharpe, 3rd ed, 2011) 4.

¹² Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 4th ed, 2007) 10-11.

¹³ For a thorough study of the history, processes and limitations of law reform commissions, see: David Weisbrot, ‘The Future for Institutional Law Reform’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 18. As an example, Rosalind Croucher describes the importance of the New South Wales Law Reform Commission’s work in the enactment of *Family Provision Act 1982* (NSW): Rosalind F Croucher, ‘Law Reform as Personalities, Politics and Pragmatics: the *Family Provision Act 1982* (NSW): a case study’ (2007) 11(1) (2007) *Legal History* 1.

¹⁴ Rosalind Croucher, ‘Introduction: Justice behind the Scenes’ (2011) 10(2) *Canberra Law Review* 2, 4.

¹⁵ *Ibid.*, 1.

¹⁶ Our conceptualisation of law reform as conception, nurturance and delivery coupled with the randomness of reform plus the amount of time required to gestate, persuaded us that the metaphor of pregnancy and birth was appropriate for structuring the paper. The metaphor is particularly apt given the last aim: ‘The baby is the spitting image of you’.

¹⁷ Rosalind F Croucher, above n 13, 19.

A Methodology

To achieve these aims, we examined in detail ACT Law Reform Committee/Commission Discussion Papers and Reports, as well as the ACT Sexual Assault Response Program (SARP) Report. These provided an excellent chronology of law reform through the 1980s, 1990s and early 2000s. In addition, in order to hear the perspectives of the people who played a role in the law reform process, we invited 25 people from both government and non-government organisations to participate in a qualitative email survey or face-to-face interview.¹⁸ Potential respondents were identified both from the Appendix of submissions to the SARP report¹⁹ and by preliminary talks with a couple of key individuals. Ten people provided responses (40% return rate): nine participants chose to complete the email survey, and one face-to-face interview was conducted using the same instrument. The face-to-face interview was recorded and later transcribed.

The research participants were recruited from the Australian Federal Police (AFP), the ACT Office of the Director of Public Prosecutions (ODPP), the ACT Supreme Court, the Office of the Victims of Crime Coordinator (VoCC), the University of Canberra, Canberra Rape Crisis Centre (CRCC), and ACT Forensic and Medical Sexual Assault Care (FAMSAC). Respondents had been involved in the law reform process as researchers, lobbyists, or members of the SARP reference group, discussed below. The nature and breadth of their experience meant that the participants were in a unique position to provide insight into the history and politics behind the *SVOLAA*. We gathered some basic background information about the participants, which included how they were involved in the development of the legislation. Participants were also asked a series of questions about the original aims and intentions of the reforms and who was involved in lobbying for them. We sought views too on how the Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) (the Bill) came about, including the lobbying and drafting processes, and its enactment. However, once the survey responses were analysed, it became obvious that there were some questions still unanswered, and so three of the participants whom we believed would have the requisite knowledge were contacted by email again to clarify or expand on their answers.

The open-ended participant responses were examined qualitatively using an 'open-coding' approach.²⁰ Because answers were generally short, this process was informal and unstructured, but did involve studying every passage of the surveys and interview transcript to determine what exactly had been said and to label each passage with an adequate code or label. This process helped us to identify the common themes that arose and summarise and observe the patterns in the responses.

¹⁸ The University of Canberra's Committee for Ethics in Human Research approved the project on 2 August 2010. Protecting the anonymity of participants was the main ethical consideration in this project. Before responding to the survey, respondents were asked to read the participant information form and sign a consent form, both of which confirmed that all responses would be de-identified.

¹⁹ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, 'Responding to Sexual Assault: the Challenge of Change' (March 2005).

²⁰ Matthew Miles and Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd ed, 1994) 40-43.

II THE 'COURTSHIP': BACKGROUND

This following part of the paper provides a background to the reform process. We look at why there was a perceived need for a more 'just' experience for victim witnesses in sexual assault matters and how the pre-2008 law reforms were limited in providing a safe place for victims' voices.

A Trauma of witnesses

It is recognised in the psychological literature that rape is an extremely personal crime and has been described as an 'ultimate violation of the self, short of homicide, with the invasion of one's inner and most private space, as well as loss of autonomy and control'.²¹ Sexual assault 'heightens a woman's sense of helplessness, intensifies conflicts about dependence and independence, and generates self-criticism and guilt that devalue her as a person'.²²

Following this violation and trauma, victims of sexual assault are often then subject to a long and distressing experience within the criminal justice system. They continue to be subject to traumatic processes and leading, repetitive, aggressive, intimidating and humiliating questions.²³ The trial process is harrowing for all victims, but for victims of sexual assault, it can retrigger the feelings of helplessness associated with the crime and increase their angst. They may experience Rape Trauma Syndrome (RTS)²⁴ or Post Traumatic Stress Disorder (PTSD) with rape as the stressor.²⁵ Therefore, given their psychological fragility, there is an enormous potential for re-traumatisation of sexual assault victims through their involvement with the criminal justice system and its processes. Of particular concern is when victims testify and are cross-examined. As the Australian Law Reform Commission recently concluded:

Evidence issues often arise where the defence is seeking to show that sexual activity was consensual and, in doing so, to undermine the credibility of the complainant. This can sometimes result in unjustifiable trauma to complainants.²⁶

It is not surprising, therefore, that the Victorian Rape Law Reform Evaluation Project (RLREP) found that 'complainants frequently were subjected to lengthy cross-examination about matters such as the clothing they were wearing at the time of the alleged rape and the amount of alcohol they had consumed, in order to ... attempt to show that they are the kind of person who was likely to agree to sexual penetration'.²⁷ Further, a NSW research project, which looked at the effectiveness of legislative provisions to protect the rights of these victims, found that cross-examination of victim-witnesses was often extensive and

²¹ Ann Wolbert Burgess, 'Rape Trauma Syndrome' (1983) 1(3) *Behavioral Sciences & the Law* 97, 101.

²² Malkah Tolpin Notman and Carol Cooperman Nadelson, 'The Rape Victim: Psychodynamic Considerations' (1976) 133(4) *American Journal Psychiatry* 408, 409.

²³ See: Australian Law Reform Commission, 'Family Violence – A National Legal Response' (114, 2010) 860, 1335.

²⁴ Described by A W Burgess and L L Holmstrom, 'Rape Trauma Syndrome' (1974) 131 *American Journal of Psychiatry* 981.

²⁵ See: B J Cling, 'Rape and Rape Trauma Syndrome' in B J Cling (ed), *Sexualized Violence against Women and Children: A Psychology and Law Perspective* (Guilford Press, 2004) 13; Patricia Eastaest and Louise McOrmond-Plummer, *Real Rape, Real Pain* (Hybrid Publishers, 2006) 221-234.

²⁶ Australian Law Reform Commission, above n 23, 1236.

²⁷ Victorian Law Reform Commission, 'Sexual Offences: Law and Procedure, Discussion Paper' (2001) [5.21].

distressing, on average lasting more than twice as long as examination-in-chief.²⁸ In 65% of trials there were two or more interruptions to evidence due to the distress of the witness.²⁹ Victims were routinely implied to be liars, seeking compensation, or vengeful, and were often described as the type of woman who could be expected to consent to sexual advances, or as an inexperienced person who consented and then later regretted her actions.³⁰

The experiences that sexual assault victims have in the criminal justice system can compound their trauma and victimisation, resulting in the deterrence of victims from reporting and/or continuing with their case.³¹ Accordingly, the 2007 ABS Victims Crime Survey indicates that only 25% of sexual assault offences are reported to police.³² This low reporting rate is due to a number of barriers including, but not limited to: 'fear of being disbelieved; fear of retribution by the offender or others connected to the offender; feelings of shame; embarrassment; living in an isolated environment; fear of being blamed; lack of confidence or trust in the legal system; and lack of confidence or trust in police'.³³ Further, research suggests that some women are so traumatised as a result of the preliminary hearing that they are either unwilling or unable to follow through with the complaint.³⁴

Some of the specific factors that compound the trauma of a trial for sexual assault victim witnesses, and which have resulted in much law reform, include: being able to see the accused in the courtroom; being cross-examined by a self-represented accused; the use of traumatising questions by defence counsel; cross-examination involving an extremely arduous test of complainants' credibility;³⁵ having to give evidence multiple times; giving evidence in a court open to the public; and the length of the process.

B What protections (provisions) were on offer in the ACT pre-2009?

1 CCTV

In the ACT, child witnesses have been able to give evidence via CCTV since July 1989.³⁶ The *Evidence (Closed-Circuit Television) Act 1991* (ACT) (now the *Evidence (Miscellaneous*

²⁸ Department for Women, 'Heroines of Fortitude' (Office for Women: NSW Department of Premier and Cabinet, October 1996).

²⁹ Ibid, 127-128.

³⁰ Department for Women, above n 28, 176.

³¹ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.

³² Australian Bureau of Statistics, 'Recorded Crime – Victims, Australia' (4510.0, 2007).

³³ S. Caroline Taylor and Leigh Gassner, 'Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-Reporting of Sexual Offences' (2010) 11(3) *Police Practice and Research: An International Journal* 240.

³⁴ See: Department for Women, above n 27; Patricia Easteal and Christine Feerick, 'Sexual Assault by Male Partners: Is the License Still Valid?' (2005) 8(2) *Flinders University Journal of Law Reform* 185.

³⁵ The Dictionary of the *Evidence Act 1995* (Cth) defines credibility as including 'the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence'. However, it appears that these are not the only factors that are taken into consideration when assessing a victim's credibility. Victims of sexual assault continue to be regarded as belonging to an unreliable class of witness; hence the complainant's dress, lifestyle, actions, and perceived reaction to the crime are often deemed relevant in determining credibility. See: Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 131; Dr Shannon-Caroline Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995: A Research Summary' (2001) 10 *Women Against Violence* 57, 58; Department for Women, above n 27, 149.

³⁶ The Community Law Reform Committee of the Australian Capital Territory, 'Sexual Assault' (Discussion Paper No. 4, 1997) [368].

Provisions) Act 1991 (ACT)) originally stated that the court had the option of ordering that a child give all or part of their evidence from a place other than the courtroom.³⁷ However, these orders could only be made where the required facilities were available,³⁸ and where the court was satisfied that the child would otherwise ‘suffer mental or emotional harm’, or the ‘facts would be better ascertained if the child’s evidence’ was given in this manner.³⁹ Furthermore, a court could not make an order under this section if it was of the belief ‘that to do so would be unfair to a party to the proceedings’.⁴⁰

In 1994, these provisions were repealed and replaced by the *Evidence (Closed-Circuit Television) (Amendment) Act 1994* (ACT), which inserted a new section 4A into the *Evidence (Closed-Circuit Television) Act 1991* (ACT). This new section provided that where the facilities were available, children were to give evidence from outside the courtroom unless otherwise ordered by the court.⁴¹ The court was restricted from making an order under this section unless it was satisfied that the child preferred to give evidence in the courtroom, that the proceedings would be unreasonably delayed if an order was not made, or that there was a substantial risk that the proceedings would be unfair if an order was not made.⁴²

Later that year, these CCTV provisions were extended to adult victims of sexual assault for a trial period, ending on 15 June 1998,⁴³ by replacing the word ‘child’ with ‘prescribed witness’,⁴⁴ the definition of which included complainants in sexual offence trials.⁴⁵ The extension of these provisions to adult witnesses continued to apply until 2003, when a new Part 4 was inserted into *Evidence (Miscellaneous Provisions) Act 1991* (ACT).⁴⁶ The new Division 4.3, entitled ‘Sexual offence proceedings—giving evidence from places other than courtrooms’, contained a new s 43, which provided for the compulsory use of CCTV facilities for victims of sexual assault where the facilities were available, using the same wording as in the previous provisions.⁴⁷

This s 43 applied to the use of CCTV by adult victims of sexual offences until 2009, when the changes made by the *SVOLAA* came into force.

2 Open/Closed Court

It is a fundamental principle of Australian common law that justice be administered in open court, that is, that the public, including the press, may attend all stages of a trial.⁴⁸ This

³⁷ *Evidence (Closed-Circuit Television) Act 1991* (ACT), s 5(1) (effective from 21 August 1991).

³⁸ *Ibid*, s 6(1).

³⁹ *Ibid*, s 6(2).

⁴⁰ *Ibid*, s 6(3).

⁴¹ *Ibid*, s 4A(1), as amended by the *Evidence (Closed-Circuit Television) (Amendment) Act 1994* (ACT) s 6.

⁴² *Ibid*, s 4A(2).

⁴³ The Community Law Reform Committee of the Australian Capital Territory, above n 36, [376].

⁴⁴ *Evidence (Closed-Circuit Television) (Amendment) Act (No. 2) 1994* (ACT), s 6.

⁴⁵ *Ibid*, s 5.

⁴⁶ Inserted by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT), s 6. The *Evidence (Closed-Circuit Television) Act 1991* (ACT) was changed to the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) in 2000 by the *Justice and Community Safety Legislation Amendment Act (No 3) 2000* (ACT), sch 1.

⁴⁷ *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 43 (effective from 22 March 2004).

⁴⁸ See: The Community Law Reform Committee of the Australian Capital Territory, above n 36, [438]; *Scott v Scott* (1913) AC 417, 441; *McPherson v McPherson* [1936] AC 177, 199-203; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

principle has legislative force in the ACT;⁴⁹ however, since 1985, there has been an exception to the open court rule in the ACT in relation to sexual offence proceedings. In 1985, the *Evidence (Amendment) Ordinance (No. 2) 1985* (ACT) inserted a new s 76D into the then *Evidence Ordinance 1971* (ACT).⁵⁰ This new section stated that any evidence given by complainants in sexual offence proceedings should, if directed by the court, be given 'in camera', that is, in a courtroom closed to the public.⁵¹

Section 76D of the *Evidence Act 1971* (ACT) applied until 2003, when it was replaced by the new Part 4 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).⁵² Despite all of these changes, the principle remained the same: Part 4 created 'new' provisions relating to the closure of the court in sexual offence proceedings, s 39 of which provided that the court may order that the court be closed to the public while complainants in sexual offence proceedings give evidence.⁵³ This section continued to apply until the *SVOLAA* came into force in 2009.

3 Admission of written statements

Since 1974, the *Magistrates Court Act 1930* (ACT) has allowed evidence to be adduced by written statements.⁵⁴ Despite this, prior to the 2008 amendments, it was the practice in the ACT for victims of sexual assault to give oral evidence at both the committal hearing and the trial.⁵⁵

In their 1997 Discussion Paper, the Community Law Reform Committee of the ACT raised the issue of victims having to give evidence at the committal hearing and at the trial, and discussed the possibility of paper-based committal proceedings.⁵⁶ The Committee questioned whether the rules requiring victims of sexual assault to give oral evidence at committal proceedings should be changed.⁵⁷

In 2001, the newly named ACT Law Reform Commission explored this issue further and came to the conclusion that a purely paper-based committal would not be adequate for many cases.⁵⁸ The Commission recommended that the prosecution be required to serve copies of any statements it wished to have admitted to the defence prior to the committal hearing, and the defence then be required to provide written notification of any witnesses it wished to cross-examine.⁵⁹ These recommendations were in line with the legislation at the time, and so did not result in any substantial law reform.

⁴⁹ See: *Magistrates Court Act 1930* (ACT), s 310.

⁵⁰ The *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 34(4) converted most former Commonwealth ordinances in force in the ACT into ACT enactments. As with most ordinances in force in the ACT, the name of this Ordinance was changed from Ordinance to Act by the *Self-Government (Citation of Laws) Act 1989 No 21*, s 5 on its conversion to an ACT enactment on 1 July 1992.

⁵¹ *Evidence Ordinance 1971* (ACT), s 76D(1), as amended by the *Evidence (Amendment) Ordinance (No. 2) 1985* (ACT), s 4.

⁵² Inserted by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT), s 6.

⁵³ *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 39, as amended by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT), s 6.

⁵⁴ *Magistrates Court Act 1930* (ACT), s 90AA, inserted by the *Court of Petty Sessions Act 1974* (ACT), s 10.

⁵⁵ See: The Community Law Reform Committee of the Australian Capital Territory, above n 36, [384]; Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.

⁵⁶ The Community Law Reform Committee of the Australian Capital Territory, above n 36, [384 - 402].

⁵⁷ *Ibid*, Issue 50.

⁵⁸ ACT Law Reform Commission, 'Report on the Laws Relating To Sexual Assault' (17, 2001) [269].

⁵⁹ *Ibid*, Recommendation 19.

In fact, the legislation surrounding this area was not substantially amended at all prior to 2008, and the legislation as at 2008 stated that the Court could admit a written statement as evidence in preliminary examinations. However, the Court and the prosecution and defence counsel had the power to require the person who made the statement to attend before the court to give evidence and be cross-examined.⁶⁰

3 Cross-examination of victim witnesses by unrepresented defendants

Since its enactment, the *Magistrates Court Act 1930* (ACT) provided a defendant with the right to personally 'examine and cross-examine the witnesses giving evidence ... against her or him'.⁶¹ In 1997, the Community Law Reform Committee of the ACT raised the idea of prohibiting an accused from personally cross-examining victims in sexual offence trials, but the discussion did not progress any further than this.⁶² Minor changes were added to the section in 2005, but did not result in any modification to the effect of the provision.⁶³ As a result, prior to the *SVOLAA*, defendants were still able to personally cross-examine victims in sexual offence trials.

III ... LEADING TO THE CONCEPTION OF THE BILL

Ultimately, the 2008 legislative reforms came about as a result of a report published by the ACT Office of the Director of Public Prosecutions and the Australian Federal Police in 2005 – *Responding to Sexual Assault: The Challenge of Change (The Challenge of Change)*.⁶⁴ However, there was a sequence of research and events prior to this that contributed to the initiation of the research and the introduction of the Bill.

A 1999

A crucial player in the ACT criminal justice system first became interested in the area of sexual assault in 1999 when he saw the *Four Corners* program 'Double Jeopardy', which highlighted an abusive cross-examination that a young boy, aged eight years, had undergone whilst giving evidence in a child sexual assault trial in Queensland.⁶⁵ This program played a tape of the cross-examination in which the boy cried whilst being shouted at by defence counsel.⁶⁶

Following that, in 1999, Dr Annie Cossins founded the National Child Sexual Assault Reform Committee (NCSARC), which was made up of some of the nation's leading lawyers, judges and academics, including the ACT Director of Public Prosecutions (DPP). This inspired the DPP and some of his staff to start looking at the reforms in Western Australia and New South Wales for child victims of sexual assault. At that time, one respondent came to the conclusion that the ACT needed to develop its laws further: he felt that Canberra was

⁶⁰ *Magistrates Court Act 1930* (ACT), s 90AA (effective to 29 May 2009).

⁶¹ *Ibid*, s 53(2) (effective from 3 August 1992).

⁶² The Community Law Reform Committee of the Australian Capital Territory, above n 36, [460].

⁶³ *Statute Law Amendment Act 2005* (ACT) [3.222].

⁶⁴ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.

⁶⁵ Interview with participant no. 8, judicial officer (Canberra, 2010).

⁶⁶ *Double Jeopardy* (1999) ABC: Four Corners <<http://www.abc.net.au/4corners/stories/s39718.htm>>.

'leading edge' in regards to the use of CCTV for children, but was still behind Western Australia.⁶⁷

B 2001

In 2001, Morgan, Disney & Associates conducted a review of the sexual assault services for children and young people in the ACT for the Department of Education and Community Services.⁶⁸ The resulting report identified the need for a 'comprehensive inter-agency model' and 'strongly recommended that a collaborative inter-agency approach be developed for children and young people who have been victims of sexual abuse'.⁶⁹

C 2002

In 2002, Theresa Davis, a prosecutor from the ACT DPP, received a Churchill Fellowship to conduct an international study on the 'innovative practices in the investigation and prosecution of sexual assault offences on adults and children'.⁷⁰ Her study included, amongst other things, an investigation into the use of videotaped interviews as victims' evidence-in-chief.⁷¹ Davis recommended that the ACT enact provisions enabling the use of pre-recorded evidence in proceedings involving child victims of sexual assault.⁷²

Davis also suggested that the ACT implement a 'one-stop shop' for victims of sexual assault, to facilitate the coordination of the police, prosecution, child protection services, rape crisis counsellors and medical practitioners.⁷³ However, one survey participant from the AFP indicated that 'despite the experiences and observations of Ms Davis while travelling in England and the United States, the ACT continued to operate disjointedly, with little interaction between key agencies'.⁷⁴

D 2003

That year Christine Eastwood and Wendy Patton did a comparative report on the experiences of child complainants of sexual abuse in the criminal justice system in Western Australia, New South Wales and Queensland, which also came to the attention of the ACT DPP.⁷⁵ Their study examined the experiences of child complainants in the criminal justice system as well as the consequences of their involvement in the process.

⁶⁷ Interview with participant no. 8, judicial officer (Canberra, 2010).

⁶⁸ See Morgan Disney & Associates, 'Developing a Strong Interagency Approach to Sexual Assault Services for Children and Young People in the ACT: A Report to the ACT Department of Education and Community Services' (2001).

⁶⁹ Interview with participant no. 5, police officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 71.

⁷⁰ Interview with participant no. 5, police officer (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.

⁷¹ Interview with participant no. 5, police officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 8.

⁷² Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 8.

⁷³ *Ibid.*

⁷⁴ Interview with participant no. 5, police officer (Canberra, 2010).

⁷⁵ Interview with participant no. 8, judicial officer (Canberra, 2010). See: Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002) Criminology Research Council <<http://www.criminologyresearchcouncil.gov.au/reports/eastwood.pdf>>.

The same year, the ACT DPP together with the AFP, made a budget proposal to develop a Sexual Offences Response Program, which aligned with the Strategic Plan for Criminal Justice 2002-2005 that had been recently approved by Cabinet.⁷⁶ The program proposed to: initiate legislative reforms that supported ‘fair investigative practices’; employ advances in technology to support the ‘detection and investigation of crime’; provide ‘advocacy services for persons with specific needs’; quickly and fairly manage cases through the courts; implement ‘victim-inclusive practices and policies’; and, review and reform criminal legislation and processes to meet current needs, in particular the needs of victims of sexual assault.⁷⁷ The program aligned with the values outlined in ACT Labor’s Plan for Justice and Community Safety (2001) including access to information, the development of case management processes within the court system to reduce delays, the improvement of recording of criminal statistics, and better facilities for women and children victims and witnesses in the court system.⁷⁸

As noted during the interviews conducted as part of the research for this paper, ‘[t]here were significant amendments taking place all over Australia and in the UK in the area of sexual assault’⁷⁹ and there was a ‘general acceptance by criminal justice agencies (namely ACT Policing and the DPP) that reform was required’:⁸⁰ ‘[t]he system wasn’t working’.⁸¹ ‘Victoria already had their response out and the ACT had to be seen to be doing something’.⁸² In addition, there was this ‘increasing awareness from empirical research that victim witnesses were having a very difficult time in the Courts’.⁸³ As one participant from the AFP stated:

It was my understanding that victims of sexual and violent offences were not being protected adequately during their processing. That is, they were being forced to relive their trauma a number of times during the investigation and Court process.⁸⁴

E 2004-2005

The ACT Government consequently provided funding to the AFP and ACT DPP to conduct some research that would follow up on the study conducted by Davis in 2002.⁸⁵ The funding provided funding for the formation of the Sexual Assault Response Program (SARP), the founding members of which were Margaret Jones, a senior prosecutor from the DPP, and Sergeant Anthony Crocker, a member of the ACT Policing Sexual Assault and Child Abuse Team (SACAT). The SARP team conducted research that looked into police, prosecution, and medical and counselling services for victims of sexual assault in the ACT, and compared them to other service models in the rest of Australia and New Zealand. Accordingly, people from many organisations both within the ACT and elsewhere were consulted. Feedback was

⁷⁶ Interview with participant no. 5, police officer (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).

⁷⁷ Interview with participant no. 5, police officer (Canberra, 2010).

⁷⁸ *Ibid.*

⁷⁹ Interview with participant no. 6, victim support worker (Canberra, 2010).

⁸⁰ Interview with participant no. 1, police officer (Canberra, 2010).

⁸¹ Interview with participant no. 6, victim support worker (Canberra, 2010).

⁸² *Ibid.*

⁸³ Interview with participant no. 4, academic/researcher (Canberra, 2010).

⁸⁴ Interview with participant no. 2, police officer (Canberra, 2010).

⁸⁵ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 8.

also gathered from individuals who were involved in the prosecution of sexual assault, law reform and victim assistance in other parts of Australia and New Zealand.⁸⁶

This research ultimately resulted in the publication of *The Challenge of Change* in March 2005.⁸⁷ This report contained 105 recommendations aimed at improving the criminal justice response to sexual assault in the ACT. The ones pertinent to legislative reform for adult victims of sexual assault were:

- The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings.⁸⁸
- The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a victim, as the victim's evidence-in-chief. The provisions should apply to witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.⁸⁹
- Child witnesses should be permitted to give their evidence at a special pre-trial hearing, and the recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.⁹⁰
- The ACT's *Evidence (Miscellaneous Provisions) Act 1991* (ACT) should specify that the accused is not to be in the view of a complainant giving evidence via closed-circuit television.⁹¹
- The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused.⁹²
- An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses.⁹³
- Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.⁹⁴
- Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness.⁹⁵
- A 'one-stop shop' for adult victims of sexual assault should be established with facilities available at the Forensic and Medical Sexual Assault Centre (FAMSAC) for police to meet with the victim and videotape interviews there.⁹⁶

⁸⁶ See Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, iv–vi for list of organisations.

⁸⁷ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.

⁸⁸ *Ibid*, Recommendation 6.1.

⁸⁹ *Ibid* Recommendation 6.2.

⁹⁰ *Ibid*, Recommendation 6.5.

⁹¹ *Ibid*, Recommendation 6.7.

⁹² *Ibid*, Recommendation 6.9.

⁹³ *Ibid*, Recommendation 6.11.

⁹⁴ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.12.

⁹⁵ *Ibid*, Recommendation 9.4.

⁹⁶ *Ibid*, Recommendation 3.33.

However, when *The Challenge of Change* was presented to the legislative assembly in 2005, the Chief Minister at the time was perceived by respondents as very unimpressed (he ‘mumbled a few words and left the room’⁹⁷) and so no reforms were initiated. In fact, the report was then apparently shelved; purportedly because the Government was not happy with it: ‘[n]othing good in it for the Government’.⁹⁸ As one respondent explained:

The human rights discourse in the ACT at the time was dominated by civil liberties perspectives (including inside the government) that only saw the accused person’s interests for fair trial, privacy and protection of dignity.⁹⁹

IV THE GESTATION - FURTHER DEVELOPMENT OF THE IDEAS FOR REFORM

A 2006-2007

It was not until the following year that the ideas for reform were taken off the shelf. Victim support agencies, Richard Refshauge (ACT DPP), Robyn Holder (VoCC), and Renée Leon (CEO of JACS) had vested interests in the area of sexual assault law reform, and so had continued to actively drive the process.¹⁰⁰ The then new ACT Attorney-General, Simon Corbell, also had a strong interest in the area of sexual assault and victim rights, and when Robyn Holder and the ACT Public Advocate, Anita Phillips, wrote to the Attorney about the *Challenge of Change* and the lack of action, the new Minister resurrected the initiative and asked JACS what was happening.¹⁰¹

As a result, a working group, known as the SARP Reference Group, was established both to provide input to the legislative reforms, using *The Challenge of Change* as a foundation, and to oversee a process of implementation.¹⁰² This paper focuses upon the SARP reference group as it had the most stakeholders as participants and it was the most public. There were, however, other groups and submissions feeding into the drafting process: ‘[t]here were meetings happening all over the place’.¹⁰³

The SARP Reference Group meetings were convened by the ACT Department of Justice and Community Safety (JACS)¹⁰⁴ ‘and [were] vaguely modelled on the approach by the ACT FVIP [Family Violence Intervention Program] in that it focused on being broadly inclusive’.¹⁰⁵

It is very usual for reports of various kinds to have recommendations circulated internally for agency viewpoints, then the relevant department (in this instance JACS) to advise the Minister either by way of a briefing note or Cabinet submission or both. Certainly the [*Challenge of Change*] recommendations were subject to this process.¹⁰⁶

⁹⁷ Interview with participant no. 8, judicial officer (Canberra, 2010).

⁹⁸ Interview with participant no. 5, police officer (Canberra, 2010).

⁹⁹ Interview with participant no. 9, victim support worker (Canberra, 2011).

¹⁰⁰ Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).

¹⁰¹ Interview with participant no. 9, victim support worker (Canberra, 2011).

¹⁰² Interview with participant no. 1, police officer (Canberra, 2010); Interview with participant no. 3, medical practitioner (Canberra, 2010).

¹⁰³ Interview with participant no. 9, victim support worker (Canberra, 2011).

¹⁰⁴ Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 9, victim support worker (Canberra, 2011).

¹⁰⁵ Interview with participant no. 9, victim support worker (Canberra, 2011).

¹⁰⁶ Interview with participant no. 9, victim support worker (Canberra, 2011).

Those involved in the SARP reference group were spokespeople from Canberra Rape Crisis Centre (CRCC), Victim Support ACT, the Office of the Victims of Crime Coordinator (VoCC), ACT Policing (ACTP), the Office of the ACT Director of Public Prosecutions (ACTDPP), Forensic and Medical Sexual Assault Care (FAMSAC), Child at Risk Assessment Unit, Victims Services Scheme (VSS), Victims of Crime Assistance League (VOCAL), Legal Aid ACT, and the ACT Bar Association.¹⁰⁷ They examined the recommendations made in *The Challenge of Change*, which involved dividing them into six key areas: victim support; training and development; court upgrades to technology and facilities; best evidence; law reform; and, interagency governance.¹⁰⁸

We must note that victim support advocates did have input into this process. One respondent from a victim support organisation explained that her agency was ‘actively involved in the reference group as well as engaged in other bi-lateral meetings, developing the wraparound approach for victims and protocols with key agencies such as the AFP [and] SACAT Unit’.¹⁰⁹ The other bi-lateral meetings involved discussion as to the policy and procedure when a sexual assault is reported. The ‘wraparound’ approach for the victims describes the idea of a ‘one-stop shop’, where victims can be medically examined and interviewed by police at the same place.¹¹⁰

The SARP Reference Group aimed for reform to ‘implement a “best practice” model’¹¹¹ to:

- ‘address the imbalances in the treatment of victims, through the legal process’;¹¹²
- ‘provide victims with the support they need, provide protection during the investigation and Court process, and [increase] the conviction rate’;¹¹³
- ‘increase the number of cases that go to trial ... and hopefully help the plight of victim witness’;¹¹⁴
- ‘make the system easier and less traumatic for victims to navigate’;¹¹⁵ and
- maintain a ‘fair system for victims without compromising the fair trial’.¹¹⁶

All of the agencies, with the exception of Legal Aid, were lobbying *for* law reform; yet although some members of the group were opposed to some aspects of the reforms, there was no overt opposition to the idea of law reform as a whole as it was widely recognised that reform was inevitable.¹¹⁷ As one respondent stated:

Legal Aid [representative] didn’t want there to be any changes – he liked the law the way it was – but he realised that the reforms were going to happen regardless, and so made some compromises with the DPP.¹¹⁸

¹⁰⁷ Interview with participant no. 1, police officer (Canberra, 2010); Interview with participant no. 2, police officer (Canberra, 2010); Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).

¹⁰⁸ Interview with participant no. 3, medical practitioner (Canberra, 2010).

¹⁰⁹ Interview with participant no. 6, victim support worker (Canberra, 2010).

¹¹⁰ Interview with participant no. 6, victim support worker (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).

¹¹¹ Interview with participant no. 1, police officer (Canberra, 2010).

¹¹² Interview with participant no. 3, medical practitioner (Canberra, 2010).

¹¹³ Interview with participant no. 2, police officer (Canberra, 2010).

¹¹⁴ Interview with participant no. 4, academic/researcher (Canberra, 2010).

¹¹⁵ Interview with participant no. 6, victim support worker (Canberra, 2010).

¹¹⁶ Interview with participant no. 3, medical practitioner (Canberra, 2010).

¹¹⁷ Interview with participant no. 8, judicial officer (Canberra, 2010).

¹¹⁸ Ibid.

Therefore, the SARP Reference Group discussions were centred on *how* the law would change.¹¹⁹ Despite this, as a result of ‘having so many different organisations involved and fighting for things they wanted’, the discussion and negotiation process was reported to be very drawn out.¹²⁰ As one respondent said: ‘[t]here was a lot of stop starting with the process [and] there was a lot of wasted time with unnecessary or unproductive meetings’.¹²¹

As a result of ‘the new Minister’s personal and political commitment’,¹²² ultimately the application for law reform from the DPP and AFP was accepted, and policy instructions were made.¹²³ This meant that the government accepted the proposal for reform to the legislation for sexual assault offences, and JACS was instructed to begin the drafting the legislation.

From here, one participant from a victim support agency described the process as ‘a little problematic’.¹²⁴ Because some of the agencies in the SARP Reference Group were non-government organisations, they were ‘left out of cabinet-in-confidence processes, which were essentially the drafting of the legislation’.¹²⁵ ‘This was in spite of the fact that [they] had been assured personally by the Attorney-General that [they] would be included’.¹²⁶ There is no direct evidence that this lack of involvement of the NGOs had any effect on the resulting legislation, but one could speculate that it may have contributed to the indeterminacy of the provisions, which is highlighted below. That said, ‘[the NGOs] were happy with the final outcomes’;¹²⁷ however, this is not to imply that everyone felt that the ‘the [SARP] recommendations [were] uniformly accepted [and] covered all the salient issues’.¹²⁸

V THE BIRTH (OF THE AMENDMENT)

Due to the fact that any interactions between the SARP Reference Group and JACS were made as ‘cabinet-in-confidence’, it is unclear whether the Group in fact produced another set of recommendations. What we do know, though, is that the Bill contained sections that reflected all but one of the recommendations made in *The Challenge of Change*. Although this sounds promising, most of the recommendations were diluted to some extent in the Bill, as shown below, and because of our limited access to internal information, we can only hypothesise about how or when the ‘watering down’ of the provisions occurred.

A 2008

The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings.¹²⁹

¹¹⁹ Interview with participant no. 8, judicial officer (Canberra, 2010).

¹²⁰ Interview with participant no. 2, police officer (Canberra, 2010).

¹²¹ *Ibid.*

¹²² Interview with participant no. 9, victim support worker (Canberra, 2011).

¹²³ Interview with participant no. 8, judicial officer (Canberra, 2010).

¹²⁴ Interview with participant no. 6, victim support worker (Canberra, 2010).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.1.

Section 33 of the Bill stated that complainants in sexual offence proceedings must not be required to attend and give evidence at a preliminary hearing.¹³⁰ This section was derived from this recommendation, and contained almost identical wording.

The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a victim as the victim's evidence-in-chief. The provisions should apply to witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.¹³¹

This recommendation was reflected in s 11 of the Bill stating that intellectually impaired complainants in sexual offence trials could have a recording of their police interview admitted as their evidence in chief, and that they must not be visible to anyone in the courtroom when the audio-visual recording is played.¹³²

Again, this is almost word for word from the recommendation. However, the section in the legislation also included a subsection providing that 'the court may refuse to admit all or any part of the audiovisual recording'.¹³³ This was not recommended in the Report and is an example of the way in which the legislation diluted the SARP recommendations by including more judicial discretion in its actual application.

The ACT's *Evidence (Miscellaneous Provisions) Act 1991* should specify that the accused is not to be in the view of complainant giving evidence via closed-circuit television.¹³⁴

Section 17 of the Bill integrated this recommendation and developed it further. The provision stated that the 'witness must not be able to see *or hear* the accused person' whilst giving evidence via audiovisual link.¹³⁵ Although really just a fine detail, this is an example of how the Bill strengthened, to some extent, the recommendation made in the report.

The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused.¹³⁶

This recommendation was incorporated into the Bill; however, the provisions included judicial discretion as to their application, which contradicts in part the recommendation to 'permit witnesses' to have a screen. The Bill stated that the judge *may* order that the courtroom be arranged so that the witness cannot see the accused whilst giving evidence, however, it also expanded this recommendation to include 'anyone else the court considers should be screened from the witness'.¹³⁷

¹³⁰ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 33.

¹³¹ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.2.

¹³² Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 11.

¹³³ *Ibid.*

¹³⁴ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.7.

¹³⁵ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 17 (emphasis added).

¹³⁶ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.9.

¹³⁷ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 8.

An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses.¹³⁸

This recommendation was integrated into the Bill with only technical changes. The Bill provided that a ‘self-represented accused person must not personally cross-examine a witness’; with ‘witness’ defined to include complainants and children (who may or may not be complainants) in sexual offence proceedings.¹³⁹

Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.¹⁴⁰

The Bill also incorporated this recommendation, even using some of the wording provided. The provisions in the Bill permitted intellectually impaired victims (which was not specifically recommended) and victims who were likely to ‘suffer severe emotional trauma’ or ‘be intimidated or distressed’ to give evidence at a special pre-trial hearing.¹⁴¹ It also stated that the recording of this evidence would be admissible at any related proceeding.¹⁴²

These eligibility restrictions were drafted despite direct opposition from victim support organisations in the Reference Group. One victim support worker ‘argued strongly against [this] provision requiring victim/witnesses to prove severe emotional trauma or distress and intimidation ... on the basis that this created an unnecessary and humiliating barrier and hurdle’.¹⁴³

Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness.¹⁴⁴

This recommendation was included in the Bill; however, the provisions applied only to complainants in sexual offence trials, which excluded other child witnesses as recommended. The Bill provided that the court must order that a complaint have a support person ‘in the court close to, and within [their] sight’ whilst they give evidence.¹⁴⁵

¹³⁸ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.11.

¹³⁹ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 8.

¹⁴⁰ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.12.

¹⁴¹ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 11.

¹⁴² Ibid.

¹⁴³ Interview with participant no. 9, victim support worker (Canberra, 2011). This section was made even further restrictive by the *Crimes Legislation Amendment Act 2009* (ACT). The main change in the wording of the provision was the replacement of the word ‘must’ with ‘may’. This change resulted in the section becoming discretionary in nature, which means that even if a witness satisfies the definition of witness under the Division, they may still not be able to give evidence at a pre-trial hearing

¹⁴⁴ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 9.4.

¹⁴⁵ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 8.

A 'one-stop shop' for adult victims of sexual assault: facilities should be available at the Forensic and Medical Sexual Assault Centre (FAMSAC) for police to meet with the victim and videotape interviews there.¹⁴⁶

This recommendation was the only one relevant to our paper that was not included in the Sexual and Violent Offences Legislation Amendment Bill. The SARP team modelled a 'one-stop shop' on the Victorian system, and this recommendation provided a way in which this could be incorporated into the ACT system. It is not clear as to why the suggestion was completely excluded from the Bill; however, one respondent suggested that it 'was probably an unrealistic expectation for a jurisdiction of this size'.¹⁴⁷ As the one-stop-shop was not legislated for in Victoria, it may also have been seen by the ACT Government as an 'administrative rather than a legislative' issue.¹⁴⁸

B The Legislative Assembly debate

The ACT Attorney-General at the time, Simon Corbell, first presented the Sexual and Violent Offences Legislation Amendment Bill to the ACT Legislative Assembly on 3 July 2008.¹⁴⁹ The discussion resumed on 21 August 2008, where ACT Liberal MLA Mr Stefaniak began by stating that the opposition would be supporting the Bill.¹⁵⁰ Dr Foskey from the ACT Greens party followed by commending the aim of the legislation; however, she brought attention to some 'very alarmed responses' from various parties, including the Human Rights Commission,¹⁵¹ Civil Liberties Australia and some prominent ACT legal practitioners.¹⁵² She stated that she was arguing for the 'right to a fair trial for both the complainant and the accused', but that there were aspects of the Bill that undermined 'basic civil liberties' and many aspects of the court process.¹⁵³ She asked the Government to reconsider pushing the Bill through, and to postpone its passage until the 'community has been given adequate time to fully consider the impact of the actual proposed changes in this Bill'.¹⁵⁴

Mr Corbell responded to Dr Foskey by explaining that prior to the drafting of the Bill there was a comprehensive consultation process with stakeholders, which included, at the earliest stage, the Human Rights Office, Legal Aid ACT, the courts and the Australian Federal

¹⁴⁶ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 3.33.

¹⁴⁷ Interview with participant no. 8, judicial officer (Canberra, 2010).

¹⁴⁸ Ibid.

¹⁴⁹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 July 2008, 2667-2671 (Mr Corbell).

¹⁵⁰ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3506-3510 (Mr Stefaniak).

¹⁵¹ The Human Rights Commission made submissions relating to the draft Bill, noting the requirement to have regard to the rights in the *Human Rights Act 2004* (ACT) in the development of ACT legislation, drawing attention to relevant provisions in the *Human Rights Act 2004* (ACT), for example, s 22 (Right to a Fair Trial) and drawing attention to the criteria in s 28 relating to the 'reasonableness' test to limitations on human rights. See: email from Nadiah Tarbet to Jessica Kennedy, 25 March 2011; Letter from Dr Helen Watchirs and Linda Crebbin to Simon Corbell, 21 July 2008. For more discussion about the perceived conflict with the accused's right to a fair trial, see: Australian Law Reform Commission, 'Family Violence – A National Legal Response' (114, 2010); Victorian Law Reform Commission, 'Sexual Offences: Final Report' (July 2004).

¹⁵² Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3510 - 3511 (Dr Foskey).

¹⁵³ Ibid, 3511 (Dr Foskey).

¹⁵⁴ Ibid.

Police.¹⁵⁵ He continued by acknowledging the importance of safeguarding the minimum guarantees for which everyone charged with a criminal offence is entitled to, but stated that protecting the rights of alleged offenders is not the sole purpose of the criminal justice system.¹⁵⁶

Dr Foskey also suggested a number of amendments to the Bill, which centred on maintaining the discretion of the court to determine witnesses' rights. For example, she proposed that the court have the discretion to order that a complainant is not required to attend and give evidence at a committal proceeding in relation to a sexual offence, instead of the section stating that all complainants are not required to attend.¹⁵⁷ She recommended further that the court have the discretion to prohibit the cross-examination of the victim by a self-represented accused, rather than a mandatory prohibition.¹⁵⁸

Mr Corbell provided a range of reasons as to why these propositions were not acceptable and stated that the government would not support Dr Foskey's amendments.¹⁵⁹ Mr Stefaniak agreed with the Attorney-General and stated that they would also oppose her amendments.¹⁶⁰ Consequently, they were negated.¹⁶¹

Mr Mulcahy from the Canberra Party also had some concerns of his own for the Attorney-General.¹⁶² He referred to a letter from Ken Archer (former Director of the ACT DPP) to the Attorney General dated 14 August 2008. Mr Archer claimed that the evidentiary provisions of the Bill would lead to an inadmissibility of evidence under the Commonwealth *Evidence Act 1995*, which could not be altered by the ACT Assembly.¹⁶³ The effect of this inadmissibility, he said, would be that crucial evidence might become inadmissible, potentially resulting in a guilty offender escaping conviction on the basis of an unintended evidentiary error.¹⁶⁴

Mr Corbell responded to Mr Mulcahy's claims by stating that the Commonwealth *Evidence Act 1995* allows other ACT legislation to continue unaffected, and that, therefore, the current Bill would operate unaffected.¹⁶⁵ He stated that the claim made by Ken Archer was wrong in this regard.¹⁶⁶ Mr Corbell concluded by saying that he was:

... confident that the Bill [achieved] the necessary balance between reducing the trauma experienced by victims and other vulnerable witnesses in sexual and violent offence court proceedings and at the same time protecting the human rights of the accused to a presumption of innocence and a fair trial.¹⁶⁷

¹⁵⁵ Ibid, 3515 (Mr Corbell).

¹⁵⁶ Ibid, 3516 (Mr Corbell).

¹⁵⁷ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3521 (Dr Foskey).

¹⁵⁸ Ibid, 3526 (Dr Foskey).

¹⁵⁹ Ibid, 3522 and 3527 (Mr Corbell).

¹⁶⁰ Ibid, 3524 (Mr Stefaniak).

¹⁶¹ Ibid.

¹⁶² Ibid, 3513 (Mr Mulcahy).

¹⁶³ Ibid, 3514 (Mr Mulcahy).

¹⁶⁴ Ibid. In particular, Mr Archer claimed that the previously recorded statement may be regarded as inadmissible under the hearsay rule dealt with in part 3.2 of the *Evidence Act 1995* (Cth).

¹⁶⁵ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3515 (Mr Corbell).

¹⁶⁶ Ibid.

¹⁶⁷ Ibid 3518 (Mr Corbell).

The Sexual and Violent Offences Legislation Amendment Bill was agreed to in principle and passed without change on 21 August 2008.¹⁶⁸ It was notified on 8 September 2008, however, it did not take effect until 1 June 2009.

VI THE AFTERBIRTH: CONCLUSION

Our examination demonstrated that the reforms were a result of a number of years of lobbying, research and consultation with relevant agencies. The result of this hard work was a number of recommendations aimed at reducing the trauma of a trial for sexual assault victim witnesses. In the end, what was necessary though for these recommendations to translate into law were influential people, with a vested interest in the area of sexual assault law reform. This personal commitment by prominent players in the criminal justice system enabled the DPP and the AFP to produce the report *The Challenge of Change*, which in turn resulted in the harnessing of the energies of government and community groups by the SARP Reference Group, and was a major driving force behind the introduction of the *SVOLAA*.

The other element we identified in the initiation of this piece of legislation is what Croucher refers to as the ‘happence of history’, which has also played a crucial part in many other major reforms to the law.¹⁶⁹ She suggests that the most prominent example may be the High Court’s decision in *Mabo*.¹⁷⁰ This renowned decision, which resulted in the acknowledgment of native title in Australia and the end of *terra nullius*, was the result of an ‘ad hoc’ meeting between gardener Koiki or ‘Eddie’ Mabo and James Cook University academics Professor Noel Loos and Henry Reynolds some 18 years earlier.¹⁷¹ In our study, the timing of some of the events that precipitated the reforms was accidental, but crucial. For example, the airing of the program ‘Double Jeopardy’ was a ‘happence’ event that essentially kick-started the whole reform process. Further, without the appointment of the new Attorney-General in 2006, the initiatives may never have been resurrected.

Our concern with the ACT reforms lies with the possible ‘afterbirth’ events. One of the aims of this study was to see how much (dis)similarity is evident between the original idea for reform and what was enacted. As we have noted above, the amendments contain ample grey areas. These include discretion in: defining who is a vulnerable witness; admitting audio-visual recording evidence; deciding when the accused may be screened from the witness; deciding when it is in the interests of justice for the witness to give evidence in an open court; deciding when the witness may be recalled; and deciding when is it in the interests of justice to order that the witness attend to give further evidence if an application is made by the accused. The judicial discretion in the Act was included despite victim support agencies arguing for none.¹⁷² The indeterminacy of the recommendations in *The Challenge of Change* report was minimal. It is not clear how much of the greyness of the legislation resulted from the input of the SARP reference group or the ACT Parliamentary Counsel's Office (PCO),¹⁷³ which provides comprehensive legislative drafting and publishing services for the Territory,

¹⁶⁸ Ibid.

¹⁶⁹ Discussed by Rosalind Croucher, above n 14.

¹⁷⁰ *Mabo & Ors v Qld (No 2)* (1992) 175 CLR 1.

¹⁷¹ Rosalind Croucher, above n 14, 1.

¹⁷² Interview with participant no. 9, victim support worker (Canberra, 2011).

¹⁷³ Rosalind Croucher, above n 13, 22 documents the influence by the NSW counterpart – the Parliamentary Counsel - and how the reform in that case study represented a ‘compromise’ between that body and the Law Reform Commission.

yet it is evident that the resulting legislation contains much more judicial discretion than was initially recommended.

Also indeterminate in the ACT reforms is the lack of direction in the process. The legislation does not provide any detail as to how the special requirements are to be applied for, or by whom, and this is not specified in the prosecutors' guidelines either. One participant informed us that 'certain special measures under the *Evidence (Miscellaneous Provisions) Act* are available on application by the prosecutor. There are [however] no formal guidelines governing when these special measures will be sought'.¹⁷⁴ The guidelines for prosecutors merely state:

In prosecuting charges of assault, especially sexual assault, there should be particular concern for the position of the victim. Many such people have suffered severe emotional and physical distress as a result of the offence and may be confused and apprehensive at the prospect of having to give evidence. Prosecutors should carefully explain to victims of such offences the role which they play in the prosecution process and, if appropriate, the steps that can be taken to ensure their protection.¹⁷⁵

This is as far as the guidelines go. There is no mention of when or how prosecutors should take the steps to ensure the victim's protection. This is interesting considering that one of the purposes of establishing a specialist sexual offences unit at the DPP in 2009 was to 'ensure maximum use is made of the special measures provided for as part of the recent legislative reforms'.¹⁷⁶ The introduction of this unit means that all sexual offence prosecutions are allocated to one of three specialist sexual offence prosecutors in the Sexual Offences Unit. These prosecutors deal with the special measures contained in the legislation on a regular basis and will make application for discretionary special measures in appropriate matters after consultation with complainants.¹⁷⁷ For example, one participant stated that through 'early, sustained and appropriate contact with complainants', and with the 'involvement of the Witness Assistant Support officers of the DPP, prosecutors are able to ascertain when it may be appropriate for a witness to give evidence at pre-trial hearing'.¹⁷⁸

However, it has been suggested that due to the absence of strict guidelines or mandating legislation, these applications for special provisions are not always made.¹⁷⁹ If this is in fact the case, the enactment of the provisions will not have their intended effect, as many victims who could have been further protected will not be.

... the principle should have been that any member of the public performing a public service in serving the administration of justice should be facilitated and enabled to do so, and not jump through hoops (ie prove vulnerabilities and only for this one and not for that one). Initiation is just another way of talking about access to rights and entitlements and, like any right or entitlement, victims need to be informed and facilitated. This process requires independent advocacy. In my view this is a specific area of responsibility for the statutory advocate. While the police and prosecution can do aspects of this they remain constitutionally focused on their role in relation to the *public* interest.¹⁸⁰

¹⁷⁴ Interview with participant no. 10, ACT prosecutor (Canberra, 2011).

¹⁷⁵ ACT Director of Public Prosecutions, *Guidelines for Prosecutors* <<http://www.dpp.act.gov.au/Guidelines%20for%20Prosecutors.html>>.

¹⁷⁶ ACT Director of Public Prosecutions, *Annual Report 2009-2010* (2010) ACT Director of Public Prosecutions, 16 <<http://www.dpp.act.gov.au/pdf/AR2009-2010.pdf>>.

¹⁷⁷ Interview with participant no. 10, ACT prosecutor (Canberra, 2011).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Interview with participant no. 9, victim support worker (Canberra, 2011) (emphasis added).

Research has shown that when there are statutory ‘grey’ areas such as exceptions or lack of clarity, a very broad and diverse interpretation of the statutes ensues. Although discretionary powers are never absolute, they are exercised within a broader legal and social context, one that is susceptible to influence by common societal beliefs. From a feminist perspective, the broader social context and its values and justice-related priorities are understood as being male dominated and therefore permeated with overt, covert, and even unconscious gender biases. This means that the ‘guidelines’, ‘principles’ and legal concept signposts do not exist in a legal vacuum and that judicial discretion in interpreting them could be seen as ‘shaped by the discriminatory and stereotypical reasoning embedded in the substantive law’.¹⁸¹ Thus from this vantage point, discretion can be seen as taking place in a legal arena in which these so-called objective standards are in reality not neutral and inevitable, but ‘operate in a partial and specifically gendered fashion’.¹⁸² So for instance, despite many changes to consent laws and to the types of questions permissible in cross-examining a victim witness, cross-examinations continue to be focused on the complainant’s actions, rather than those of the accused,¹⁸³ and evidence of sexual reputation is still being admitted, often without reference to the relevant legislation,¹⁸⁴ with applications for its admission routinely approved.¹⁸⁵

Most recently, a report published by the Victorian Department of Justice, which assessed the impact of Victorian reforms very similar to those discussed in this paper, found that ‘for many, but not all, victims of sexual assault their experience of the criminal justice system is vastly improved’.¹⁸⁶ It is possible though that the reforms may have led to different and subtler ways of harassment in cross-examination:

Judges said they were seeing a reduction in the use of aggressive tones and overbearing and overly repetitive questions in cross examination. Judges felt that this change in behaviour by defence lawyers was significant and the direct result of the reforms. They noted, however, that the approach of some defence counsel was now more subtle and that intervention was still needed in relation to overly complex questioning and the speed at which questions were fired at the witness.¹⁸⁷

Further, one of the Victorian reform’s main aims was to increase the reporting and conviction rates for sexual assault, and these have proved resistant to change so far.¹⁸⁸ In fact, this study found that there has been a decline in the conviction rate for sexual offence matters in the County Court: the conviction rate is now at its lowest since 2004,¹⁸⁹ sitting at 38%.¹⁹⁰

¹⁸¹ Simon Bronitt, ‘No Records. No Time. No Reason’ (1996) 8(2) *Current Issues in Criminal Justice* 130, 134.

¹⁸² Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 41.

¹⁸³ Bernadette McSherry, ‘Constructing Lack of Consent’ in Patricia Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 26. See also: Patricia Eastal ‘Australia’ in Geetanjali Gangoli and Nicole Westmarland (eds), *International Approaches to Rape* (Policy Press, 2011).

¹⁸⁴ See: Department for Women, above n 28; and, Mary Heath, ‘The Law and Sexual Offences Against Adults in Australia’ (2005) 4 *Australian Centre for the Study of Sexual Assault Issues* 1, 13.

¹⁸⁵ Ibid. See also: Melanie Heenan, ‘Reconstituting the “Relevance” of Women’s Sexual Histories in Rape Trials’ (2002) 13 *Women Against Violence* 4.

¹⁸⁶ Success Works, ‘Sexual Assault Reform Strategy: Final Evaluation Report’ (Victorian Department of Justice, 2011) 224.

¹⁸⁷ Ibid, 120.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, 78.

¹⁹⁰ Ibid, 80. Victoria’s Chief Crown Prosecutor, Gavin Silbert, SC, believes that the OPP’s practice of pursuing weak cases with little prospect of success has led to this drop in conviction rate.

Thus given the greyness in much of the special provisions of the ACT legislation, the question remains: was the enactment actually a 'healthy birth'/delivery or was it perhaps (birth)marked by indeterminacy? Further research is required therefore to see if these provisions are implemented in the spirit of the recommendations and whether the legislation does in fact result in improving victims' safe speaking.¹⁹¹

¹⁹¹ One of the authors is looking at the efficacy of the ACT legislation for her doctoral project.

ACCESSING THE COURTS

ANNE WALLACE AND LEISHA LISTER*

ABSTRACT

This paper examines the way in which people access courts, using a case study of recent reforms in the Indonesian Religious Courts to illustrate the importance of transparent processes, timely and accessible information and legal support. The paper examines the relationship between institutional reform and access to justice approaches, in light of the various theoretical models of judicial reform. It suggests that a dual-track approach has been effective in this situation and identifies some key features that have contributed to that success.

I INTRODUCTION

Judicial reform initiatives have become an important feature of the development programs that have been an increasing feature of the international landscape in the period since World War II. A recurrent theme in the literature on judicial reform is the debate between two competing models — a “thin”, pro-market efficiency model¹ as opposed to a “thick”, pro-poor rights promoting model.²

The former, widely perceived as the prevalent model, is a ‘top-down’ approach centring on reform of state institutions and legal frameworks to promote transparency, efficiency and accountability, with the overarching objective of promoting economic reform.³ This ‘market’ or ‘rule of law’ model (sometimes characterised as supply, rather than demand, driven) has been of particular significance in reform efforts in Eastern Europe.⁴

The latter, a ‘rights based’ model, prioritises the promotion of access to justice by means of a ‘bottom up’ approach focussed on community engagement.⁵ The development of this alternative paradigm in legal development, focussing on access to justice and legal empowerment has occurred against a wider context, including a move to a broader concept of ‘development’ with a focus on the rights and needs of the poor, rather simply promoting or creating the conditions for economic growth, and a concept of economic development itself

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¹ Livingstone Armytage, *Searching for Success in Judicial Reform – Voices from the Asia Pacific Experience* (2009, Oxford University Press) 2.

² Stephen Golub, *Beyond Rule of Law Orthodoxy-The Legal Empowerment Alternative*, Rule of Law Series, No 41 (Carnegie Foundation, 2003); Benjamin van Rooij, *Bringing Justice to the Poor: Bottom-up Legal Development Cooperation* (March 25, 2009) 3-4

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368185>; Livingstone Armytage, ‘Judicial Reform in Asia: Case Study of AusAID’s Experience in Papua New Guinea: 2003-2007’ (2010) 2(4) *Journal of Development Effectiveness* 442, 443.

³ Armytage, above n 1, 2; Dory Reiling, *Technology for Justice - How Information Technology Can Support Judicial Reform* (Leiden University Press, 2009) 15; Jacqueline Vel, ‘Policy Research on Access to Justice in Indonesia: A review of World Bank and UNDP Reports’, 2010(1) *Law, Social Justice & Global Development Journal*, 6.

⁴ *Ibid.*

⁵ van Rooij, above n 2, 3-4.

that is focused at the micro, rather than the macro, level.⁶ It has been an emerging feature of reform projects centred in developing countries in the Asia-Pacific region in recent decades, although the desire for judicial reform in order to enable, for example, a country to join the World Trade Organisation, also remains a strong incentive to participate in these types of reforms.⁷

It needs to also be seen against a background of increasing criticisms of the dominant rule of law approach, which is seen as being based on a series of assumptions — about its impact on the alleviation of poverty and promotion of economic growth — that have not been validated empirically.⁸ It has also been criticised as having a poor track-record to achieving poverty reduction and over-emphasising the role of legal institutions, including the judiciary, in achieving reform,⁹ and giving rise to approaches to implementing change that do not always take account of local contexts.¹⁰

This paper examines some recent judicial reform efforts in the Indonesian courts and suggests that a blend of the two approaches can achieve successful outcomes — under certain conditions. In particular, appropriate approaches by external agencies and organisations involved in international development projects can facilitate a process of engagement between civil society and legal institutions engaged in reform to achieve improvements in access to justice for the poor. It draws on a recent investigation into this subject matter by two leading Australian experts in Indonesian legal reform, concerning the outcomes of the Indonesia – Australia Legal Development Facility (LDF) project that ran from 2004 to 2007, and was funded by AusAID (the Australian Government development agency) in the sum of A\$25 million.¹¹ It also draws on the experience of both authors' involvement with aspects of that project, and a recent conference held in Indonesia to promote court administration.¹²

It begins by sketching an overview of both the 'market' and 'rights-based' approaches to judicial reform, before providing an introduction to the context of recent judicial reform initiatives in Indonesia. It then focuses specifically on two case studies of successful reform initiatives in Indonesia's Religious Court, identifying particular factors that have contributed to that success. From that analysis, it identifies some key features, including approaches to partnerships in judicial development that support local autonomy and allow for the development of approaches that meet local solutions, rather than focussing solely on models provided by external donor agencies.

II JUDICIAL REFORM MODELS

'Pro-market' reforms tend to emphasise the need to improve the quality and timeliness in court processes and judicial decision-making by reforming the legal framework in which economic activity takes place (laws, institutions, personnel), as well as providing a stable social environment within which market activity can flourish, by safeguarding public order

⁶ Ibid, 19-20.

⁷ Reiling, above n 3, 15.

⁸ van Rooij, above n 2, 11-16; Golub, above n 2, 9-11.

⁹ van Rooij, above n 2, 11-16; Golub above n 2, 11-16.

¹⁰ van Rooij, above n 2, 11.

¹¹ John W S Mooney and Budi Soedarsono, *Independent Completion Report* (Indonesia – Australia Legal Development Facility, 2003) 8-19.

¹² IACA Asia-Pacific Regional Conference, Bogor, Indonesia, 13-16 March 2011: *Asia Pacific Conference in Indonesia* (2011) International Association for Court Administration <<http://www.iaca.web.id/>>.

and security.¹³ A central feature of the rights-based approaches are judicial reform projects that focus on improving access to justice and reducing poverty, as well as promoting good governance.¹⁴

The two models are not necessarily inconsistent; organisations such as the World Bank explicitly incorporate both rationales into their programs, with its concept of ‘inclusive liberalism.’¹⁵ However the relationship between them and the extent to which both can be successfully accommodated within judicial strengthening programs is a subject of debate. Some research suggests that even where a bottom up approach is explicitly mandated in reform agendas, and supported by development funding, there will be a tendency to revert, in the implementation of such an initiative, to conventional, ‘top-down’ state-centric activities such as ‘developing case management systems, training clerks, renovating court infrastructure and so on.’¹⁶

III JUDICIAL REFORM IN THE INDONESIAN COURTS

The Indonesian judicial system, has long suffered from a poor reputation.¹⁷ In 2007, the World Bank described it in the following terms: ‘Thirty years of political marginalization has left Indonesia’s legal institutions degraded and ineffective. Rife with corruption and poorly resourced, the legal institutions suffer from a chronic lack of public trust.’¹⁸

In the period since the end of the New Order Era and the resignation of President Soeharto in 1998, there has been an active law reform movement. There has been a particular focus on providing access to justice, for the poor and marginalised. A national Access to Justice Strategy was launched in 2009,¹⁹ and the country’s current National Medium Term Development Plan 2010-2014 sets annual targets that must be met for specific access to justice initiatives (including those discussed below).²⁰ Access to justice for women and children has been identified as a priority area,²¹ something that has particular significance for the work of the Indonesian Religious Courts.

Structural reforms that transferred authority for the courts from the executive to the judiciary and the appointment of a Chief Justice with a professed reform agenda, has been accompanied by the issuing of a number of Judicial Reform Blueprints, which include a focus on access to justice.²² The most recent of these was issued in October 2010²³ and its emphasis on access to the courts has been reinforced by Presidential instruction.²⁴

¹³ Ibid.

¹⁴ Armytage, above n 1.

¹⁵ Vel, above n 3, 6; See also *World Bank’s Role* (2011) World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,menuPK:1974074~pagePK:149018~piPK:149093~theSitePK:1974062,00.html>>.

¹⁶ Armytage, above n 2.

¹⁷ Cate Sumner and Tim Lindsey, ‘Courting Reform: Indonesia’s Islamic Courts and Justice for the Poor’, Lowy Institute Paper 31 (2010, Lowy Institute for International Policy) 11, 12.

¹⁸ World Bank, *Justice for the Poor in Indonesia: Legal Reform at Sub-National Level. Draft Strategy Paper 2006-2009* (World Bank, Jakarta, 2007).

¹⁹ Wahyu Widiana, ‘Access to Justice for the Poor: the Badilag Experience’, (Paper presented at the IACA Asia-Pacific Regional Conference, Bogor, Indonesia, 13-16 March 2011) 11.

²⁰ Widiana, above n 19, 1; Diani Sadiawati ‘Access to Justice for The Poor’ (Presented at the IACA Asia-Pacific Regional Conference, Bogor, Indonesia 13-16 March 2011).

²¹ Sadiawati, above n 20.

²² Sumner and Lindsey, above n 17, 13-14.

However, as Sumner and Lindsay note,²⁵ this access to justice reform agenda, at least prior to the most recent judicial blueprint, appeared to have had little impact on public perceptions of the courts, which are still generally low. The sole and striking exception to this rather gloomy picture is Indonesia's national system of Religious Courts, which consistently score highly in surveys of public trust and competence.²⁶

The Indonesian Religious Courts deal with cases where the parties are Muslim and on a range of issues related to what in Australia would come under the general rubric of 'family law' — marriage, divorce, divisions of property, and the status, maintenance, custody and guardianship of children — as well as issues related to inheritance, wills and testaments, charitable requests and philanthropy and 'shar'iah' economy issues.²⁷ In a country of over 230 million²⁸ where over 80% of the population is Muslim,²⁹ they are among the busiest courts in the country.³⁰

To give an indication of their size and significance, overall there are 807 courts established over Indonesia's 34 provinces and 443 districts. Of those, 372 are Religious Courts (342 first instance courts, and 30 higher courts). In simple terms, 46% of the country's courts are Religious Courts.³¹

Much of the reform effort in the Religious Court over the past 15 years has been carried out in co-operation with AusAID funded programs. One feature of those programs has been the involvement of Australian courts as development partners; the Religious Courts have worked particularly closely with the Family Court of Australia over the past fifteen years, on issues such as case management, financial management, and access to justice issues.³²

This examination of the Religious Courts' success focuses on two reform initiatives: firstly, a government funded program to assist those living in remote areas and those who were unable to afford court fees to access the court's services, by increasing the use of court circuits and providing a system of fee waivers, and secondly, the court's innovative use of modern information and communications technology to create a culture of information exchange, transparency in decision-making and promote access to the courts.

An analysis of both these reforms suggests that while the initial impetus for judicial reform in Indonesia may be influenced particularly by the market model of judicial reform, a strong focus on access to justice within Indonesia, and within the leadership of the courts, and the Religious Court in particular, has resulted an approach that has focussed on access to justice

²³ Widiana, above n 19, 1.

²⁴ Ibid.

²⁵ Sumner and Lindsey, above n 17, 13-14.

²⁶ Ibid.

²⁷ Sumner and Lindsey, above n 17, 1-2.

²⁸ World Bank, *World Development Indicators* (2011) Google Public Data Explorer http://www.google.com.au/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_totl&idim=country:IDN&dl=en&hl=en&q=what+is+the+population+of+indonesia#ctype=1&strail=false&nسلم=h&met_y=sp_pop_totl&scale_y=lin&ind_y=false&rdim=country&idim=country:IDN&ifdim=country&hl=en&dl=en.

²⁹ *About Indonesia* (2009) Embassy of the Republic of Indonesia

<<http://www.kemlu.go.id/canberra/Pages/TipsOrIndonesiaGlanceDisplay.aspx?IDP=1&l=en>>.

³⁰ Sumner and Lindsey, above n 17, 2.

³¹ Widiana, above n 19, 1.

³² Ibid, 1-2.

for the poor, while pursuing structural reform. This has been facilitated by an emphasis by those Australian agencies, in particular the Australian courts working with the Religious Courts that has focussed on providing support that has 'enhanced the ability of the Indonesian judiciary to manage and resource their court as an independent institution - in a very difficult cultural, political and institutional setting'³³ rather than importing pre-determined solutions.

III FEE WAIVERS AND CIRCUIT COURTS

Two of the most successful initiatives undertaken by the Religious Courts have been the conduct of circuit courts, and the extension and publicising of the court's ability to waive court fees in certain cases (prodeo cases).³⁴ As explained below, these initiatives operate in tandem.

Both initiatives were instituted as a result of the findings of an access and equity study conducted between 2007-2009 to investigate public perceptions about family law and access to the Religious courts.³⁵ The study was conducted with the assistance of the Family Court of Australia and the Indonesia Australia Legal Development Facility, as part of a project funded by the Australian Agency for International Development ('AusAID').³⁶ A follow-up survey was conducted in 2009.³⁷

Among its findings, the survey revealed that Indonesia's poor experience significant barriers to using the services of the Religious Courts to deal with family law matters. One particularly marginalised group, who score very low on access to justice indicators, are households headed by single women (defined as widowed, divorces or separated, single women, unmarried women with children, neglected wives, women caring for very ill husbands).³⁸ The 2009 survey found that one third of these households live below the Indonesian poverty line (US\$1 per day).³⁹

The access to justices surveys found that, for these households, their lack of access to justice often result in 'a cycle of non-legal marriage and divorce.'⁴⁰ PEKKA, a non-government organisation that supports and advocates for this group, report that less than 50% of their members have registered marriages; less than 4% would take a case to the court, only one in 10 obtain divorce through the court because of the cost,⁴¹ and 56% of children in these households do not have birth certificates.⁴²

³³ Mooney and Soedarsono, above n 11, 8-19.

³⁴ Widiana, above n 19, 2.

³⁵ Ibid; Bagir Manan, 'Access to Justice in Indonesia' (Paper presented at the IACA Asia-Pacific Regional Conference, Bogor, Indonesia, 13-16 March 2011) 1. For a full account of the findings, see Cate Sumner, *Providing Justice to the Justice Seekers: A Report on the Indonesian Religious Courts Access and Equity Study* (2010); Sumner and Lindsey, above n 17, 18-27.

³⁶ Ibid; *Our Projects: Indonesia-Australia Legal Development Facility (IALDF)* (2011) GRM International <http://www.grminternational.com/hiBand/projects/project_sheet.cfm?pdsnumber=356>.

³⁷ Widiana, above n 19, 4.

³⁸ Nani Zulminarni, 'Women Headed Household Empowerment (PEKKA) Organizing Around Access to Justice' (Presented at the IACA Asia-Pacific Regional Conference, Bogor, Indonesia, 13-16 March 2011).

³⁹ Ibid.

⁴⁰ Widiana, above n 19, 2.

⁴¹ Zulminarni, above n 38.

⁴² Ibid.

Lack of registration, of both births and marriages, has also been revealed as a significant issue, and are often linked, so that, for example, production of a valid marriage certificate is required in order to register the birth of a child.⁴³ Without valid identity documents, it can be difficult for these households to access state resources, such as cash transfer schemes, and free health care for the poor.⁴⁴

For this group, the main barriers to accessing the services of the Religious Courts were identified as a lack of financial resources to pay court fees and travel to court.⁴⁵ Indonesia is a vast country, and the survey found that distance to court and transport costs could add up to 70% to the total cost of having a matter brought to court.⁴⁶ For PEKKA households, the average distance to a court from their home was 20 kilometres.⁴⁷ Such difficulties were obviously exacerbated by the fact that the Religious Courts had been unable to meet the requirement laid down by law to establish a permanent court in each of Indonesia's 443 districts.⁴⁸ Survey findings indicated that 88% of those for whom divorce might be an option would seek to obtain a legal divorce if court fees were waived and 89% would be more motivated to do so if the court hearing was held in a nearby town.⁴⁹

The surveys found that another significant factor contributing to lack of access to the Religious Courts was the inability of potential clients to access information about court services, an inability further impeded by low levels of literacy.⁵⁰ The report recommended the use of circuit courts as having the potential to assist with improving levels of awareness and providing information to communities about court services, as well as answering an immediate need to assist communities deal with their legal matters.

The recommendations of the report on the survey were to increase the budget provided to the Religious Courts to provide for the waiver of court fees (prodeo cases) and for the conduct of circuit courts.⁵¹ It also recommended that more frequent circuits be held, and that there be a program of raising public awareness, and providing more and better information, about court procedures, including fee waiver.⁵²

Following the 2007 survey, the Supreme Court increased the budget for prodeo cases, and additional funding was also provided to enable the Religious Court to conduct more circuit courts.⁵³ Subsequently, there was a four-fold increase from 2007-2010 in the number of clients from remote and regional areas are accessing the court (an increase from 3,359 to 13,011).⁵⁴ While circuit courts were carried out 'from time to time'⁵⁵ prior to the reform process, the result of the reforms and additional funding has been to make the scheduling of circuits a more regular, and demand-driven process (as we will discuss below) and the court

⁴³ Widiana, above n 19, 9.

⁴⁴ Sadiawati, above n 20.

⁴⁵ Widiana, above n 19, 2, 4, 8.

⁴⁶ *Ibid.*

⁴⁷ Zulminarni, above n 38.

⁴⁸ Widiana, above n 19, 8.

⁴⁹ *Ibid.* 4.

⁵⁰ *Ibid.* 2, 8; Sumner, above n 35.

⁵¹ Sumner, above n 35; Widiana, above n 19, 2, 8.

⁵² Sumner, above n 35; Widiana, above n 19, 3.

⁵³ Sumner and Lindsay, above n 16, 30.

⁵⁴ Widiana, above n 19, 9.

⁵⁵ *Ibid.*, 7.

now conducts circuits in 179 locations.⁵⁶ There has been a significant increase in the number of prodeo cases.⁵⁷

However, it is important to note that merely increasing the budget for both these activities was not, on its own, responsible for this increase in access to justice. Indeed initially there were difficulties in spending the increased budget for fee waiver.⁵⁸ In part, this was a result of a lack of process, and it was subsequently necessary to introduce new systems of financial reporting to monitor the expenditure of the budget for prodeo and ensure appropriate accountability (discussed further below).⁵⁹ The increase in budget has been complemented by the court setting yearly targets for the number of prodeo cases to be dealt with using this funding.⁶⁰

Lack of awareness among potential court clients of the availability of fee waiver was revealed as a significant issue and one that the Religious Courts have tackled by means of a novel partnership with PEKKA, the non-government organisation (NGO) referred to above that works to strengthen and support households headed by women. The conduct of circuit courts has also been seen as a way to increase community awareness about court services and, here again, the involvement of PEKKA has been critical to the court's success.

PEKKA itself is a national network comprising 503 grass roots organisations, covering 353 villages, 86 sub-districts, and 28 districts, throughout the country.⁶¹ Its response to the national access to justice strategy has been to employ a number of techniques including critical awareness raising, paralegal development, the use of multi-stakeholder forums, conducting research and networking.⁶²

PEKKA were involved, and facilitated, the 2007 and 2009 access to justice surveys, but their involvement was conditional on there being an agreement with the court that the research would be used to deliver actual benefits to the women who had participated in it. The organisation actively sought to use its involvement in the research to facilitate dialogue with higher levels of the Religious Court. That dialogue resulted in an awareness among PEKKA of the fee waiver budget and that it was not being fully taken up, and PEKKA then took on the project, working with the court, use the prodeo budget, by assisting their communities to access fee waiver and circuit courts conducted at village level.⁶³

All these strategies have been employed to assist the access to justice program in the Religious Courts. At grassroots level, paralegals literally doorknock villages asking women if they have marriage certificates, if separated if they want a divorce, or if their children's births have been registered. They explain about court costs, fee waiver and the court process. As the national co-ordinator of PEKKA recently explained, communities are sometimes initially reluctant to approach the court, but after hearing about fee waiver they are more eager to come.⁶⁴ The paralegals provide ongoing assistance and support by preparing applications for

⁵⁶ *Ibid.*, 9.

⁵⁷ *Ibid.* 7, 9.

⁵⁸ *Ibid.*, 3.

⁵⁹ *Ibid.*, 6.

⁶⁰ *Ibid.*, 7.

⁶¹ Zulminarni, above n 38.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

women seeking orders from the court and accompany them to the court to for filing of documents, and for hearings.⁶⁵

However, the work done by PEKKA workers goes further than the type of paralegal work that would familiar in the Australian context. PEKKA volunteers organise a volume of cases ready for hearing, arrange for registration of the necessary paperwork in the court and then request the court to conduct a circuit court in the area where the cases are ready to be heard.⁶⁶

Circuit court hearings then, are co-ordinated jointly by the Religious Court and PEKKA. After cases are filed at the court, information about the court process and requirements is fed back to the applicants by the paralegals.⁶⁷ Cases are usually heard quickly with a decision handed down in two to three days.⁶⁸ In 2010, more than 4,000 cases were processed through circuit courts in this fashion.⁶⁹

As at 2010, 120 well-trained PEKKA paralegals had assisted 258 clients to access a village circuit court, of whom 226 had been fee waiver cases. It has facilitated 1689 clients to access birth certificates for their children.⁷⁰ On the 'demand side', PEKKA has identified no less than another 9323 potential cases for the court; information that is, in turn, useful for the court in planning its workload.⁷¹

However, while PEKKA's involvement has been critical in enabling the court to achieve its to expending its fee-waiver and circuit court budget and, in a country where public trust in the judicial system has long been marred by a lack of transparency and accountability, it has also been important that the fee waiver program, has been administered in a way that demonstratives those qualities as well. Here the major enabling factor has been a strategic and thoughtful use of simple and effective information and communications technology ('ICT').

IV USE OF INFORMATION AND COMMUNICATIONS TECHNOLOGY

As discussed above, the increased budget for prodeo cases necessitated new systems to monitor and report on the way that budget was allocated.⁷² At a more general level, of course, good reporting systems are important to helping the courts appropriately allocate resources and accurately gauge the level of demands for access to justice and court services.⁷³

A timely and accurate reporting from 706 courts throughout a large, geographically scattered country can be a resource-intensive activity for any organisation. A particular consideration for the Indonesian courts has been the time taken to collect data, compile and process reports. Reporting is still largely done in paper-based formats which are sent by mail, in a two-stage

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Widiana, above n 19, 6.

⁷³ Aria Suyudi, 'SMS Data Collection to Increase Access to Justice – enhance Transparency and Accountability: Indonesian Experience' (Presented at the IACA Asia-Pacific Regional Conference, Bogor, Indonesia 13-16 March 2011).

process which involves monthly reports being compiled at regional level and then consolidated at the Supreme Court level, involving some 29 forms to be completed.⁷⁴ The complexities of this process have been exacerbated by changes in the management responsibilities from central government to the judiciary in 2005.⁷⁵

As a result the court leadership has had difficulties in obtaining accurate data about workload and case processing in the lower courts and in monitoring and enforcing reporting requirements.⁷⁶ Although improvements in infrastructure are being made, including the use of information and communications technology, such as email, the majority of the courts still lack these facilities.⁷⁷

On the other hand, SMS mobile phone technology is widely available in Indonesia, and offers easy to use tool that can be mobilised quickly;⁷⁸ and it is this that the Religious Courts have employed to provide a cost effective method of obtaining timely reports, with a system called SMS Gateway.⁷⁹ Indonesia enjoys 100% coverage cellular signal nation-wide, and has over 180 million cellular subscribers, catering to over 240 million citizens, as opposed to a merely 30 million broadband users.⁸⁰

From the perspective of the courts, SMS technology is very economical to operate, requires a minimal investment (court staff either have one, or can be issued with a court mobile).⁸¹ SMS can also be used for broadcasting mass messages to staff (such as reminders about due dates for reporting information) as well as for reporting purposes.⁸²

In simple terms, the way it works is to require court staff to SMS their report data, in a required format, to a central court number. The data is uploaded from that message onto the court server and collated.⁸³ The resulting reports are then uploaded onto the Court's website,⁸⁴ so that court staff, and the public, can see the resulting statistics as they are added, in real time.

The SMS Gateway has been very successful in reducing the time required to both transport and process reports. Data is transported practically instantaneously and processing time has, also been reduced 'from months to almost instant.'⁸⁵ The strategy is to use it to complement existing printed reports, so that it also serves as a vehicle to introduce staff to a change to a more IT-based reporting environment.⁸⁶

The publication of the resulting statistics is only part of the function of the Religious Courts' website. The site, launched in 2006, has been purposefully used as a platform 'to

⁷⁴ Ibid.

⁷⁵ Suyudi, above n 73.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Widiana, above n 19, 6; Suyudi, above n 73.

⁸⁰ Suyudi, above n 73.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Suyudi, above n 73.

⁸⁴ At <<http://www.badilag.net/>>.

⁸⁵ Ibid.

⁸⁶ Ibid.

communicate new events, policies, information and training packages to all courts via the Internet.⁸⁷ The information thus communicated is also publically available, which is part of a deliberate a court strategy which has focused on the use of the website to promote accountability and transparency.⁸⁸

V STRUCTURAL REFORM – LEGAL INSTITUTION STRENGTHENING

These initiatives in Indonesia's Religious Courts have taken place against a backdrop of capacity building with the courts themselves, something that has been a significant part of the overall law reform agenda. Indeed, it has been observed that: 'The judiciary is one of the few legal institutions that has marked the reform policy with structural change, improved internal coherence and an internally driven evolution,'⁸⁹ although the overall pace of change remains slow, and concerns about corruption remain significant.⁹⁰

The AUSAid-funded Legal Development Faculty Program included a judicial reform agenda, which an independent evaluation has assessed as the most prominent and successful aspect of that program,⁹¹ pointing to 'increased judicial transparency and accountability in the Supreme Court ... enhanced ability of the court to manage its business under the 'One Roof' administrative arrangements; publication of fees and case timetables, internet publication of judgments, and reduction on case-processing times and backlogs.⁹² Another significant outcome of the structural reforms identified by Sumner and Lindsay in the case of the Religious Courts, has been the appointment of a dedicated court administrator, at a senior level, someone who has management, rather than judicial, qualifications. This is contrary to the position in the other Indonesian courts, where these positions tend to be occupied, on a rotating basis, by members of the judiciary.⁹³

VI DISCUSSION AND ANALYSIS

This recent reform experience in the Indonesian courts is interesting in several respects. On the one hand, it can be attributed to factors inherent in that particular court, including strong leadership, which is committed both to improving its public image, but also to a social justice agenda,⁹⁴ the use of a dedicated court management position with specialist expertise to run the Religious Court, as well as a strong commitment to electronic communication, in particular, the use of the Internet.⁹⁵

The broader context in which institutional reform is being pursued in Indonesia is also significant; notably, the strong emphasis in national rhetoric and policy on access to justice, and the active role played by non-government organisations, such as PEKKA, and other elements of civil society, in the reform process. That context also includes the economic and social changes occurring in Indonesia; the rapid development of information and communications technology, in particularly, SMS and Internet. These are developments that

⁸⁷ Sumner and Linsey, above n 17, 34.

⁸⁸ Ibid; Widiana, above n 19, 8.

⁸⁹ Mooney and Soedarsono, above n 11, 18.

⁹⁰ Ibid 15.

⁹¹ Mooney and Soedarsono, above n 11.

⁹² Ibid, 19.

⁹³ Sumner and Lindsay, above n 17, 33-4.

⁹⁴ Ibid, 34-5.

⁹⁵ Ibid.

are not perhaps often perceived as immediately relevant to the many Indonesian who live below the poverty line and lack the capacity to access even basic services, yet these reforms illustrate that combined approach – working at village level with NGOs, coupled with a willingness to engage with modern information and communication tools, can be very effective in judicial reform.

The role of grassroots organisations such as PEKKA in assisting courts (and government funders) to implement reforms to improve access to justice and obtain accurate data about the potential demand for judicial services is also significant.⁹⁶ Although courts in many countries, do generally seek to engage more broadly with their constituents and representative interest groups these days, what is striking about this example is that the relationship between the NGO and the court has been developed as one of equals – PEKKA’s supporting the court’s reform projects in order to deliver real benefits to its constituency.⁹⁷

There may be parallels or lessons that can be drawn here for other courts and their constituencies; not just in Indonesia but also elsewhere in the world. The specific nature of the jurisdiction and the issues may change; but it may be possible to forge a useful operating partnership in other contexts – the delivery of court services to indigenous Australians in this country, is an obvious example that springs to mind.

The Indonesian Religious Court’s experience with the use of ICT is particularly interesting. As Reiling points out, technology is often highlighted as a means to achieve reform in judicial systems, and resolve a range of problems in developing court systems, ranging from the immediately practical (publication of court decisions) to the symbolic (acting as a signifier of a modern judicial system), but in practice it does not resolve them so easily.⁹⁸

One common complaint is that overseas aid agencies who fund judicial reform projects in developing countries often import expertise that brings with it pre-defined solutions based on experience in developing countries. These solutions sometimes provide unsuitable for adaption to the local system, for a range of reasons, including lack of supporting infrastructure, adequately trained personal, ongoing budget for technical support and, critically, a failure or inability to adapt or adjust them to the needs of the local court system.

While the development of an SMS reporting system is not, in itself, an Indonesian initiative, the fact that this solution to the problem of timely reporting was suggested, and implemented, by and using local ‘in-house’ technical expertise within the courts, is significant. It demonstrates that development projects may be better fussed on supporting local expertise to identify sustainable solutions to local needs, rather than importing pre-defined solutions.

VII CONCLUSIONS

These recent reform initiatives in Indonesia’s Religious Court have attempted to marry both approaches to judicial reform – a grass roots justice initiative and a structural reform program in the judiciary. The results suggest that rather than viewing these development approaches as competing paradigms, an approach that sees them work in tandem maybe more successful in promoting access to justice for the poor, at least under certain conditions.

⁹⁶ Zulminarni, above n 38.

⁹⁷ Ibid.

⁹⁸ Reiling, above n 2, 15-16.

An independent evaluation of the IFLF program identified the need to improve the process for monitoring and evaluating such projects to ensure, among other things, that lessons learned are captured and disseminated, and that the process of monitoring and evaluation receives attention from the outset, so that there is a clear understanding of what constitutes a 'lesson' in term of project's objectives, rather than simply at the level of project activities.⁹⁹ Identifying conditions under which a successful structural reform can support access to justice could be a critical part of such evaluation.

One lesson that may be able to be drawn from the Religious Court experience, is that the fact that it has been served by a dedicated and specialist court administrator (unlike the other Indonesian courts) and has a clearly defined jurisdiction may mean that these solutions have been easier to craft and implement than would be the case in a court with a more diverse jurisdiction, juggling competing demands, without the benefit of such administrative expertise. A challenge now for the Indonesian courts will be to see if the success in the Religious Court can be continued and extended to other areas of the country's judiciary.

⁹⁹ Mooney and Soedarsono, above n 11, 9-10, 36-40.

OPENING THE DOOR TO JUSTICE: QUESTIONS ABOUT AUSTRALIA'S NATIONAL INFORMATION REGIME

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I FOUNDATIONS OF JUSTICE?

A Introduction

This paper is a meditation¹ on tensions in what has variously been characterised as the information society, the information economy and the information state.²

The author aims to provoke discussion at the 2011 *Justice Connections* conference rather than to provide a report on work in progress, to offer definitive answers regarding legal and public policy conundrums, unpack the nature of rights and responsibilities in a pluralist liberal democratic polity, supply a formal analysis of a legal *cause célèbre* or critique an exemplary text.³

The following paragraphs accordingly ask some questions and pose challenges for legal scholars, administrators and citizens. They suggest that there is value in thinking about the relationship between justice and information at the level of principle and practice.

The paper's coverage is not exhaustive and it does not purport to examine philosophical and technical issues regarding professional privilege, the secrecy of jury deliberations, freedom of speech, the national security regime and suppression orders. Instead, the paper initially identifies the role of information as a basis for retrospective, contemporary and future justice.

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¹ The following paragraphs provide a symposium paper. They thus do not purport to take the form of much law journal writing, in which a thesis is posed and critiqued, a legal judgment is unpacked or a statute is glossed through invocation of authorities such as HLA Hart, Richard Posner, Owen Dixon, Jacques Derrida, Michel Foucault, Lord Denning or Carl Schmitt. Access to justice requires an occasional questioning of legal disciplinarity, of conventions regarding scholarly style and of 'taken for granted' institutional performance mechanisms, highlighted in Frank Larkins, *Australian Higher Education Research Policies and Performance, 1987-2010* (Melbourne University Press, 2011) and Philip Mirowski, *Science-Mart: Privatizing American Science* (Harvard University Press, 2011).

² Debate about the meaning and origins of those characterisations continues, with observers pointing to: Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton University Press, 1962); Daniel Bell, *The Coming of Post-Industrial Society* (Basic Books, 1973); 'The Social Framework of the Information Society' in Michael Dertouzos and Joel Moses (ed) *The Computer Age: A Twenty Year View* (MIT Press, 1979) 500; Eugene Garfield, '2001: An Information Society' (1979) 1(4) *Journal of Information Science* 209. Other perspectives are provided in works that privilege mass entertainment and marketing, such as: Michael Wolf, *The Entertainment Economy* (Times, 1999); Thomas Davenport and John Beck, *The Attention Economy* (Harvard Business School Press, 2001); and Ian Ward, 'Mapping the Australian PR State', in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) 3.

³ The author expresses his appreciation for the opportunity to read an advance copy of Dr Sarah Ailwood's paper on testimony and Tegan Wagner.

The paper then offers some observations on particular information access mechanisms and some questions about rights and responsibilities.

Consideration of duties, barriers, gateways and entitlements is desirable, given that both justice and information access are dynamic. Government is not a docile cow with an inexhaustible information teat; it instead consumes, generates and dispenses information in ways that directly and indirectly shape participation in civil society. Provision of information about law is not necessarily an unalloyed good: as Sol Encel and colleagues noted in *The Elephant in the Room: Age Discrimination in Employment*,⁴ awareness of law often leads to ‘nimble side-stepping – compliance with the letter rather than the spirit of the law’. Recent Commonwealth government justice and access initiatives, such as the *Freedom of Information Amendment (Reform) Act 2010* (Cth) and emphasis on alternative dispute resolution, are important but we should not mistake procedural rights for substantive rights.

Mechanisms discussed in later sections of this paper are the:

- Freedom of Information statute that has been promoted as a major part of the current Government’s reform agenda⁵ and as embodying a Commonwealth ‘open access’ philosophy that is consistent with the 2009 national *Strategic Framework for Access To Justice in The Civil Justice System*;⁶
- archives statutes and regulations that deal with retention and creation of the records of Commonwealth and State/Territory agencies;
- Commonwealth Ombudsman, an entity construed in terms of information access rather than mediation;
- movement towards pro-active electronic publication of information about Commonwealth agencies, albeit with uncertain recognition of ‘digital divides’ that inhibit identification and use of electronic resources and with inadequate funding of the cross-jurisdictional legal publishing initiative known as AustLII;
- use of Crown Copyright and Creative Commons licensing in conjunction with that movement;
- judiciary, in particular efforts to provide a more effective ‘voice’ for engendering both an understanding and appreciation of the law;
- traditional and new media (eg ‘citizen journalism’ and tools such as Twitter), with questions about whether disintermediation is increasing access to data but reducing an understanding of information;
- engagement by academia with the legislature and national bureaucracy to inform and restrain lawmaking and administrative practice.

Questions in the following pages reflect the recognition in the *Strategic Framework* that:

Access to justice is not just about courts and lawyers, but is also about better and early access to information and services to help people prevent and resolve disputes.

While courts are an important part of the justice system, there are many situations where other options for resolving a dispute will be faster, cheaper and more suitable in the circumstances. Often a full blown court case will be completely disproportionate to the issues in dispute.

⁴ Sol Encel, Penelope Nelson and Maria Stafford, *The Elephant in the Room: Age Discrimination in Employment* (National Seniors Productive Ageing Centre, 2011) 31.

⁵ See for example Australian Information Commissioner, ‘The Australian Information Commissioner will Protect Information Rights and Advance Information Policy’ (Media Release, 1 November 2010) 1 <www.oaic.gov.au/news/media_release_oaic_launch.html>.

⁶ The *Framework* is available at www.accessjustice.gov.au. The absence of detailed public critique by the legal academy of that document is indicative of a barrier to justice that is discussed below.

Sometimes, simply having access to good information can help people to resolve their own disputes quickly and effectively.⁷

That statement is indicative of our society's faith in information, which – like sunlight, vitamins, tax reductions or a mother's love – cures all ills.

It is also indicative of cost-shifting in the post-industrial information economy or information society, where disintermediation results in the consumer and the database undertaking activity that was formerly the preserve of the person behind the counter (minor official, sales assistant, claims processor, notary).⁸ Governments are concerned with bureaucratic rationality rather than the highly individualised 'markets of one' envisaged by e-commerce enthusiasts and that disintermediation tends to result in people being treated as abstractions – as data subjects rather than as individuals, embodiments of a particular attribute (eg 'eligible' versus 'non-eligible') rather than persons with substantive rights. Do notions of an online Fordist efficiency in public administration (including the operation of the justice machine that we know as the courts) militate against justice?

B An Information Lens

It is a truth everywhere acknowledged, but – unlike Jane Austen – alas little critiqued, that most Australians are living in an information society.⁹

What is an 'information society' and what is its significance for justice?

In 1979 Eugene Garfield offered a concise and pragmatic definition, characterising an information society as one

in which we take for granted the role of information as it pervades and dominates the activities of government, business and everyday life.¹⁰

Unlike 'cyberselfish' policy advocates¹¹ – such as John Perry Barlow, George Gilder, Nicolas Negroponte, Alvin Toffler, Clay Shirky and John Gilmore¹² – for whom information is an

⁷ *Access To Justice* (2011) Commonwealth Government <www.accesstojustice.gov.au>.

⁸ Nicholas Gruen, chair of Australia's Government 2.0 Taskforce, commented that 'If Government 2.0 is realised, citizens won't just be consulted by government they'll actively collaborate with government.' Government 2.0 Taskforce, 'Government 2.0 Taskforce Paper Released for Public Comment' (7 December 2009).

⁹ Merely leading some horses to the information pipeline doesn't mean that they will or can drink. The elision of difference by enthusiasts for the National Broadband Network and for other initiatives, such as provision of laptops for all students, reinforces a range of digital divides and construes access as the availability of infrastructure.

¹⁰ Eugene Garfield, '2001: An Information Society' (1979) 1(4) *Journal of Information Science* 209.

¹¹ For a critique of the social and political implications of US digital transcendentalism see: Richard Barbrook and Andy Cameron, 'The Californian Ideology' (1996) 26 *Science of Culture* 44; Richard Barbrook, *Imaginary Futures: From Thinking Machines to the Global Village* (Pluto, 2007); Thomas Streeter, 'That Deep Romantic Chasm: Libertarianism, Neoliberalism and the Computer Culture' in Andrew Calabrese and Jean-Claude Burgelman (ed) *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield, 1999) 49-64; Paulina Borsook, *Cyberselfish: A Critical Romp Through the Terribly Libertarian Culture of High Tech* (PublicAffairs, 1999).

¹² Esther Dyson, George Gilder, George Keyworth and Alvin Toffler, *Cyberspace & the American Dream: A Magna Carta for the Knowledge Age* (1994) Progress & Freedom Foundation <www.pff.org/issues-pubs/futureinsights/fi1.2magnacarta.html>.

unalloyed good (if indeed not god),¹³ Garfield cautioned against a simplistic evaluation of information access. Realists have recognised that the creation, dissemination and consumption of information has political and social implications that are not adequately addressed through sound-bites such as ‘information just wants to be free’¹⁴ or the imminent demise of the State, which will supposedly evaporate like a mothball when exposed to the beneficent warmth of the internet.¹⁵ Garfield for example differentiated between an ‘information conscious’ society in which users take information for granted and an ‘information literate’ society in which users know how to handle information.¹⁶ Are we an information literate society, particularly in relation to justice? That question is worth posing after recent national and state elections that featured claims about knife-crime, the ‘refugee menace’ and the efficacy of closed circuit cameras or mandatory sentencing that are at odds with reality.

From a justice perspective we are an information society because information is a commodity¹⁷ (publishing and education are major sectors in the Australian economy) and because much employment involves what Bell dubbed ‘symbolic analysts’ (workers using, processing and creating information rather than widgets).¹⁸

Both the justice system and public administration are founded on information, with for example:

- the State construing the allocation of welfare and other entitlements through the individual’s membership of particular classes of needs or rights, ie as an abstraction that in a world of bureaucratic rationality potentially denies personhood by treating the individual as a number rather than someone who is unique and that may be inconsistent with notions of individualised justice;¹⁹
- the publication of statute and case law, in principle readily accessible to legal practitioners and non-specialists alike rather than being unrecorded (with consequent inconsistency in judicial and administrative decision-making) or carefully restricted to an elite that is thus not publicly accountable;²⁰

¹³ For expressions of futurism about digital information and cyberspace as the ‘noosphere’ see David Batstone, ‘Virtually Democratic’ (RMIT Alfred Deakin Lecture, 17 May 2001) and Kevin Kelly, ‘We Are The Web’, (2005) 13(8) *Wired Magazine* <<http://www.wired.com/wired/archive/13.08/tech.html>>.

¹⁴ ‘Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind ... I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear’: John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996) <<http://editions-hache.com/essais/pdf/barlow1.pdf>>.

Australian prisoners – along with the digits – presumably yearn to be free; their confinement reflects certain realities that are not answered with a libertarian repackaging of Marx’s exhortation for the oppressed to throw off their chains or assumptions that ‘being digital’ will make you rich, hip and cool.

¹⁵ Nicholas Negroponte, *Being Digital* (Vintage, 1995) 238. A succinct response was provided by Bart Kosko, *Heaven in a Chip: Fuzzy Visions of Science and Society in the Digital Age* (Three Rivers Press, 2000) 43: ‘we’ll have governments as long as we have atoms to protect’.

¹⁶ Eugene Garfield, ‘2001: An Information Society’, 1(4) *Journal of Information Science* (1979) 209.

¹⁷ Dan Schiller, *How To Think About Information* (University of Illinois Press, 2007) 21.

¹⁸ Carl Shapiro and Hal Varian, *Information Rules* (Harvard Business School Press, 1999). For the analysts see: Daniel Bell, *The Coming of Post-Industrial Society* (Basic Books, 1976) 477; Robert Reich, *The Work of Nations* (Simon & Schuster, 1993) 169.

¹⁹ Murray Gleeson, ‘Individualised Justice: The Holy Grail’ (1995) 69 *Australian Law Journal* 421.

²⁰ It is axiomatic that the rule of law, as distinct from rule by law (in particular a politicised, non-transparent and idiosyncratic rule by law, involves citizen and practitioner access to statute and case law. Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 39 for example emphasises wide promulgation of rules as a basis

- documentation of government policies and of administrative actions, with decisions in principle being made on the basis of compliance with the policy and associated law rather than on the basis of personal connections or illicit payments;
- reporting and commentary, credible or otherwise, in the mass media regarding crimes, sentencing, rights, responsibilities and policies;
- public policy-makers drawing on suggestions, criticism and advice from voters, advocacy bodies and independent experts, whether as a manifestation of ‘consultation theatre’ that serves to legitimise power differentials in a non-plebiscitary democracy or as an expression of bureaucratic incapacity through several decades of outsourcing.

This discussion began by noting that most Australians are living in an information society and can take for granted the role of information in their daily lives. Use of the word ‘most’ is deliberate. Information and the infrastructure for the delivery of that information is, like the future (to adapt William Gibson’s famous quip about digital modernity),²¹ unevenly distributed and people in particular locations or with particular attributes may not have the same opportunities for access and to justice as those enjoyed by their peers.

Examples include some Indigenous peoples in what is dubbed ‘remote Australia’ (although their ancestral lands may not be remote to them); the urban poor; the deaf and blind or people with mobility problems;²² and – more subtly – people whose cultural values militate against higher education, against use of public libraries or merely against a fact-based analysis of claims in the mass media.²³

Initiatives such as the National Broadband Network will address some of those divides and reinforce others.²⁴ They will provide physical – or a surrogate – access to information about law and public administration but will not necessarily increase information literacy and thereby enhance access to justice. Having more information – footnotes, video clips, web pages, ministerial statements, justice strategic frameworks – does not automatically increase

for justice. Randall Peerenboom, *China’s Long March Toward Rule Of Law* (Cambridge University Press, 2002) 245 notes issues regarding lack of access to legal information in a contemporary rule by law regime.

²¹ ‘The future is already here – it’s just not very evenly distributed’. The past of course is also here, also unevenly distributed and presumably going to remain so. Gibson is quoted in Christopher Meyer, ‘If It’s An Information Revolution, Where Are The Peasants?’ (2000) 5 *Perspectives in Business Innovation: The Connected Economy* np. Works such as: James Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (Harvard University Press, 1986); JoAnne Yates, *Control Through Communication: The Rise of System in American Management* (Johns Hopkins University Press, 1993); Richard Barbrook, *Imaginary Futures: From Thinking Machines to the Global Village* (Pluto, 2007); Frank Webster, *Theories of the Information Society* (Routledge, 2002); Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press, 1977) have highlighted antecedents of what we call the information society.

²² Among local works on digital divides see: Gerard Goggin and Christopher Newell, *Disability in Australia: Exposing A Social Apartheid* (UNSW Press, 2005) 199; Suzanne Willis and Bruce Tranter, ‘Beyond the “Digital Divide”’: Internet Diffusion and Inequality in Australia’ (2006) 42(1) *Journal of Sociology* 43; Tony Vinson, *Dropping Off The Edge* (Jesuit Social Services, 2007).

²³ Graham Murdock and Peter Golding, ‘Information Poverty and Political Inequality: Citizenship in the Age of Privatized Communications’ (1989) 39(3) *Journal of Communications*, 18-195; Oscar Gandy Jr, ‘The Surveillance Society: Information Technology and Bureaucratic Social Control’ (1989) 39(3) *Journal of Communications*, 61-76.

²⁴ Tanya Notley and Marcus Foth, ‘Extending Australia’s Digital Divide Policy: An Examination of the Value of Social Inclusion and Social Capital Policy Frameworks’ (2008) 7 *Australian Social Policy* 1.

understanding.²⁵ Although criticisms of the internet as fostering inattention and superficiality²⁶ are polemical²⁷ and overstated (laments about the ‘shallows’ are evident from at least the first era of Yellow Journalism²⁸ and are a recurrent feature of criticism of television) we might question the contemporary enthusiasm for Twitter,²⁹ Facebook³⁰ and crowd-sourced³¹ reference material such as Wikipedia.³² Does access to information through such mechanisms underpin justice or instead foster an information illiteracy that values incident over context, sound bites over sense?³³

C International framework

Is there an international right of ‘access to information’, a right that can be invoked for example in the High Court to address deficiencies in the development of legislation or that offers a strong foundation for provision of free access to the proceedings of all Magistrates’ Courts? Is access to information a human right?

²⁵ Herbert Simon, ‘Rationality as Process and as Product of Thought’, in David Bell, Howard Raiffa and Amos Tversky (eds), *Decision Making: Descriptive, Normative, and Prescriptive Interactions* (Cambridge University Press, 1988) 73 comments that: ‘In a world where information is relatively scarce, and where problems for decision are few and simple, information is almost always a positive good. In a world where attention is a major scarce resource, information may be an expensive luxury, for it may turn our attention from what is important to what is unimportant.’

²⁶ Nicholas Carr, *The Shallows: How the Internet is Changing the Way We Think, Read and Remember* (Atlantic, 2010); Lee Siegel, *Against The Machine: Being Human in the Age of the Electronic Mob* (Serpent’s Tail, 2008); Evgeny Morozov, *The Net Delusion: How Not To Liberate The World* (Allen Lane, 2011); Sven Birkerts, *The Gutenberg Elegies: The Fate of Reading In An Electronic Age* (Faber, 1994).

²⁷ For an egregious example see Neil Postman, *Technopoly: The Surrender of Culture to Technology* (Knopf, 1992) 70: ‘Like the Sorcerer’s Apprentice, we are awash in information. And all the sorcerer has left us is a broom. Information has become a form of garbage, not only incapable of answering the most fundamental human questions, but barely useful in providing coherent direction to the solution of even mundane problems ... the tie between information and human purpose has been severed, ie, information appears indiscriminately, directed at no one in particular, in enormous volume and at high speeds, and disconnected from theory, meaning, or purpose ... We are a culture consuming itself with information, and many of us do not even wonder how to control the process. We proceed under the assumption that information is our friend, believing that cultures may suffer grievously from a lack of information, which, of course, they do. It is only now beginning to be understood that cultures may also suffer grievously from information glut, information without meaning, information without control mechanisms.’

²⁸ W Joseph Campbell, *Yellow Journalism: Puncturing the Myths, Defining the Legacies* (Praeger, 2003); Shannon Petersen, ‘Yellow Justice: Media Portrayal of Criminal Trials in the Progressive Era’ (1999) 1(1) *Stanford Journal of Legal Studies* 72.

²⁹ Bernardo Huberman, Daniel Romero and Fang Wu, ‘Social Networks That Matter: Twitter Under the Microscope’ (2009) 14(1) *First Monday*.

³⁰ David Kirkpatrick, *The Facebook Effect* (Simon & Schuster, 2010)

³¹ James Surowiecki, *The Wisdom of Crowds* (Doubleday, 2004); Jeff Howe, *Crowdsourcing: Why the Power of the Crowd is Driving the Future of Business* (Crown, 2008); Adam Thierer and Clyde Crews Jr, *What’s Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* (Cato Institute, 2003); Axel Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Producership* (Peter Lang, 2008). Readers who have encountered the notion of penal populism, for example in works cited below n 95 below, might be wary about an uncritical reliance on the wisdom of the crowd.

³² Joseph Reagle, *Good Faith Collaboration: The Culture of Wikipedia* (MIT Press, 2010); Dan O’Sullivan, *Wikipedia: A New Community of Practice?* (Ashgate, 2009); Andrew Keen, *The Cult of the Amateur: How Today’s Internet is Killing Our Culture and Assaulting Our Economy* (Nicholas Brealey, 2007).

³³ At a less polemical level, does the uncritical recycling evident in much online writing by non-professionals about law encourage assumptions in Australia that justice – in particular rights and responsibilities regarding cyberspace – has a US flavour, with for example a global *Lex Informatica* tacitly embodying a Jeffersonian interpretation of US constitutional law regarding free speech?

Landmark statements of principle such as the 1948 United Nations *Universal Declaration of Human Rights* (UDHR) identify human rights as being held by all people equally, universally, and forever.³⁴ Those rights are interdependent, inalienable, indivisible³⁵ and independent of technology³⁶ but are broad and subject to interpretation in practice.³⁷

Article 18 of the UDHR indicates that ‘Everyone has the right to freedom of thought, conscience and religion’, a right that has been reflected in debate about censorship and privacy. Article 19 enshrines:

the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 26 identifies a salient right to education, ‘directed to the full development of the human personality’ and implicitly requiring access to information.

UNESCO has argued that access to information (aka right to information or RTI) is a fundamental human right in the 21st century, in line with the UDHR. In 1997 the UN's Administrative Committee on Coordination (ACC) issued a *Statement on Universal Access to Basic Communication and Information Services*, foreshadowing a ‘Human Right for Universal Access to Basic Communication & Information Services’.

Such an RTI has not been enshrined in an international agreement that binds Australian legislatures. During early 2003 the UNHCR argued that ‘the right to access information would also entail the availability of adequate tools to access information, and has implications for the sharing of knowledge as well’.³⁸ Although cited at gatherings such as the 2003 World Summit on the Information Society,³⁹ there has been little progress in moving beyond generalities. For an overarching right of access to information Australians will presumably need to look to the legislature rather than the High Court, Geneva or New York.

We might ask why we do not have a statutorily recognised right to information and whether a right would be restricted to government information?⁴⁰ Do restrictions on access to non-government information, through for example privacy, confidentiality and contract law, fundamentally inhibit access to justice or merely represent an inconvenience?

³⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989).

³⁵ Interdependence, for example, means that an individual's right to free expression and to participation in government is directly affected by rights to the physical necessities of life, to education, to free association and non-interference by police or other agencies. Inalienability means that those rights are innate: a person cannot lose those rights and cannot be denied a right because it is ‘less important’ or ‘non-essential’. It is common to differentiate between two classes of rights: civil and political rights (sometimes labelled as fundamental rights) and economic, social and cultural rights (complementary rights).

³⁶ William McIver Jr, William Birdsall and Merrilee Rasmussen, ‘The Internet and the Right to Communicate’, (2003) 8(12) *First Monday*.

³⁷ For a revisionist view see Andrew Williams, *European Union Human Rights Policies: A Study in Irony* (Oxford University Press, 2004).

³⁸ Office of the Commissioner for Human Rights, *Background Note on the Information Society and Human Rights* (2003) United Nations Commissioner for Human Rights <www.itu.int/dms_pub/itu-s/md/03/.../S03-WSISPC3-C-0178!!MSW-E.doc>.

³⁹ Marita Moll and Leslie Shade, ‘Vision Impossible? The World Summit on the Information Society’ in Marita Moll and Leslie Shade (ed), *Seeking Convergence in Policy and Practice* (Canadian Centre for Policy Alternatives, 2004) 47.

⁴⁰ Alasdair Roberts, ‘Structural Pluralism and the Right to Information’ (2001) 51(3) *University of Toronto Law Journal* 243.

One answer might be that an abstract right is overly broad, implicitly requiring courts to make unpopular value judgments about that valorises types of information (access to legal literature but not to comics?) and encourages a State intervention through, for example, government funding of access mechanisms such as public libraries.

A response to criticisms that a ‘right to information’ is as broad and meaningless as a ‘right to health’ or ‘right to communication’ is that Australian courts and legislatures over the past century *have* grappled with questions about rights and social policy, with the Constitution, for example, endowing the national parliament with a head of power regarding pensions for the aged and infirm⁴¹ and the High Court in a succession of cases finding and circumscribing an implied freedom of political communication,⁴² often characterised as a positive right rather than as a freedom from inappropriate interference.

D An Australian right?

Given the preceding comments it is unsurprising to note that in Australian law there is no broad statutory right of access to information.

We might, after consideration, decide that articulation of a positive right is not necessary, as justice is served through a patchwork of Commonwealth, State and Territory statute law and common law that addresses particular types of information/communication and uses of information.

That patchwork, for example, covers:

- institutional and personal confidential information;
- copyright;⁴³
- privacy;⁴⁴
- national security and law enforcement;⁴⁵
- information acquired by government agencies through mandatory data collections, eg the national census;⁴⁶
- the electoral roll;⁴⁷
- obscene or offensive content;⁴⁸
- trade practices;⁴⁹
- the operation of Parliament and the courts;⁵⁰
- restrictions on access by prisoners;⁵¹

⁴¹ Australian Constitution, s 51(xxiii), s 51(xxiiA). Note that these sections provide a head of power rather than providing Australian citizens, residents and aliens with a justiciable right.

⁴² eg: *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1; *Stephens v Western Australian Newspapers* [1994] HCA 45; (1994) 182 CLR 211.

⁴³ *Copyright Act 1968* (Cth).

⁴⁴ eg: *Privacy Act 1988* (Cth); *Workplace Video Surveillance Act 2005* (WA); *Health Records (Privacy and Access) Act 1997* (ACT).

⁴⁵ eg: *Crimes Act 1914* (Cth), s 15HK, s 15KP.

⁴⁶ eg: *Census & Statistics Act 1905* (Cth), s 10, s 11.

⁴⁷ eg: *Parliamentary Papers Act 1908* (Cth); *Parliament of Queensland Act 2001* (Qld), s 8, s 25, s 29, s 50.

⁴⁸ eg: *Broadcasting Services Amendment (Online Services) Act 1999* (Cth); *Re Bauskis* [2006] NSWSC 908; *Police v Pfeifer* (1997) 68 SASR 285.

⁴⁹ eg: *Competition & Consumer Act 2010* (Cth), Sch 2.

⁵⁰ eg: *Supreme Court Act 1970* (NSW).

- defamation⁵² and vilification;⁵³
- operation of government entities;⁵⁴
- spent convictions;⁵⁵
- witness protection schemes;⁵⁶
- restrictions on reporting of legal proceedings;⁵⁷

all of which potentially impinge on access to justice. That law embodies inescapable tensions and on occasion will result in outcomes or practices that some people will consider to be unjust.⁵⁸ Do we need an overarching and justiciable right to information?⁵⁹

II AN AUSTRALIAN FRAMEWORK?

Recent Commonwealth Government statements have referred to a ‘right to information’.⁶⁰ Those statements are rhetorical rather than justiciable.

The ‘right’ is not comprehensive and instead relates to community access to information provided to and/or created by the national government.

It does not encompass the information of the State/Territory governments, responsible for the agencies with which many Australians deal most frequently. That restriction reflects the federal nature of government in Australia; there appear to have been no significant suggestions that all levels of government move towards an integrated ‘open access’ regime.

The ‘right’ also does not cover the private sector, with people instead having to rely on mechanisms such as discovery in the course of litigation, mandatory publishing of financial statements by listed corporations, information analysis and dissemination by the mass media (which might be chilled through defamation or other tools),⁶¹ and statutory requirements under the patchwork of privacy statutes for data subjects to be access information that is held by credit providers and other non-government entities.

Tensions in access to information as a basis for justice are evident in that privacy law: should we be able to access non-government information about other people rather than about

⁵¹ eg: *Corrections Act 1968* (Vic), s 47A, s 47B, s 47D.

⁵² eg: *Defamation Act 2005* (NSW).

⁵³ cf Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002); Lisa Hill, ‘Parliamentary Privilege and Homosexual Vilification’ in Katherine Gelber and Adrienne Stone (ed) *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007) 82.

⁵⁴ eg: *Financial Management & Accountability Act 1997* (Cth); *Public Service Act 1999* (Cth).

⁵⁵ eg: *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Criminal Records (Spent Convictions) Act 1992* (NT).

⁵⁶ eg: *Witness Protection Act 1991* (Vic).

⁵⁷ eg: *Supreme Court Act 1986* (Vic), s 20.

⁵⁸ eg: *Hogan v Hinch* [2011] HCA 4, for which see: Skye Masters, ‘*Hogan v Hinch*: Case Note’ (2011) 10 *Canberra Law Review* 197.

⁵⁹ See in particular the discussion in Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 27, 70. The lucid analysis in that work contrasts with much legal writing, where a serious tone and lofty diction disguises the paucity of analysis and the shallowness of research.

⁶⁰ For example: Australian Information Commissioner, above n 5.

⁶¹ The ABC reported on 18 May that immigration centre operator SERCO regards an ‘unauthorised media presence’ at one of its facilities as the highest possible threat level, ie equivalent to a bomb threat or escape: *Unauthorised Media on Par with Bomb Threats: Serco* (18 May 2011) ABC News <www.abc.net.au/news/stories/2011/05/18/3220131.htm>.

ourselves? Should we, indeed, like citizens of some Scandinavian countries, be able to see full or abstracted tax returns from our fellow citizens?⁶² (Realisation that some extremely wealthy individuals, along with leading corporations, are paying little or no tax might encourage meaningful tax reform rather than outbreaks of *poujadism* about ‘The Very Big Tax’, aka a carbon tax regime.)

We might also want to revisit notions of a broad national information policy (NIP), considering access to information generally rather than in terms of narrow silos labelled ‘library’, ‘school’, ‘archives’, ‘print media’, ‘broadcast’, ‘freedom of information’, ‘the Internet’ and so forth.

A A national information policy?

At the beginning of the ‘Internet Age’ in 1974, amid visions of technocratic rationality⁶³ and provision of access to cultural resources through flagships such as the National Library of Australia, Donald Lamberton characterised ‘national information policy’ as

embracing efforts to put into practice the basic notion that the social and economic system will function more efficiently if improved information-flows to the decision-making centers can be ensured. This notion underlies much of the effort directed to such seemingly diverse activities as mass education, market research, financial analysis, research and development (R and D) and social management techniques, such as national income accounting and input-output analysis.⁶⁴

Antecedents of such a policy are evident in prior decades and in the writing of public intellectual Barry Jones.⁶⁵ In practice national information policies have typically been an exercise in badging rather than in sustained substantive change,⁶⁶ with governments hoping for an image of modernity or activity through statements about information rights and a coherent policy that addresses community needs by integrating the activity of competing bureaucratic interests. Reality has always been less exciting, with resistance by agencies (a NIP has generally been exploited as an opportunity to gain/retain funding) and failures to implement the grand vision on a day by day basis in delivery of services to ordinary consumers.

In October last year the national Government announced that:

Information policy reform is of growing importance in Australian Government. With a view to strengthening government information policy and practices, the Australian Government has recently commissioned a number of reviews. Issues canvassed in this reform process include opening public sector information to greater use and reuse outside of government; using good

⁶² See for example the discussion of Norway in: Joshua Blank, ‘In Defense of Individual Tax Privacy’ (New York University Law & Economics Working Papers No 263, 2011) 49; Joel Slemrod, ‘Taxation and Big Brother: Information, Personalization and Privacy in 21st Century Tax Policy’ (Annual Lecture, Institute of Fiscal Studies, London, 2005) 19; Makato Hasegawa, Jeffrey Hoopes, Ryo Ishida and Joel Slemrod, ‘The Effect of Public Disclosure on Reported Taxable Income: Evidence From Individuals and Corporations in Japan’ (Social Science Research Network Paper 1653948, 2010) 6.

⁶³ As points of reference see: Philip Mirowski, *Machine Dreams: Economics Becomes A Cyborg Science* (Cambridge University Press, 2002); Sonja Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (University of Chicago Press, 2003).

⁶⁴ Donald Lamberton, ‘National Information Policy’, in Sandra Braman (ed), *Communications Research and Policy-Making* (MIT Press, 2003) 105.

⁶⁵ Barry Jones, *Sleepers Wake! Technology and the Future of Work* (Oxford University Press, 1982).

⁶⁶ Critiques include: Michael Middleton, ‘Information Policy and Infrastructure in Australia’ (1997) 24(1) *Journal of Government Information*, 9-25; Julian Thomas, ‘Towards Information Policy?’ (1998) 87 *Media International Australia*, 9-14.

information policy to stimulate innovation; enhancing participation in government through use of web 2.0 tools; encouraging a coordinated approach to government information policy; and clarifying the roles of key government information management agencies.

Concurrent with these reviews, the *Freedom of Information Act 1982* (Cth) (the FOI Act) has been substantially amended, 'to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government'. A new independent statutory office has been established, the Office of the Australian Information Commissioner (OAIC), headed by three Commissioners: the Australian Information Commissioner, the Freedom of Information Commissioner and the existing Privacy Commissioner.⁶⁷

Given the history of information policy initiatives we might ask whether current reforms have moved beyond a rather patchy mix of ministerial exhortations, media statements and expressions of enthusiasm for potential community engagement mechanisms such as Twitter.

One example is the Information Commissioner's website, which we might reasonably assume would represent best practice. That site (along with the superseded site of the Privacy Commissioner) has yet to feature the genetic privacy *Determinations* that amend the *Privacy Act 1988* (Cth) and allow medical practitioners to indulge in large scale 'genetic fishing expeditions'.⁶⁸ If the Information Commissioner lacks the commitment or capacity to provide access to key law, we might wonder whether there is a real commitment elsewhere in the national bureaucracy.

B Freedom of Information

Use of FOI by journalists and by government 'clients' has been routinised over the past two decades.⁶⁹ The FOI reforms are valuable as a signal to officials that the Government is keen – or wants to be perceived as keen – to encourage transparency and to reverse the traditional access policy with a default position that all government documents are potentially accessible unless there is good reason (eg for the purposes of law enforcement and international relations or for the protection of privacy and public safety) for access to be denied.

From a justice perspective the removal of application fees is to be welcomed, although it unclear whether agencies in the past chose to impose application fees and thereby substantially inhibited access by individuals, commercial interests or journalists.⁷⁰ Note that processing fees have not been abolished⁷¹ and access may be refused on the grounds of

⁶⁷ Issues Paper 1: Towards An Australian Government Information Policy (2010) Office of the Australian Information Commissioner, 5

<www.oaic.gov.au/.../issues_paper1_towards_australian_government_information_policy.pdf>.

⁶⁸ Bruce Arnold and Wendy Bonython, 'Relatively Speaking: Genetic Privacy and Public Interest Determinations 11 and 11A under the *Privacy Act 1988* (Cth)' (2010) 7(1) *Privacy Law Bulletin*, 2.

⁶⁹ In 2005-2006 some 41,430 FOI access requests were received, of which 14,627 were directed to the Department of Immigration & Multicultural Affairs, 13,817 to Centrelink and 8,330 to the Department of Veterans' Affairs. 85% were for personal information about the applicant and other people. The remaining 15% concerned documents featuring other information, for example government policy development and decision-making. 38,987 of the requests were determined in the reporting period and granted in full or in part. The average processing cost was \$601 per request; the government at that time reported that only 2% of the total cost was recovered in fees and charges. The cost of provision of information to the community is arguably an acceptable and unremarkable part of a liberal democracy, ie should be absorbed by the taxpayer rather than assessed using a commercial metric.

⁷⁰ For the *Freedom of Information Act 1982* (Cth), prior to the recent reforms see Moira Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2005).

⁷¹ *Freedom of Information Act 1982* (Cth), s 29.

‘unreasonableness’.⁷² Some agencies, such as the Immigration Department, have alerted applicants that the fees for provision of some information will be more than \$20,000. Do we have an expectation that all government information should be free to any applicant, irrespective of whether that information directly concerns the applicant?

The reforms are new and as yet they have been tested in only three cases.⁷³ A wariness about potential differences between perceptions and reality, image and actual practice, reflects uncertainty about the ‘Assange Effect’. In a seminar for the Australian & New Zealand Institute for Governance in February this year, the author suggested that digital anarchist Julian Assange,⁷⁴ the proprietor of Wikileaks, was the most useful ally of bureaucrats who were concerned to restrict access to government information.

Egregious failures in US government information practice, demonstrated through dissemination by Wikileaks and its mainstream media partners of diplomatic cables that often do not go beyond cocktail party chatter, will presumably be reflected in restrictions on what information is kept, who gets to see it and how it is distributed.⁷⁵ Those restrictions will in some instances involve reliance on word of mouth – unrecorded meetings behind closed doors – as a replacement for meticulous documentation on files and the generation of drafts through email and groupware. The Assange Effect will chill information access (and generate revenue for airlines and the shredder industry) rather than liberating official and private information.

A weakness of the new FOI Act is that it does not, in practice, meaningfully address government information practice. For government recordkeeping – what gets documented, when it gets documented, how it gets documented – we need to look at statutes such as the *Archives Act 1983* (Cth) discussed below and broader public administration law such as the *Financial Management & Accountability Act 1997* (Cth).

Those frameworks provide substantial discretion to senior officials. They do not prohibit use of Post-It notes or other aids that can be removed from a file prior to provision of access under FOI or that indeed are never placed on file. The use of ‘disposable media’ is unclear: there has been no large-scale authoritative study on the prevalence and significance of such practice. However, it is a commonplace in discussion among mid to senior level Commonwealth bureaucrats in Canberra that some matters are routinely handled through Post-Its and through calls or face to face meetings.

If the Government wants to cement the FOI reforms it might consider a detailed and independent examination of agency recordkeeping practice that underpins substantive rather than merely procedural access, and hence substantive justice. In the absence of sustained

⁷² *Ibid*, s 24, s 24AA.

⁷³ *Parnell v Minister for Infrastructure & Transport* [2011] AICmr 3; *Besser v Department of Infrastructure & Transport* [2011] AICmr 2; *Crowe v NBN Co Ltd* [2011] AICmr 1.

⁷⁴ Daniel Domscheit-Berg and Tina Klopp, [tr] Jefferson Chase, *Inside Wikileaks: My Time With Julian Assange At The World’s Most Dangerous Website* (Scribe, 2011); Micah Sifry, *Wikileaks and the Age of Transparency* (Scribe, 2011); David Leigh and Luke Harding, *WikiLeaks: Inside Julian Assange’s War on Secrecy* (Public Affairs, 2011); Andrew Fowler, *The Most Dangerous Man In The World* (Melbourne University Press, 2011).

⁷⁵ See for example Australian National Audit Office, *The Protection and Security of Electronic Information Held by Australian Government Agencies* (2011); Marcus Mannheim, ‘Costly Veil of Secrecy Descends Over PS’, *Canberra Times* (Canberra), 28 May 2011, 1 regarding classification frameworks.

engagement with agency information handling the national bureaucracy resembles St Augustine when he exhorted the Lord to give him chastity ... but not quite yet.⁷⁶

From a justice perspective one of the most valuable aspects of the FOI changes has received very little attention. The reforms require agencies to maintain and publish 'FOI Logs', ie to indicate that information has been provided in response to FOI applications.⁷⁷ Law can be characterised as an information mechanism, with decision-makers and others receiving and acting upon signals. Emulation is important. Discerning what other people have been looking at may point potential applicants in the right direction and more broadly provides an example that can be followed by potential applicants who have an weak understanding of their rights and thus lack agency.

C A big bureaucratic post box

Writers on administrative law have traditionally construed the Commonwealth Ombudsman⁷⁸ as a mediation or accountability mechanism. At a more subtle level we can construe the Commonwealth Ombudsman scheme as an information mechanism, with the Ombudsman's staff liaising with agencies to obtain information that addresses complaints by members of the public or that simply directs people in the right direction (eg indicates that their complaint should be made to a state/territory government agency).

The Ombudsman is not a judicial body: it cannot overturn decisions by government officials or unilaterally correct deficiencies in public administration. Where agencies are recalcitrant it relies on 'naming and shaming', an approach that has underwhelmed embattled bodies such as the Immigration Department.

The Ombudsman's emphasis on persuasion, its low resourcing and its tacit role as a directory service means that it serves as a bureaucratic post box. It lacks the staff and authority for comprehensive investigation of government agencies, instead typically investigating on an exception basis. That investigation is founded on requests for information from contact officers in the agencies of concern.

An Ombudsman need not be so hobbled, so dependent on its contacts engaging in a 'please explain' exercise. From a justice perspective we might endow the Ombudsman with more teeth, both through a greater level of resourcing and through authority for active investigation on agency premises (emulating the Australian National Audit Office) rather than relying on what its contacts say has happened.

D The View from the Past

The past offers a language for interpreting the present. Access to the 'historical record' may be important as a basis for righting continuing wrongs, addressing past injuries or gaining an

⁷⁶ Some idea of agency resistance is provided in comments featured in: *Principles on Open Public Sector Information: Report on Review and Development of Principles, May 2011* (2011) Office of the Australian Information Commissioner

<http://www.oaic.gov.au/publications/reports/Principles_open_public_sector_info_report_may2011.html>.

⁷⁷ *Freedom of Information Act 1982* (Cth), s 11C(3).

⁷⁸ *Ombudsman Act 1976* (Cth).

insight into how contemporary bureaucracies may behave now and in the future (given that government agencies and large organisations are creatures of habit).

That past might have featured abuse of minors and their parents, with the destruction of documentation for example impacting on judicial consideration of claims in *Cubillo*⁷⁹ and the ‘child migrant cases’.

It might have featured surveillance – in some instances little more than fantasy or malicious tittle-tattle but affecting careers – of political activists, members of the ‘creative class’ and jurists.⁸⁰ Contrary to expectations articulated by Richard Florida about governments greeting the creatives with a soy chai latte and subsidised fibre,⁸¹ people who fit outside the institutional mould have often been the subject of suspicion.⁸² We might want to know what the various national intelligence agencies and their State/Territory police counterparts were up to, if for no other reason than to question contemporary assurances of pressing need and good behaviour in the latest iteration of past wars on Wobblies, Communists and other enemies du jour. Access through records, and more importantly a commitment by intelligence agencies to accountability through preservation of information obviates the need for governance exercises such as the ‘Murphy Raid’.⁸³

Access to information for justice is not necessarily easy. In some instances it is not possible. Why?

One reason is that Australia’s archival regime is fragmented. At a government level we see a dichotomy between the Commonwealth and State/Territory governments. No statute covers all government records (the different jurisdictions have discrete legislation of varying comprehensiveness) and archival law does not require the preservation of non-government documentation. The records of private sector entities – commercial enterprises, not-for-profit organisations, educational institutions and religious bodies – may not be extant. If they are still in existence and can be identified (not a certainty, given indications that the archival practice of some bodies involves throwing files into a shed and trusting that the pigeons or possums will rearrange the chaos), there is no automatic right of access. That might be unfortunate for those seeking justice in relation to claims of institutional knowledge of sexual abuse of minors in the custody of clergy or seeking information about corporate knowledge that smoking is not in fact a viable therapy for conditions such as asthma and bronchitis.

It is unclear whether the National Archives has ever used its powers to deal with misbehaviour by government agencies. The Act is weak. The commitment of both the government and the executive of the Archives to ready access by Australians to the records of the national administration is thrown into doubt by last year’s announcement that the NAA would close several of its regional offices (for example in Adelaide, Hobart and Darwin),

⁷⁹ *Cubillo v Commonwealth* [2000] FCA 1084. Among studies see: Alisoun Neville, ‘*Cubillo v Commonwealth*: Classifying Text and the Violence Exclusion’ (2005) 5 *Macquarie Law Journal* 31.

⁸⁰ Fiona Capp, *Writers Defiled: Security Surveillance of Australian Authors and Intellectuals* (McPhee Gribble, 1993) 1920-1960.

⁸¹ Richard Florida, *The Rise of the Creative Class* (Basic Books, 2002).

⁸² Frank Cain, *The Origins of Political Surveillance in Australia* (Angus & Robertson, 1983); *Terrorism & Intelligence in Australia: A History of ASIO and National Surveillance* (North Australian Scholarly Publishing, 2008); Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (Allen & Unwin, 1993); David McKnight, *Australia's Spies and Their Secrets* (Allen & Unwin, 1994).

⁸³ Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997) 164.

with some material being transferred to repositories in the east coast and a pious – apparently unavailing – hope being expressed that sister institutions in the State/Territory governments would assume custody of what was left, ie many kilometres of files, registers, cards, photographs, video and computer tape. The claimed rationale was budget stringency (perhaps less than persuasive when over \$200 million is being distributed to religious organisations for operation of the National Chaplaincy Program in public schools) and opportunities for savings. Unsurprisingly there has been speculation across the archival profession that the closures are a precursor of further cuts, with the Archives eventually operating only out of Canberra and Sydney.

The Commonwealth is considerably more advanced than its Australian Capital Territory counterpart. There has been no comprehensive study of records management in the ACT government and comments in this part of the paper are necessarily speculative. Complaints by people in disputes with the ACT Housing agency and other bodies suggest that ACT residents are being denied justice because recordkeeping practice centres on document exchange using email, with little attention to generation of a paper record and to backing up of documents in an electronic repository that is independent of an individual official's email account.

That deficiency is reportedly exacerbated by deletion of documents in that account when the officer leaves the agency. Some claimants appear to have sought access to information under FOI, being informed variously that information is no longer extant or that provision of information through a major search of fragmented databases would be inordinately expensive.

E Access to a commodity

Dollars talk, and not just in denying access to current or potential litigants. The national information policy espoused by the current Government characterises official information as a public resource, a resource that as far as practical is to be shared.⁸⁴

That sharing – bounded through use of mechanisms such as Creative Commons and evident in gateways such as data.gov.au – poses challenges for officials who have a narrow view of Crown copyright⁸⁵ and who conceptualise government information as a commodity that must be guarded for commercial exploitation that funds the operation of the particular agency or contributes to general revenue. There is a tension in Commonwealth information policy between agencies that recognise geospatial, demographic or other information as saleable assets, those with an ‘information just wants to be free’ ethos and those who have a more nuanced understanding that encompasses recognition of privacy concerns. It would be timely to revisit the *Statement of Intellectual Property Principles for Australian Government Agencies*, with active encouragement of (rather than a mere exhortation that agencies consider) licensing of public sector information under an open access licence.⁸⁶

⁸⁴ See in particular the Principles on Open Public Sector Information, above n 76.

⁸⁵ John Gilchrist, ‘Crown Use of Copyright Material’ (2010) 1 *Canberra Law Review*.

⁸⁶ Anne Fitzgerald, Neale Hooper and Brian Fitzgerald, ‘Enabling Open Access To Public Sector Information With Creative Commons Licences: The Australian Experience’ in Brian Fitzgerald (ed), *Access To Public Sector Information: Law, Technology & Policy Vol 1* (Sydney University Press, 2010) 71.

F Access, but for whom

Anatole France famously commented that in a liberal democratic state, both poor and rich alike were legally able to sleep under bridges, although the rich – quite unaccountably – seemed reluctant to exercise that right.

Access to justice is predicated on all people having access, not merely those who are ‘digitally proficient’, financially advantaged or time rich. A decade ago the SOCOG dispute⁸⁷ highlighted questions about access by the blind or other disadvantaged people to information resources. From a legal perspective we have not advanced far and arguably are falling behind, as agencies cut costs by replacing their shopfront presence – particularly in rural/remote Australia – with an online presence.

Going online has been celebrated as providing members of the public with 24/7 access to an official information cornucopia, a brave new world of Government 2.0 where the governed and governors alike engage in a community dialogue through Twitter, blogs, RSS and other new media.⁸⁸ We might ask whether reality is more sombre for the disadvantaged, with both the blind and the non-blind alike experiencing frustration and disengagement when encountering electronic resources that do meet international web accessibility standards and that do not supply accurate, current information. Spending 30 minutes in a fruitless search of an agency (or university) website may be a common experience but from a justice perspective it should be an exception rather than the rule. What are we doing about it?

At a more mundane level, we might question the information practice of government agencies in providing access to consultation documents and policy statements. Ministerial commitment to making information available is undermined by use of electronic content management systems that assign non-intuitive and excessively lengthy URLs to online resources, with the Commonwealth Attorney-General’s Department being an example of bad practice. The URL identifying one recent A-G’s document was a mere 247 characters. Inefficiencies in resource identification – which result in inequities in access to information – are exacerbated by the inadequacy of the site-specific search engines used by many agencies in aiding access to what is held on their sites. As two generations of information architects such as Jakob Nielsen have commented, if you cannot find what you are looking for, that content, in practice, does not exist.⁸⁹

III ASLEEP IN THE SEA OF DATA

Regrettably, although this conference is graced by the presence of former High Court Justice Michael Kirby – the great articulator rather than the great dissenter – the legal consciousness of many Australians appears to be framed by consumption of *Underbelly*, Andrew Bolt,⁹⁰

⁸⁷ Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games, HREOC H99/115 (24 August 2000).

⁸⁸ *Engage: Getting On With Government 2.0* (2009) Government 2.0 Taskforce <<http://gov2.net.au>> and <www.finance.gov.au/publications/gov20taskforcereport/index.html>.

⁸⁹ Jakob Nielsen, *Designing Web Usability: The Practice of Simplicity* (New Riders, 2000).

⁹⁰ For Bolt and peer Janet Albrechtsen see the polemical: Niall Lucy and Steve Mickler, *The War on Democracy: Conservative Opinion in the Australian Press* (Crawley: University of Western Australia Press, 2006) 69-106.

BraveHearts, *Blue Heelers*, Derryn Hinch,⁹¹ Alan Jones⁹² and Wikipedia. To use the words of legal and media scholar Geoff Stewart, 'If it bleeds it leads ... and don't worry about the nuance'.⁹³

A Process over outcome?

Substantive rather than merely procedural justice requires understanding, an understanding of legal principles and processes by members of the public and an understanding (informed through consultation) by legislators and official decision-makers.

It is perplexing, to say the least, that the *Strategic Framework* noted above was not accompanied by appropriate funding of the Australian Law Reform Commission, reversing several years of serious cutbacks that have seen the ALRC announce that it will be narrowing its consultation and emphasising electronic contact. One response might be that all or most substantive input to ALRC investigations now involves electronic submissions. A rejoinder is that it is important in a liberal democratic state for bodies such as the ALRC to be seen to be accessible and committed to public consultation with people who live on the disadvantaged side of the information highway.⁹⁴

Does access to justice involve understanding of the courts?

The recent Hora report in South Australia, a jurisdiction increasingly disfigured by penal populism⁹⁵ and willingness to fetter the courts⁹⁶ amid rhetoric about a war on crime, suggested appointment of a 'Media Judge', who would encourage community understanding of the law through communication with journalists and students.⁹⁷ It is striking that the new Chief Justice of the NSW Supreme Court, at the announcement of his appointment, voiced a commitment to improving access to justice but was silent about the significance of information as a facilitator of that access.⁹⁸ Should we expect the judiciary to articulate legal principles and processes in terms that can be readily understood by non-professionals and in media other than law reports or the occasional work such as *The Quest For Justice* by former ACT Supreme Court Justice Ken Crispin?⁹⁹

⁹¹ Skye Masters, 'Hogan v Hinch: Case Note' (2011) 10 Canberra Law Review 197; Anne Twomey, 'Case Note: Derryn Hinch v Attorney-General for the State of Victoria' (1987-88) 16 Melbourne University Law Review 683-688; and Christine Everingham, *Social Justice and the Politics of Community* (Aldershot: Ashgate, 2003) 44.

⁹² Chris Murphy, *Jonestown* (Allen & Unwin, 2007).

⁹³ Mr Stewart is a co-author with Bruce Arnold and Susan Priest of works on *Underbelly*, law and the mass media.

⁹⁴ Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and Davis Weisbrot (ed), *The Promise of Law Reform* (Federation Press, 2005) 164.

⁹⁵ For the notion of penal populism as a reflection of communication failures see: John Pratt, *Penal Populism* (Routledge, 2007); Arie Freiberg and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008); Julian Roberts, Loretta Stalans, David Indermaur and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003).

⁹⁶ *Totani & Anor v The State of South Australia* [2009] SASC 30.

⁹⁷ Peggy Hora, *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System* (2011) Adelaide Thinkers in Residence, 68 <www.thinkers.sa.gov.au/Thinkers/Hora/finreport.aspx>.

⁹⁸ Geesche Jacobsen and Anna Patty, 'New State Chief Justice Sets Out Legal Access for all as a Priority', *Sydney Morning Herald* (Sydney), 14 May 2011, 3.

⁹⁹ Ken Crispin, *The Quest For Justice* (Scribe, 2010).

When examining some public statements and litigation we might of course wonder whether the politicians and their advisers actually understood, or care to understand, the law.¹⁰⁰

B Breaching the silos

The *Strategic Framework*, importantly, does not provide substantial funding for AustLII, the open source project that is the only integrated public legal database covering the Australian jurisdictions. Different governments (at a whole of government or agency level) have instead concentrated on funding jurisdiction specific databases such as Comlaw and www.consumerlaw.gov.au. Access to justice would be enhanced through sufficient funding for AustLII to be certain of continued operation (in contrast to suggestions last year that inadequate support would force its imminent closure) and improve its interface.

IV WHOSE ACCESS, WHOSE JUSTICE

Preceding pages have highlighted tensions in information policy and questions about differentials in access to information.

We might recognise those tensions in assessing comments such as the statement¹⁰¹ by Deakin University academic Mirko Bagaric,¹⁰² that:

privacy is a middle-class invention by people with nothing else to worry about. Normally they would have every right to live in their moral fog, but not when their confusion permeates the feeble minds of law-makers and puts the innocent at risk.

The right to privacy is the adult equivalent of Santa Claus and unicorns. No one has yet been able to identify where the right to privacy comes from and why we need it. In fact, the right to privacy is destructive of our wellbeing. It prevents us attaining things that really matter, such as safety and security and makes us fear one another.

A strong right to privacy is no more than a request for secrecy - refuge of the guilty, paranoid and misguided, none of whom should be heeded in sorting through the moral priorities of the community.¹⁰³

At best that is a perplexing comment from a senior academic, one belied by his apparent reluctance to share his personal information (financial records, intimate photos, medical data and so forth) with all the world. It is a reminder that there are economic and cultural differences in Australia: the rich and savvy get to shelter behind hedges and threats of defamation action, the poor – especially the stigmatised – are open to view.

One rationale for access to government information is that it reduces information differentials: we can see ‘them’ rather than officials enjoying a privileged position in a one-way view of us. That access might go some way to addressing disquiet about the Australia

¹⁰⁰ *South Australia v Totani* [2010] HCA 39.

¹⁰¹ Mirko Bagaric, ‘Privacy is the Last Thing We Need’, *The Age* (Melbourne), 22 April 2007. Another expression of Bagaric’s disquiet regarding privacy (and, apparently, with much Australian law) is evident in ABC Radio National, ‘The Law Report: Criminals and Privacy’ (28 March 2006).

¹⁰² Dr Bagaric is co-author of *Privacy Law in Australia* (Federation Press, 2005) and other works, including *Torture: When The Unthinkable is Morally Permissible* (State University of New York Press, 2007). We might ask whether jumper leads and waterboarding are appropriate mechanisms for accessing information in pursuit of justice. Cf Elaine Scarry, *Rule of Law: Misrule of Men* (MIT Press, 2010); Friedrich Spee, tr Marcus Hellyer, *Cautio Criminalis* (University of Virginia Press, 2003).

¹⁰³ For scepticism about the media claims of an overarching ‘right to know’, using words similar to Dr Bagaric, see: David Salter, *The Media We Deserve* (Melbourne University Press, 2007) 40-41.

Card and its successors,¹⁰⁴ both in terms of how national identity schemes are developed and how they are implemented on an ongoing basis.

An informed public would also be able to contribute to official consideration of suggestions that privacy is a fundamental right and that in the global digital environment justice requires new mechanisms such as prenotification schemes.¹⁰⁵ Should the mass media have better access to justice, and get to shape how law articulates justice, than someone who is on welfare, wants to buy a carton of milk without disturbance by the paparazzi¹⁰⁶ or likes to engage in Nazi-themed consensual S&M?¹⁰⁷ In an era where managerial failure, exploitation by private equity (with a fixation on short-term returns) and increasing incapacity through loss of experienced journalists, do the mainstream media matter? Can we rely on ‘citizen media’, given that a shrill populism appears to gather more attention in cyberspace than a nuanced and informed analysis of what is happening in court?¹⁰⁸

V CONCLUSION

The preceding paragraphs of this paper have concentrated on access by Australians to government information as a basis for justice. Being a citizen, however, carries with it responsibilities rather than merely rights. Do Australians, particularly people in advantageous positions, have a duty to contribute to political and administrative processes through the provision of information that may guide and inform officials and legislators?¹⁰⁹ Is access to justice fundamentally a demand by ‘us’ for information from ‘them’, a ‘them’ that exists on a different plane but on occasion unaccountably shares the same lift or queue at the departure gate?

Almost a century ago philosopher Julien Benda assailed *la trahison des clercs*, the willingness of intellectuals to betray their vocation by acting as advocates for irrationalism, violence and hate.¹¹⁰ Benda called the academics and other thinkers in from the streets. We have heeded that call too well.

The disengagement of academia from providing advice, offering ideas and questioning pieties through public consultation processes such as parliamentary committee hearings and responses to calls from government agencies for submissions is striking. An in-progress tabulation of submissions to parliamentary committees demonstrates that few people are contributing and that submissions by academics, including law academics, are rare.

¹⁰⁴ See for example: Margaret Jackson & Julian Ligertwood, ‘Identity Management: Is an Identity Card the Solution for Australia?’ (2006) 24(4) *Prometheus*, 379; Lucy Craddock & Adrian McCullagh, ‘Identifying the Identity Thief: Is it Time for a (Smart) Australia Card?’ (2007) 16(2) *International Journal of Law & Information*, 125.

¹⁰⁵ *Case of Mosley v United Kingdom* (Application 48009/08), European Court of Human Rights (4th Chamber).

¹⁰⁶ *von Hannover v Germany* (2004) 40 EHRR 1.

¹⁰⁷ *Mosley v News Group Newspapers* [2008] EWHC 1777.

¹⁰⁸ For perspectives on the crisis in ‘dead media’ see: Elizabeth Wynhausen, *The Short Goodbye* (Melbourne University Press, 2011); Robert McChesney and Victor Pickard (ed), *Will The Last Reporter Please Turn Out The Lights* (The New Press, 2011).

¹⁰⁹ cf Jason Brennan, *The Ethics of Voting* (Princeton University Press, 2011) 51.

¹¹⁰ For Benda see in particular H Stuart Hughes, *Consciousness & Society: The Reorientation of European Social Thought 1890-1930* (Harvester Press, 1979) 413-418. A perspective on academic expression is provided in Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart, 2010).

One reason for that abdication of responsibility might be that the current generation of academic considers that engagement is contrary to the unwritten academic code, with the task of some law teachers apparently being only to inculcate values, impart dogma and encourage ways of thinking among students. Another reason might be that academics, along with some civil society advocates, see contribution of information to parliament and agencies as pointless, given perceptions that decision-making is driven by political expediency or lobbyists,¹¹¹ or are simply self-involved.¹¹²

A more subtle reason might be simply that the academic precariat,¹¹³ operating in an environment where career prospects are denominated in terms of DIISR points and successful grant applications, are simply too busy to engage.¹¹⁴ In essence, contribution to a Senate committee inquiry or to policy development by a regulatory agency may induce a warm inner glow and informal esteem among some peers but is at the expense of formally recognised activity. That is regrettable, given that parliamentary committee staff are often highly talented and dedicated but are not meant to ghost the reports of the elected representatives or speak for the electors.¹¹⁵

If, as a liberal democratic political system grappling with complex legal issues, such a genetic privacy and evidence by national security informants, we want informed and effective policymaking by the legislature it is desirable that the academy has voice and chooses to advise rather than staying off the streets. As a consequence, the legislatures may need to revisit the policy settings for the 'enterprise university' in order encourage access to information from legal academics.¹¹⁶

¹¹¹ Note for example the Australian Privacy Foundation comment that the Senate Legal and Constitutional Committee had 'abjectly failed' in 'its responsibilities to test proposals', so that 'inadequate, even fawning behaviour by Senate Committees places in increasing doubt the preparedness of civil society to expend its resources preparing submissions to Senate Committees and making time available to provide verbal evidence'. Australian Privacy Foundation supplementary submission to the Senate Environment & Communications References Committee inquiry into The Adequacy of Protections for the Privacy of Australians Online (30 November 2010) 9. Cf Edgar Whitley, Ian Hosein, Ian Angell & Simon Davies, 'Reflections on the Academic Policy Analysis Process and the UK Identity Cards Scheme' (2007) 23 *The Information Society* 51.

¹¹² For the ahistorical nature of contemporary laments about academic woes see Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities* (Fordham University Press, 2008); Russell Jacoby, *The Last Intellectuals: American Culture in the Age of Academe* (Basic Books, 1987).

¹¹³ John Cross and Edie Goldenberg, *Off-Track Profs: Nontenured Teachers in Higher Education* (MIT Press, 2009).

¹¹⁴ 'DIISR' points, for those outside the academy, reflect publication in specific journals, with institutions and individuals seeking to maximise the number of publications in those journals in order to retain Commonwealth government funding or retain a salaried position. In reality the quality of much DIISR-rated publication is indifferent (one rated journal is replete with pseudo-science about dowsing, remote sensing, reincarnation and 'quantum holism') and much is only read by a few academics, having no discernable impact on the legal profession or more broadly on enhancement of the Australian justice system.

¹¹⁵ John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007) 142.

¹¹⁶ See for example Mike Molesworth, Richard Scullion and Elizabeth Nixon, *The Marketisation of Higher Education and the Student as Consumer* (London: Routledge, 2011); Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance & Reinvention in Australia* (Cambridge: Cambridge University Press, 2000); John Cain and John Hewitt, *Off Course: From Public Place to Marketplace at Melbourne University* (Melbourne: Scribe, 2004).

The academy might also ask whether there is a responsibility to be intelligible and thus be read. Some law teachers might take to heart the comment by John Roberts, US Chief Justice, that:

I think it's extraordinary these days – the tremendous disconnect between the legal academy and the legal profession. They occupy two different universes. What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law. Whether it's analytic, whether it's at whatever level they're operating, it doesn't help the practitioners or help the judges.¹¹⁷

¹¹⁷ Bryan Garner and John Roberts, 'John G Roberts Jr' (2010) 13 *The Scribes Journal of Legal Writing* 37.

WHO IS THE 'GOOD' BULLYING VICTIM/CORPSE?

PATRICIA EASTEAL AM AND JOSIE HAMPTON*

ABSTRACT

Bullying in the workplace is a serious concern both because of its high prevalence and the potential harm caused to its targets and witnesses. Reporting is low. There has been little research done that has examined the bullying victims' journeys down the different legal avenues in Australia. We aim to address at least part of that gap in this paper. We do that by first describing briefly the various remedial pathways available to victims, and then we report on our analysis of a sample of relevant legal cases. From the latter, we identify some demographic variables about the complainants and aspects of the bullying background to discover what type of target pursues the matter legally. We also determine if certain types of bullying appear to be more likely to result in upheld complaints, and to identify at least some of the other factors that may affect a complainant's success in disputes that involve bullying.

I INTRODUCTION

A recent survey of the Victorian public sector found 21% of respondents had experienced bullying at work, and 34% had witnessed it being directed at someone else.¹ In fact, a 2009 Australian survey of 800 employees across occupations found that one-quarter had been a target of bullying while more than one-half had been a witness.² Bullying is therefore a serious concern because of its high prevalence. This seriousness is enhanced by the potential harm caused to victims/targets.³ According to the Victorian State Service Authority:

There is a substantial amount of research on the potential negative impact of bullying on individuals ... This research shows that victims of bullying are likely to experience a range of negative effects including stress, reduces sense of self-efficacy, poor work performance, depression and anxiety.⁴

Where a target is more vulnerable, the chance of developing a severe psychological injury is greater and can even lead to suicide.⁵ Bullying also affects witnesses, people closely connected with the victim, and the workplace in which it occurs.⁶

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¹ Victorian State Service Authority, *Trends in Bullying in the Victorian Public Sector: People Matter Survey 2004-2010* (2011) 2.

² *Workplace Bullying Still Rife in Australian Companies* (2009) Drake International <<http://www.drakeintl.com/au/pdf/workplace-bullying-in-australian-companies.aspx>>.

³ We use the terms 'victim' and 'target' interchangeably.

⁴ Victorian State Service Authority, above n 1, 12.

⁵ One example is the tragic and highly publicised case of Brodie Rae Constance Panlock who committed suicide in 2006 following several years of bullying as a café employee. See the following example of media coverage: Jen Vuk, 'Brodie's Death a Warning to Small Business', *Sydney Morning Herald* (online), 24 December 2009 <<http://www.smh.com.au/opinion/society-and-culture/brodies-death-a-warning-to-small-business-20091223-ldfn.html>>.

What exactly does ‘bullying’ mean? According to WorkCover NSW, ‘bullying is repeated unreasonable behaviour towards a worker or group of workers that creates a risk to health and safety.’⁷ Most definitions of workplace bullying in Australia are quite similar to this,⁸ and can usually be broken up into the following elements: systematic and repeated, negative behaviour towards another worker or workers, which is unreasonable, and which poses a risk of injury to the victim. Note though that whilst bullying is ordinarily repetitive, it could be a one-off incident.

Bullying may involve both *overt* and/or *covert* behaviours, which are unreasonable in the circumstances.⁹ Examples of the former, which is the most common type of bullying, include: abusive behaviour or language, inappropriate comments, teasing, pranking or playing jokes, tampering with a worker’s belongings or working equipment, isolation and exclusion of the victim, and threats of and/or actual physical assault.¹⁰ Covert bullying behaviours may include: making it difficult or impossible to achieve working goals or deadlines, overworking or underworking, setting tasks above or below the person’s ability, ignoring the victim, denying access to information or resources, and unfair treatment in relation to workers’ entitlements.¹¹

Bullying is often subtle and therefore difficult to prove.¹² Thus, not surprisingly, previous research has found that the formal reporting of unacceptable workplace behaviour more commonly occurs in response to ‘violent behaviours’ in contrast to more covert stressful experiences.¹³ Feelings of powerlessness and concern about employment elsewhere, coupled with a lack of understanding of employees’ rights concerning workplace safety, probably also play a role in low levels of reporting.¹⁴

Reporting may be problematic too, since bullying is quite a broad concept. It can encompass other anti-social behaviours, such as harassment, victimisation, antisocial behaviour, incivility and violence.¹⁵ Confusing bullying with these other narrower forms of behavioural abuse can be problematic, and:

[t]argets need to be able to accurately decide whether they are experiencing unacceptable behaviour, and be able to identify the nature of the behaviour. This helps to prevent spurious or

⁶ Bullying has negative repercussions on productivity, absenteeism and morale, and results in staff turnover: above n 1, 5.

⁷ WorkCover Authority of NSW and WorkSafe Victoria, *Preventing and Responding to Bullying at Work*, (3rd ed, 2009) 3.

⁸ See, eg: Victorian State Service Authority, above n 1, 5; Commission for Occupational Safety and Health, Western Australia, *Code of Practice: Violence, Aggression and Bullying at Work* (2010) 18; *Occupational Health, Safety and Welfare Act 1986 (SA)*, s 55A; *What is Bullying at Work?* (2011) Beyond Bullying <<http://www.beyondbullying.com.au/what.html>>.

⁹ WorkSafe Western Australia, *Code of Practice: Violence, Aggression and Bullying at Work* (2010) 19.

¹⁰ *Ibid.* See also Drake International, above n 2, where it was found that silence, isolation and verbal insults constituted 36% of the bullying incidents, with public humiliation and criticism accounting for 26%.

¹¹ WorkSafe Western Australia, above n 9.

¹² Donna-Louise McGrath, ‘The National Hazard of Workplace Bullying: Implications of an Australian Study’ (paper presented at Our Work Our Lives 3rd National Conference, Women & Industrial Relations, Darwin Convention Centre, Northern Territory, 12-13 August 2010) 2.

¹³ Nick Djurkovic, D McCormack and Gian Casimir, ‘The Behavioural Reactions of Victims to Different Types of Workplace Bullying’ (2005) 8(4) *International Journal of Organizational Theory and Behavior*, 439.

¹⁴ Donna-Louise McGrath, above n 12, 2.

¹⁵ Sara Branch, ‘You Say Tomatoe and I Say Tomato: Can We Differentiate between Workplace Bullying and Other Counterproductive Behaviours?’ (2008) 13(2) *International Journal of Organisational Behaviour* 4, 8.

vexatious reporting. The avenues available to targets are vastly different if the behaviour is harassment, discrimination or violence, as opposed to bullying.¹⁶

What about the minority of victims who do disclose their experience(s) of workplace bullying¹⁷ and may consider pursuing a legal remedial pathway? There is no precise legislation that victims of bullying can look to in order to determine their rights to a remedy under the law in Australia. Instead, they must shape their experiences to fit into a legal pathway for which the law recognises a remedial right.¹⁸ As Margaret Thornton summarises:

For the most part, workplace bullying is inchoate as a legal harm, despite the dramatic increase in its reportage, if not its incidence. To date, bullying has been understood largely as a managerial rather than a legal problem.¹⁹

There has been little research done that has examined the bullying victims' journeys down the different legal avenues in Australia.²⁰ We aim to address at least part of that gap in the present paper (albeit in a way limited by the size and the nature of the sample as discussed in the following section on methodology). We do this by first describing briefly the various remedial pathways available to victims, and then we report on our analysis of a sample of relevant legal cases. From the latter, we identify some demographic variables about the complainants and aspects of the bullying background to discover *who* ends up in court or in a tribunal. We also aim to determine if certain types of bullying are more likely to result in upheld complaints, and to identify at least some of the other factors that may affect a complainant's success in disputes that involve bullying.

II METHODOLOGY

We searched the Australasian Legal Information Institute (AustLII) database using the terms 'workplace' AND 'bullying.' This resulted in over 200 'hits'. We then listed the results by date, with the aim of retaining the most current 30 matters²¹ for each of the following six remedial pathways—discrimination and equal opportunity, occupational health and safety, industrial relations, workers compensation, tort and criminal. We identified the first 30 matters for the workers compensation and industrial relations pathways but the other paths did not have this many to record: there were 20 cases where discrimination and workplace bullying was mentioned; 15 with occupational health and safety; 11 tort matters, and five judgments where criminal assault and workplace bullying was mentioned. From these six lists we then excluded matters that were not useful for our analysis because: the complainant

¹⁶ Carlo Caponecchia and Anne Wyatt, 'Distinguishing Between Workplace Bullying, Harassment and Violence: A Risk Management Approach' (2009) 25(6) *Journal of Occupational Health and Safety, Australia and New Zealand* 439, 442.

¹⁷ We do know that before Christine Hodder's 2005 suicide (an act that a parliamentary inquiry found to have resulted from workplace bullying in the Cowra ambulance service) she had filed two formal complaints but 'had lost faith in management over dealing with her complaints': Natasha Wallace, 'Bullying Caused Woman's Suicide, Story Told', *Sydney Morning Herald* (online), 9 July 2008 <<http://www.smh.com.au/articles/2008/07/08/1215282835387.html>>.

¹⁸ Bruce Arnold, *Australian Bullying Law* (2010) Caslon Analytics <<http://www.caslon.com.au/cyberbullyingnote9.htm>>.

¹⁹ Margaret Thornton 'Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?' (2004) 17 *Australian Journal of Labour Law*, 161, 176.

²⁰ *Ibid*; Bruce Arnold, above n 18; Robyn Kieseker and Teresa Marchant 'Workplace Bullying in Australia: A Review of Current Conceptualisations and Existing Research,' (1999) 2(5) *Australian Journal of Management & Organisational Behaviour*, 61, 68-69.

²¹ We refer to 'matters' rather than cases to capture either one case, or a number of cases involving the same parties and the same disputed 'matter.' In the paper we refer to the final or last outcome.

was not bullied, but rather the accused was the bully; we were unable to detect a final decision in the matter; bullying was not an essential part of the claim being made; and/or the matter did not disclose enough information to be used. This selection process resulted in a sample of 21 judgments.²²

Caveats: The findings in this study are specific to matters, which were not successfully settled before a final hearing, and our paper reflects only upon characteristics of the cases that are reported on AustLII. These are not exhaustive and may be neither representative of all cases that culminate in adjudication nor reflect the actual proportions of victims that travel along the different remedial pathways.²³ Also, given the small sample size, our findings should be viewed only as potentially indicative.

III POSSIBLE LEGAL PATHWAYS

A Common law

Where bullying creates an unsafe working environment which causes injury to an employee, in terms of the common law, that employee can elect to remedy their injury under either contract or negligence.²⁴ Remedies, which a victim might commonly seek include damages, a declaration as to the rights of the employee under the contract for employment, or injunctive relief.²⁵ Disputes can be instituted in a court,²⁶ or a tribunal that hears civil claims.²⁷

An unsafe working environment can constitute a breach of contract, depending on what the (express or implied) terms of the contract seek to cover.²⁸ Dismissing an employee due to bullying can also constitute a breach of contract. In terms of the common law, it is the 'wrongfulness' and 'unlawfulness' of a dismissal which attract a right to remedy, in comparison with the broader Industrial Relations remedial pathway discussed below, under which the 'fairness' of a dismissal determines a victim's right to remedy. However, it must be noted that unfair dismissal legislation may exclude certain employees, and thus the common law remains an essential avenue for some victims to bring an action.²⁹

Under the common law victims of bullying can also action wrong done to them in tort. Torts that may be relevant include breach of statutory duty,³⁰ trespass to the person (assault, battery and false imprisonment), defamation and, more commonly, negligence. Under the common law relating to negligence, an employer owes a duty of care to all employees³¹ to provide a safe workplace that is, to the extent which is reasonable,³² free from stressors such as

²² These were discrimination and equal opportunity, occupational health and safety, industrial relations, workers compensation and tort matters since there were no criminal cases in the sample.

²³ For example, in February 2010 the OH&S proceedings concerning the workplace bullying experienced by Brodie Panlock were decided in the Victorian Magistrates' Court; however the judgment is not on AustLII.

²⁴ Natalie Van Der Waarden, *Employment Law: An Outline* (LexisNexis Butterworths, 2nd ed, 2010) 88.

²⁵ See, eg, injunctive relief such as reinstatement.

²⁶ The choice of court will depend on the amount of damages which are being sought and the respective Court's monetary jurisdiction.

²⁷ Such as a Civil and Administrative Tribunal or equivalent.

²⁸ See, eg, *Goldman Sachs JB Were v Nikolich* [2007] FCAFC 120.

²⁹ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 619.

³⁰ Occupational Health and Safety legislation provides a legislated duty that employers must maintain a safe working environment for employees. See discussion on laws below.

³¹ *Hamilton v Nuroof* (1956) 96 CLR 18.

³² Natalie Van Der Waarden, above n 24, 93.

bullying.³³ Whether this duty has been breached depends on what is ‘reasonably foreseeable’ to cause injury or harm, which will vary from employee to employee. Some employees may require more care than others.³⁴

B Discrimination legislation

If bullying experienced by a victim can be constructed as an act of discrimination or harassment, a remedial right may be found under Commonwealth and State discrimination legislation:³⁵

However, to have recourse to anti-discrimination legislation, a person must be able to show that he or she was bullied *because* of his or her sex — or race — or disability — or sexuality — or other trait that constitutes a proscribed ground.³⁶

Remedies which may be granted for breach of these laws include apologies, damages, declarations, and orders directing a respondent not to repeat or continue certain conduct.³⁷ The principles of torts are ‘a starting point for the assessment of damages under discrimination legislation, but those principles should not be applied inflexibly.’³⁸

Complaints under discrimination legislation must be made to the appropriate agency of the jurisdiction in which the claim is to be instituted. For example, in the Federal jurisdiction, this is the Australian Human Rights Commission (AHRC). The AHRC, after receiving a complaint, will either investigate the matter further, or decline to do so.³⁹ If a choice is made to investigate the matter, the President of the Commission must attempt to conciliate the matter.⁴⁰ If conciliation is unsuccessful, or if for another reason the President elects to terminate the complaint,⁴¹ the complainant can apply to the Federal Court or the Federal Magistrates Court to have the matter resolved.⁴² There may be lengthy delays for such a process and if the complainant loses, (s)he may be responsible for both her/his own legal costs plus those of the respondent, which can be a disincentive.⁴³

C Occupational Health and Safety laws

Under Occupational Health and Safety (OH&S) legislation⁴⁴ an employer generally owes a duty to protect the health and safety of employees at work as far as is reasonably

³³ *Wilson & Clyde Coal Co v English* [1938] AC 57.

³⁴ *Paris v Stepney Borough Council* [1951] AC 367.

³⁵ See, eg, *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Anti-Discrimination Act 1997* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1994* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

³⁶ Margaret Thornton, above n 19, 178.

³⁷ *Federal Discrimination Law* (2009) Australian Human Rights Commission <http://www.hreoc.gov.au/legal/FDL/FDL_2008_2009/chap7.html - 7_6>.

³⁸ *Ibid*, chapter 7 at 1, citing *Hall v Sheiban* (1989) 20 FCR 217.

³⁹ *Australian Human Rights Commission Act 1986* (Cth), s 46PF (1), s 46PF (5).

⁴⁰ *Ibid*, s 46PF(1).

⁴¹ Various grounds for termination are listed under: *Ibid*, s46PH.

⁴² *Ibid*, s 46PO.

⁴³ Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: an Evaluation of the New Regime* (Themis Press, 2011).

⁴⁴ These laws are also referred to as workplace safety laws. See *Occupational Health and Safety Act 1991* (Cth); *Work Safety Act 2008* (ACT); *Occupational Health and Safety Act 2000* (NSW); *Workplace Health and Safety*

practicable.⁴⁵ When bullying takes place, directors, managerial staff and other employees may also be liable for a breach of duty under OH&S legislation.⁴⁶

Each jurisdiction has an agency that administers OH&S legislation. For example, under the Commonwealth scheme it is Comcare, and in New South Wales and Victoria, the appropriate authority is called WorkCover. Employees who work for the Commonwealth are covered by the Federal legislation, whereas other employees are protected by their respective State or Territory's enactments.⁴⁷

Inspectors who are responsible for investigating alleged OH&S breaches hold the power to issue a notice of infringement, penalty or prohibition.⁴⁸ Inspectors can also initiate prosecution that may result in a fine,⁴⁹ publication of the offence and/or orders for remedial action to improve or rectify the health and safety issue in dispute.⁵⁰ These matters may be heard by a Commission⁵¹ or in a local court, depending upon the jurisdiction.

It should be noted that under this pathway, the individual target of bullying does not receive compensation or an apology; however OH&S laws are usually 'complemented by statutes that mandate workplace insurance',⁵² as discussed next.

D Workers' compensation claims

Under workers' compensations schemes, employers are obliged to insure their workers against the development of injury or disease arising out of work. Each State and Territory has its own legislative scheme, as does the Federal jurisdiction. The latter applies to agencies and those employed by the Commonwealth.⁵³ Aside from a liability for the harms that have arisen

Act 2007 (NT); Workplace Health and Safety Act 1995 (Qld); Occupational Health, Safety and Welfare Act 1986 (SA); Workplace Health and Safety Act 1995 (Tas); Occupational Health and Safety Act 2004 (Vic); Occupational Safety and Health Act 1984 (WA).

⁴⁵ See, eg, *Occupational Health and Safety Act 1991 (Cth)*, s 16(1); *Occupational Health, Safety and Welfare Act 1986 (SA)*, s 19(1); *Occupational Health and Safety Act 2004 (Vic)*, s 21(1).

⁴⁶ Karen Böhm, *Liability of Directors and Managers Under Occupational Health and Safety Law* (2006) Truman Hoyle Lawyers <<http://www.trumanhoyle.com.au/downloads/ldmohsl0706.pdf>>.

⁴⁷ Breen Creighton and Andrew Stewart, above n 29, 260.

⁴⁸ See, eg, *Occupational Health and Safety Act (Vic)* (2004), Division 9, ss 110-120, which outlines powers to issue notices. Note that during the investigation, the alleged offender may remain in the workplace.

⁴⁹ Each piece of OH&S legislation has a differing penalty provision. For example under the *Occupational Health and Safety Act 2004 (Vic)*, s 21(1), an employer who breaches their duty to an employee is liable for 1,800 penalty units (natural person) or 1,900 penalty units (body corporate). See also under the *Occupational Health and Safety Act 2000 (NSW)* that an employer is liable for 7,500 penalty units (previous offending corporation) or 5,000 penalty units (not previously offending corporation) or 750 penalty units (previously offending individual) or 500 penalty units (not previously offending individual). Prosecution may be becoming more prevalent: see Neil Cunningham, 'Prosecution for OHS Offences: Deterrent or Disincentive?' (2007) 29 *Sydney Law Review* 359.

⁵⁰ Breen Creighton and Andrew Stewart, above n 29, 264.

⁵¹ For example, the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees can hear OH&S matters under the Commonwealth regime while s 105 of the *Occupational Health and Safety Act 2000 (NSW)* provides that proceedings under that Act are to be brought before either the IR Commission (in Court session) or a local Court.

⁵² Bruce Arnold, above n 18.

⁵³ See, eg, *Safety, Rehabilitation and Compensation Act 1988 (Cth)*; *Workers Compensation Act 1951 (ACT)*; *Workers Compensation Act 1987 (NSW)*; *Workplace Injury Management and Workers Compensation Act 1998 (NSW)*; *Workers Rehabilitation and Compensation Act 1986 (NT)*; *Workers Compensation and Rehabilitation Act 2003 (Qld)*; *Workers Rehabilitation and Compensation Act 1986 (SA)*; *Workers Compensation and Injury*

within the context of their employment, employers may also be liable for aggravation of pre-existing conditions if the worker can show a connection to the employment as a reason for aggravation.⁵⁴

In terms of the procedure for obtaining compensation, an employee, employer or third party can notify the relevant scheme agent of the injury.⁵⁵ From here, the scheme agent will respond, notifying the employee whether they are entitled to receive compensation. If they are not, the employee can generally dispute that decision with the scheme agent. If this does not resolve the matter, the disputes can be reviewed in a court or tribunal.⁵⁶

Successful compensation usually results in reimbursement for medical expenses and a degree of income replacement during the time period that the victim is unable to work.⁵⁷ Where a disease or injury complained of reaches a prescribed level of seriousness, action under the common law may also be possible, but will be capped in some way.⁵⁸

E Industrial relations disputes – unfair dismissal

Victims of bullying who have been ‘unfairly’ dismissed or felt they had no choice but to leave the employment (constructive dismissal) may choose to seek either reinstatement or compensation in lieu of reinstatement under Industrial Relations (IR) laws.⁵⁹ The application of these laws can be quite confusing. Employees must determine if they fit the requirements to rely on the *Fair Work Act 2009* (Cth) (FWA), or whether they need to rely on their respective State’s legislation.⁶⁰ Under both federal and State regimes, the victims’ applications are considered by a specialist body.⁶¹ Applicants must apply within the amount of time specified by the specific legislation. Under the FWA, that period is 14 days.⁶² Most States and Territories cut off applications after 21 days,⁶³ although the time period allowed in Western Australia is longer—28 days.⁶⁴

Management Act 1981 (WA); *Accident Compensation Act 1985* (Vic); *Workers Rehabilitation and Compensation Act 1988* (Tas).

⁵⁴ See, eg, *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 5A(1)(c); *Workers Compensation and Rehabilitation Act 2003* (QLD), s 32(3)(b) etc.

⁵⁵ See, eg, *Step by Step Claims Process* (2010) WorkCover New South Wales
<<http://www.workcover.nsw.gov.au/INJURIESCLAIMS/MAKINGACLAIM/Pages/Stepbystepclaimsprocess.aspx>>.

⁵⁶ See, eg, Queensland Industrial Relations Commission (for reviews from Q-Comp); Administrative Appeals Tribunal (for reviews of decisions of Comcare) etc. Also see County Court of Victoria in *de Petro v International Airlines Services Pty Ltd* [2009] VCC 1478, decided under the *Accident Compensation Act 1985* (Vic).

⁵⁷ See, eg, *Benefits and Entitlements* (2010) WorkCover New South Wales
<<http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/default.aspx>>.

⁵⁸ South Australia and the Northern Territory have abolished the right to seek common law compensation for employer-employee disputes.

⁵⁹ See, eg, *Fair Work Act 2009* (Cth), Ch 3, Pt 2-3; *Industrial Relations Act 1996* (NSW), Ch 2, Pt 6; *Industrial Relations Act 1999* (Qld), Ch 3; *Fair Work Act 1994* (SA) Ch 3, Pt 6; *Industrial Relations Act 1979* (WA), ss 23A, 29, 29AA; *Industrial Relations Act 1984* (Tas), ss 29-31.

⁶⁰ *Guide – Unfair Dismissal* (2011) Fair Work Australia
<<http://www.fwa.gov.au/index.cfm?pagename=resourcefactsunfair#topofpage>>.

⁶¹ This is Fair Work Australia under the *Fair Work Act 2009* (Cth), and an Industrial Relation Commission or equivalent under state and Territory regimes.

⁶² *Fair Work Act 2009* (Cth), s 394(2)(a).

⁶³ See, eg, *Industrial Relations Act 1996* (NSW), s 85(1); *Industrial Relations Act 1999* (Qld), s 74(2) etc.

⁶⁴ *Industrial Relations Act 1979* (WA), s 29(2).

Applicants may also be limited by certain eligibility criteria, depending on the particular legislation that they rely upon. For example, s 383 of the FWA provides that an employee must have served a minimum employment period to apply. The *Fair Work Regulations* also state that the worker must be covered by a modern award, or enterprise agreement, or the sum of the employee's annual rate of earnings must be less than the high-income threshold.⁶⁵ Particular types of employees may also be excluded from use of this remedy: casual employees who are not employed on a regular systematic basis,⁶⁶ transferred employees,⁶⁷ or short term or probationary employees.⁶⁸

Generally, the relevant body will attempt to resolve the matter by conciliation before it arbitrates the matter.⁶⁹ The test for deciding whether someone has been unfairly dismissed is a determination of whether the dismissal was 'harsh, unjust or unreasonable.'⁷⁰

F Criminal law (particularly for assault)

Where a bully's conduct constitutes a criminal offence, such as an assault,⁷¹ the victim may notify police. If the matter is prosecuted, summary offences will be heard in the Magistrates Court of the respective jurisdiction, whereas indictable offences will generally be heard in the District/County Court or Supreme Court after a committal hearing.

A bully may be found guilty of an offence and punished in a way considered appropriate by the court with respect to that jurisdiction's sentencing procedures.⁷² Possible punishments may involve incarceration.

Criminal law is rarely relied upon to remedy assaults in the context of workplace bullying, as evidenced both by the lack of criminal law cases in our sample and by the perceived need for the *Crimes Act 1958* (Vic) to be amended recently.⁷³ Workplace and cyber bullying are now included in the Victorian *Crimes Act 1958*, with the prospect of expanding the definition of stalking and broadening the intention to include self-harm.⁷⁴

⁶⁵ See *Fair Work Regulations 2009* (Cth), r 3.05.

⁶⁶ See, eg, *Fair Work Act 2009* (Cth), s 384(2)(a).

⁶⁷ See, eg, *Ibid*, s 384(2)(b).

⁶⁸ See, eg, *Industrial Relations Act 1999* (Qld), s 72.

⁶⁹ Breen Creighton and Andrew Stewart, above n 29, 306.

⁷⁰ See, eg, *Fair Work Act 2009* (Cth), s 385; *Industrial Relations Act 1996* (NSW), s 83(1A)(a).

⁷¹ See, eg, the *Criminal Code 1899* (Qld), s 245(1), which defines assault as: 'A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an assault.'

⁷² See, eg, *Crimes (Sentencing) Procedures Act 1999* (NSW); *Criminal Law (Sentencing Act) 1988* (SA) etc.

⁷³ The Crimes Amendment (Bullying) Bill 2011 (Vic) was recently assented to and amended section, s 21A of the *Crimes Act 1958* (Vic). The offence of stalking now applies to situations of serious bullying and provides for a maximum sentence of 10 years.

⁷⁴ See Explanatory Memorandum, Crimes Amendment (Bullying) Bill 2011 (Vic).

IV ABOUT THE BULLYING: WHO ENDS UP IN THE COURT OR TRIBUNAL?

A Gender

In the Victorian Public Sector study, 23% of females reported having experienced bullying, compared to 18% of men.⁷⁵ The Drake International survey mentioned earlier found that males and females were ‘almost equally at fault as the bully or as the target of the behaviour.’⁷⁶ Interestingly, though, in our sample of legal cases, a higher proportion of the complainants were female (65%), and the bully was a woman in only three out of the 21 matters. Of additional interest, Table 1 shows that the cases most likely to be upheld consist of a male being bullied by a male or males. No one bullied *by* a woman had her complaint upheld.

Table 1: Gender of the Victim/Bully and Outcome

Sex of parties known	Upheld (n = 9)	Dismissed (n = 11)
Male bullied by a male (n = 7)	5	2
Female bullied by a male (n = 10)	4	6
Female bullied by a female (n = 2)	-	2
Female bullied by male and female (n = 1)	-	1

One variable that may be influencing the outcome is the number of male bullies in the matter.⁷⁷ In three of the five upheld male bully/male victim situations, there was more than one bully. For instance, in one situation, a 16-year-old boy was bullied by a group of five male employees.⁷⁸ In another, three men in higher positions bullied an apprentice.⁷⁹ And, in *Ferguson*, the victim was bullied by two men who were both in higher positions than him.⁸⁰

One of the successful female victims (discrimination path) was also bullied by two males: this was short-term bullying in a butcher shop.⁸¹ In that matter, the incidents included sexually harassing behaviour, such as the bullies saying derogatory things about other women and putting pigs’ tails in their trousers to imitate a penis; verbal abuse, and an altercation involving physical contact.

The female complainants who were unsuccessful had not experienced the extreme physical abuse that was seen as a characteristic in the male victims’ disputes which were upheld. For instance, three torts cases that were unsuccessful on appeal involved female victims and non-physical bullying behaviours. In *Bau*, the target was a woman employed in a police special projects unit. She alleged that an air hose was shot up her dress.⁸² She also experienced

⁷⁵ Victorian State Service Authority, above n 1, 27.

⁷⁶ Drake International, above n 2.

⁷⁷ Note that in one of the two male/male cases that were dismissed, there were also two bullies: *Domenico Cascio and the Trustee for Elsa Trust trading as Anywhere Computer Accessories* [2009] NSWIRComm 1096. However in that case, there had been no physical abuse. Alleged behaviours included a phone call to the victim’s father about him being a trouble-maker and a verbal altercation between the victim and a member of managerial staff.

⁷⁸ *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.

⁷⁹ *Blenner-Hassett v Murray Goulburn Co-Operative Co. Ltd. & Ors* [1999] VCC 6.

⁸⁰ *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184. (13 March 2009)

⁸¹ *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.

⁸² *Bau v State of Victoria* [2006] VCC 1779; *Bau v State of Victoria* [2009] VSCA 107.

comments that she or any other employee could leave the workplace if they didn't like the bullies' conduct, verbal abuse and having to listen to the men bragging about oral sex on the phone and making inappropriate comments/jokes. Another unsuccessful matter that went to appeal was heard in first instance in the Victorian County Court.⁸³ That case involved a female senior account/event manager. A male supervisor wrongly accused her of misconduct and violence towards him and taking unauthorised breaks (ie it appeared that the woman was set up in numerous ways). The bully sent threatening emails to the victim too. In addition, she witnessed the bully causing distress to co-workers. The third negligence claim by a female victim that failed (despite her reporting quickly and having expert evidence) included allegations of verbal slander, aggressiveness and a general unwillingness to co-operate.⁸⁴

B Age

Our sample shows that targets can be any age ranging from 16 to 61. However, as Table 2 highlights, there may be a correlation between youth and success with a legal remedy: all victims of bullying aged 18 or younger had their complaints upheld.

Table 2: Age of the Victim and Outcome

Age of the victim known	Upheld (n = 6)	Dismissed (n = 6)
Victim 18 and younger at the onset of bullying (n = 3)	3	-
Victim older than 18 (n = 9)	3	6

C Type of Work

Bullying takes place in a broad spectrum of workplaces – from butcher shops to law firms. However, only 13% of those employed as professionals were successful in court or tribunal, in comparison with the majority of blue collar, retail or other employee types (see Table 3). This may be related to the type of bullying that occurs in the different sorts of workplaces (discussed further next), with the most brutal behaviour occurring in manual labour environments.

Table 3: Type of Workplace and Outcome

Type of employee	Upheld (n =10)	Dismissed (n =11)
Professional (n =8)	1	7
Blue collar (n =6)	4	3
Retail (n =2)	2	0
Other ⁸⁵ (n =5)	3	1

One example of such brutality was a case in which a 16-year-old male factory apprentice was bullied by a group of males for a half hour. The torturous events included being wrapped in plastic wrap, fastened to a trolley, spun around, and having sawdust and wood glue put in his mouth, shoes and clothing.⁸⁶

⁸³ *Turner v Victorian Arts Centre Trust* [2009] VSCA 224.

⁸⁴ *Pecenka v Minister for Health* [2010] WADC 163.

⁸⁵ These include security, bowling club and hospital workers.

⁸⁶ *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.

D Type of bullying

Most of the cases in our sample involved a variety of bullying behaviours. Three quarters of complainants who had been physically abused (eight of the 21) were successful. We found that usually direct or indirect assaults on a person's body were accompanied by other types of bullying, such as intimidation and verbal abuse. The former comprised tactics such as raising one's voice, using physical force on an object near the victim, threatening to terminate the victim's employment, bullying other people in front of the target, giving the victim meaningless tasks or tasks that were destined to fail and humiliating the victim. In these cases, verbal abuse included harsh, derogatory and aggressive use of wording expressed verbally, or through electronic means, to the victim, including things said about someone close to the victim.

An example of these multiple manifestations of bullying took place in *Naidu's* case.⁸⁷ The physical assault in the matter (touching and squeezing the victim's genitals) had been preceded by the bully saying, 'I will do you' and then punching a hole in a wall. On a daily basis the target was called names such as 'cocoanut [sic] head, monkey face, only a black man, poofter' not only in private conversation but in the presence of contractors, security personnel and common staff too. Other behaviours that do not fit into the categories of intimidation, verbal abuse and physical abuse also took place. For instance, the target was made to start work at 6.30 am and finish at midnight or later six days a week, and sometimes seven days, for eighteen months whilst being paid only for eight hours a day in a five day week. He was also pressured to behave in certain ways such as being required to telephone his boss if he wanted to go to the toilet.

In another example of physical assault (*Blenner-Hasset*), the victim's clothes were forcibly removed and grease was applied to his genitals.⁸⁸ Additionally, he was hung from a safety harness and paint was put in his hair. He was put into a 44-gallon drum and rolled around the workshop. Pinned with his overalls in a vice, he was also intimidated and threatened that glue would be put up his anus if he did not bring cake into work. He also witnessed a work experience employee being hung by a harness with a fire lit under that employee. The young man, who was aged between 17 and 21 over the four year period of bullying, was also told that he would be physically assaulted if he told anyone about the incidents.

Finally, in *Ferguson*, physical abuse included tossing a full cup of hot black tea onto the target, burning him, throwing plastic tables and chairs at him and grabbing his shirt and attempting to push him.⁸⁹ As with the other examples of physical assaults, this workplace environment was redolent of other types of bullying: setting the victim up for failure by giving him the wrong machine to work on and then making out he was responsible for the mix-up; humiliating him in front of other employees in regards to his speeding offence displayed in a newspaper; and telling him he was an incompetent worker and then smashing his tools on the ground in front of him. He was verbally abused too, such as being called a terrorist due to his dark features.

⁸⁷ *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618.

⁸⁸ *Blenner-Hasset v Murray Goulburn Co-Operative Co Ltd & Ors* [1999] VCC 6.

⁸⁹ *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184.

E Length of the bullying

As it is clear from the incidents just described and from the accepted definitions of what constitutes bullying conduct, bullying is not commonly a one-off incident but often takes place over a substantial period of time. Thirteen of 21 of the cases in our sample occurred for more than three months. Table 4 indicates what we would predict from the cases just described, such as the *Naidu* matter, which extended for five years:⁹⁰ long-term bullying complaints (three months and longer) are more likely to be upheld—62% of the long-term bullying compared to only one quarter of the short-term matters—although it should be noted that one of the successful short-term matters, discussed earlier, consisted of a single instance of intense brutality lasting 30 minutes.⁹¹

Table 4: Duration of Bullying and Outcome

	Upheld (n =10)	Dismissed (n =11)
Short term bullying (n = 8)	2	6
Long term bullying (n = 13)	8	5

Cranston v Consolidated Meat Group is an example of a short-term bullying complaint. The alleged incident was a one-off heated altercation that failed in a negligence and trespass to the person (assault) suit. It involved a man waving a butcher knife aggressively and being verbally abusive to a female victim in the butcher shop where they both worked.⁹²

F Reporting⁹³

Does reporting quickly make a victim seem more credible to decision-makers? Interestingly our findings are somewhat counter-intuitive, with half of matters in which the victim reported within a week being upheld in contrast to two thirds of those who either did not disclose or did so more than a week after the incident. When we look at the facts in a few of the upheld cases that had delayed or no reporting though, this finding becomes more comprehensible.

For instance, in *W v Abrob*, the victim, an 18-year-old retail employee, had no one to complain to other than the male bully, who was the boss and the only employee senior to her.⁹⁴ She did not complain formally until some seven months after the bullying had started. This was done verbally in a meeting with her employer/bully and another member of staff. In this matter, the bullying included unwanted touching, physical assault – punching the victim in the upper right leg – and verbal abuse.

In another successful (discrimination) case, in which the target did not report, the person who was responsible for hearing complaints about behaviour such as bullying was also one of the bullies. Accordingly, the victim, in his affidavit, said:

How can you say something to a person saying that I feel bullied when he was the bloke giving me the – the bullying and throwing stuff at me and all that sort of stuff, so how – you don't win so what's the use of saying that, you've just got to wear it and keep going.⁹⁵

⁹⁰ *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618.

⁹¹ *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.

⁹² *Cranston v Consolidated Meat Group Pty Ltd & Anor* [2008] QSC 41.

⁹³ We are defining 'reported' as an informal or formal complaint to someone in an authority position.

⁹⁴ *W v Abrob Pty Ltd t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11.

⁹⁵ *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184.

The victim in the *Blenner-Hasset* matter did not report the bullying until 14 years after the first incident; this was about ten years from the last incident and also a decade since he had left that workplace. Notwithstanding this delay, the complaint was upheld, perhaps due to the youth of the victim at the time, the brutal nature of the four-year-long bullying described above and the medical evidence of on-going trauma.⁹⁶

If the behaviour is common knowledge, according to the decisions in two cases, there need not be a formal reporting. Adams J in the *Naidu* matter found that regardless of not detailing the specifics of the bullying incidents, merely reporting that the bully/supervisor was ‘demanding’ on numerous occasions (coupled with the common knowledge that the other employees in the workplace had that the bully/supervisor was demanding) was enough to have warranted investigation.⁹⁷ Therefore, without such investigation, the employer of the victim effectively breached their duty of care in negligence to take reasonable measures to eradicate bullying.⁹⁸ And, in the *Barton* unfair dismissal case involving a female legal secretary being verbally abused for about one year by male lawyers/partners, most employees were already aware of the bullying in the workplace. Although it was some three months before a meeting was held and the complaints were raised, her complaint was upheld.⁹⁹

V ABOUT THE LEGAL PATHWAYS

Table 5 shows from our sample of relevant matters which legal paths were pursued and their outcomes.

Table 5: Pathway and Outcome of Complaint

	Upheld (n = 10)	Dismissed (n =11)
Discrimination (n = 5)	2	3
OH&S (n = 1)	1	-
Workers compensation (n = 3)	-	3
Industrial relations (n = 5)	4	1
Torts law¹⁰⁰ (n = 7)	3	4 ¹⁰¹

It appears that the complaints were more likely to be upheld in the OH&S (100%) and Industrial Relations (80%) pathways. We note, though, that one of the cases in the latter category was an appeal (*Fary*).¹⁰² In this case, a male diesel mechanic was bullied for ten months. The bullying included tampering with or stealing the victim’s belonging and pay-sheets being altered. The matter was reported quickly but there were no expert witnesses used. The victim had been found at first instance not to have been terminated for a harsh,

⁹⁶ *Blenner-Hassett v Murray Goulburn Co-Operative Co Ltd & Ors* [1999] VCC 6.

⁹⁷ *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618, 180-182.

⁹⁸ *Ibid.*

⁹⁹ *Barton v Baker Johnson Lawyers* [2003] QIRComm 349; 173 QGIG 867.

¹⁰⁰ Four of the tort matters also ran in contract law: *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618, which was successful for both, and the three unsuccessful cases: *Bau v State of Victoria* [2009] VSCA 107; *Turner v Victorian Arts Centre Trust* [2009] VSCA 224; *Pecenka v Minister for Health* [2010] WADC 163.

¹⁰¹ The victim pursued action in tort for both negligence and trespass to the person (assault) in *Cranston v. Consolidated Meat Group Pty Ltd & Anor* [2008] QSC 41.

¹⁰² *Fary v Clements Techforce Pty Ltd* [2002] SAIRComm 7.

unjust or unreasonable reason. However, this decision was quashed on appeal, and then in a re-hearing the result was reversed.¹⁰³

The high amounts of damages awarded in the successful torts matters far exceed the remedies in the other pathways. In *Naidu*,¹⁰⁴ almost three and a half million dollars was ordered to be paid by the two defendants—the Group 4 Securitas Pty Ltd and News Limited. The complainant in *Bailey* received \$507,550, which was made up of loss of earning capacity \$117,000, future loss of earning capacity \$334,305, super, tax and costs.¹⁰⁵ And, in *Blenner-Hasset*, the complainant was awarded \$350,000.00 which included \$150,000 in general damages, damages for pain, suffering and the loss of enjoyment of life.¹⁰⁶

Significant damages can also be awarded for non-physical abuse if a psychiatric condition has resulted that has been shown to prevent the complainant from being capable of ‘remunerative employment because of ... disabling and ongoing psychiatric problems.’¹⁰⁷

If one pursues the discrimination path, the damages awarded are generally significantly lower. This correlates with what has been found in research on sexual harassment remedies.¹⁰⁸ For instance, in the *W v Abrob* matter, the respondents were ordered to pay \$22,599, comprising general damages of \$12,000, loss of wages of \$7,302.70, interest on loss of wages of \$876.32, \$420 for future treatment and \$2,000 for loss of income-earning capacity. The victim in *Styles* could not recover for the loss of wages (past or future) since the retrenchment itself did not breach the *Equal Opportunity Act 1995* (Vic).¹⁰⁹ She did, however, receive \$8,000 by way of compensation for embarrassment, humiliation and stress and it was ordered that a written apology in a form and at a time to be agreed between the parties would be required of the respondents.

Industrial Relations Commissioners may order reinstatement or compensation for lost wages. Examples from the sample include: in *Paul Baker* the amount awarded was equal to 13.2 weeks pay plus 9% (\$13,283.00);¹¹⁰ in *Barton* the compensation was equivalent to six months’ wages based on the salary the applicant received immediately prior to the dismissal; and in the *Fary* appeal, four weeks pay was ordered to be paid by the respondent to the applicant as compensation.¹¹¹

In the OH&S matter, *Inspector Gregory Maddaford*, the company was convicted and fined \$24,000. Additionally, the directors were personally convicted and fined \$1,000 each. WorkCover appealed against the fines of the two directors; these were increased to \$9000 and \$12000.¹¹² Other employees in that case were convicted and fined or had to pay costs since:

what started out as a simple episode of bullying got out of control leading to a serious physical threat to Doyle's health and safety ... In those circumstances, there is a need for this Court to

¹⁰³ *Ibid*; *Fary v Jctf Pty Ltd Formerly Trading As Clements Techforce* [2003] SAIRComm 24.

¹⁰⁴ *Naidu v Group 4 Securitas Pty Ltd and Anor* [2006] NSWSC 144.

¹⁰⁵ *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, 20: the plaintiff was assisted by having kept diaries ‘corroborative of abusive behaviour ... of an intimidatory, harassing and bullying nature’.

¹⁰⁶ *Blenner-Hasset v Murray Goulburn Co-Operative Co. Ltd. & Ors* [1999] VCC 6.

¹⁰⁷ *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, 71.

¹⁰⁸ Patricia Easteal and Skye Saunders ‘Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases’ (2008) 33(2) *Alternative Law Journal* 75, 108.

¹⁰⁹ *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.

¹¹⁰ *Paul Baker v Australian Guarding Services Pty Ltd* [2007] AIRC 543.

¹¹¹ *Fary v Clements Techforce Pty Ltd (Appeal)* [2002] SAIRComm 56.

¹¹² *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317.

impose sentences which compel attention to occupational health and safety. Accordingly, issues of general deterrence are significant in the determination of penalty in the present matter.¹¹³

A Tribunal/Court

The location of the hearing may depend upon both the pathway and the jurisdiction. For example, as mentioned earlier, a discrimination matter heard under the Commonwealth legislation will be heard in Federal Court or Federal Magistrates Court. Table 6 shows that 36% of court cases were successful for the bullying victim, compared to 60% of the matters that took place in a commission or tribunal.

Table 6: Venue and Outcome

	Upheld (n = 10)	Dismissed (n = 11)
Court (n = 11)	4	7
Commission/Tribunal (n = 10)	6	4

One might theorise that this is due to the latter not usually being bound by the rules of evidence. Accordingly, in *Healthscope*, a workers compensation matter, which resulted in a dismissal, the Commissioner described the Tribunal as ‘an informal jurisdiction in which parties are not obliged to provide pleadings which articulate and confine the issues.’¹¹⁴ In *Ferguson*, a court case, the judge noted that two supporting affidavits were led by the plaintiff, a lot of the content of which was inadmissible due to high levels of hearsay.¹¹⁵ On the other hand, when hearsay evidence is allowed in the tribunal context, it may work against the side leading it, such as in the *Paul Baker* matter, where it was deemed to make the respondent’s account less credible, and thus the victim’s evidence was favoured:

It is worthy of note at this point that there is a jungle of hearsay in the evidence of the witnesses for the respondent concerning what is in issue ...¹¹⁶

In practice however, are there actual differences in the *application* of the rules of evidence? It has been observed that:

The absence of formality and the technical requirements of the rules of evidence does not displace due process, natural justice or procedural fairness ... In a Tribunal, evidence may be received in a form which would not be permitted in accordance with the rules of evidence. However, the opposing parties will always be given the opportunity to test the evidence if it is reasonably challenged. Broadly speaking, procedural fairness requires Tribunals to do what is fair in the circumstances of each case.¹¹⁷

Accordingly, the Commissioner in *Styles* described the relationship between the Victoria Civil and Administrative Tribunal (VCAT) and the rules of evidence as follows:

Section 98 of the VCAT Act provides that the Tribunal is not bound by the rules of evidence although it is bound by the rules of natural justice and may inform itself as it thinks fit. The Tribunal, however, can determine that it is bound by the rules of evidence. But to say that the Tribunal considered itself not bound by the rules of evidence does not mean that it cannot use those rules as a guide. Indeed, it frequently does so.¹¹⁸

¹¹³ Ibid 14, 81.

¹¹⁴ *M v Healthscope (Tasmania) Pty Ltd* [2007] TASWRCT 29, 31.

¹¹⁵ *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184. Note that despite the Court’s application of evidence rules in a way that reduced the strength of the plaintiff’s case, the complaint was upheld.

¹¹⁶ *Paul Baker v Australian Guarding Services Pty Ltd* [2007] AIRC 543, 57.

¹¹⁷ The Hon Justice Garry Downes AM, ‘Tribunals in Australia: Their Roles and Responsibilities’ (2004) 84 *Reform* <<http://www.aat.gov.au/SpeechesPapersAndResearch/SpeechesAndPapers/Downes/Tribunals.htm>>.

¹¹⁸ *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914, 28.

In that VCAT matter, the applicant had sought the use of two statutory declarations. The individuals who had made them could not be found for cross-examination. Even if required to abide by the rules of evidence in the *Evidence Act 1958* (Vic), the documents would still have been able to be used. However, discretion was exercised by the Deputy President not to allow the documents in the proceedings since the Tribunal ‘had no opportunity to judge the demeanour of the makers of the documents or to ask them questions’ and other witnesses who were cross-examined gave evidence on the relevant issues anyway.¹¹⁹

B Expert evidence

Almost every complainant in the sample had corroborative evidence and about two thirds (for whom information was available) offered expert witness testimony or reports. These witnesses do not appear to affect outcomes¹²⁰ but are seemingly used to document the degree of injury. In *Naidu*, as an example, a psychiatrist and two forensic psychiatrists were called to give evidence which supported that the complainant suffered from anxiety, depression and PTSD which were likely to have been caused by the bullying. The judge was more favourably inclined to these witnesses than to the medical practitioner who gave evidence in favour of the defendant since the latter’s evidence detailed a strong and pervasive scepticism towards the truthfulness of the victim which was inconsistent with the need for an unbiased medical report.¹²¹

The victim in *Bailey* offered evidence from two general practitioners, a clinical psychologist, a consultant psychologist and two consultant psychiatrists; the respondent had three consultant psychiatrists.¹²² This was run as a negligence suit. The 52-year-old female bar steward had experienced a range of bullying behaviour by her male supervisor, including verbal abuse, sexual harassment, threats to terminate employment, coercive behaviour and accusations of theft. The experts showed that the bullying had resulted in:

a serious chronic generalised anxiety disorder, post-traumatic stress disorder and depression. She was unlikely to fully recover and, given her age, was unlikely to return to paid employment.¹²³

A respondents’ experts may contribute to a matter being dismissed. For instance, in *D’Urso*, the respondents used experts to show that the victim had failed to identify to the Court that her reactive depression was a pre-existing condition.¹²⁴ *Healthscope* (a workers compensation case in which the female orderly, after disagreeing with roster changes, was ostracised by other employees, verbally abused, laughed at and joked about) is another example of conflicting views of experts.¹²⁵ A consultant psychiatrist gave evidence on behalf of the employer indicating that other stressors had caused the depression, or at least made it worse. This practitioner testified that it could not be said that any one incident or stress had resulted in the worker’s illness. Her evidence was favoured over that of two experts for the complainant who both concluded that the change of roster was the precipitator of the worker’s condition and that the reason for the worker’s depression was the harassment.

¹¹⁹ *Ibid*, 30.

¹²⁰ In our sample, 55% of matters that used expert witnesses were upheld compared to half of those that did not.

¹²¹ *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618.

¹²² *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284.

¹²³ Bruce Arnold, above n 18.

¹²⁴ *D’Urso v Peninsula Support Service Inc (Anti-Discrimination)* [2005] VCAT 871.

¹²⁵ *M v Healthscope (Tasmania) Pty Ltd* [2007] TASWRCT 29.

There is not always a battle of the experts; in *Blenner-Hassett*, for instance, medical evidence on behalf of the (successful) plaintiff was given by four different medical practitioners but there was no medical evidence led on behalf of the defendant company.¹²⁶

C Credibility of the Complainant

As one would expect, the norm is for complainants who are successful to be deemed credible. The decision-maker appears to look for a certain presentation:

[The victim's] manner when giving this evidence was of someone recalling a vivid and distressing memory. I have no doubt she was telling the truth about what occurred to her in her employment.¹²⁷

Dignity plus a display of (some) emotion seem to be desirable and perceived as believable:

In my view the plaintiff was a most credible witness. Notwithstanding that the subject matter of the proceedings was undoubtedly greatly distressing to her she gave her evidence in a measured and dignified manner.¹²⁸

Also predictably, the victim's evidence is often compared to that of the alleged bully. For instance, in *Styles*:

I prefer Ms Styles' evidence. Ms Styles' evidence was given in a direct and, in my view, candid and unhesitating manner. [The respondent] Mr Howe appeared to me at times reluctant to give direct answers to questions.¹²⁹

And, in *Baker*, Commissioner Lewin commented that the respondent's evidence included 'convoluted, contradictory and inconclusive hearsay ...'¹³⁰ However, the Commissioner found that the victim's 'evidence was robust and resilient in these circumstances' and preferred the 'demeanour of Mr Baker.'¹³¹

There were exceptions, however, where the complaint was upheld but the plaintiff's testimony questioned:

I found it difficult to accept the truthfulness of his account, so extraordinary did his descriptions of Mr Chaloner's conduct seem and so passive was the plaintiff's response. However, I have been persuaded that the substance of the plaintiff's evidence in this regard is not only truthful (in the sense that he believes it to be true) but also by and large reliable. At the same time, I think that it contains some exaggeration and repetition. This is an overall impression and does not fasten on any particular incident; it is a common sense evaluation of the plaintiff's evidence as a whole.¹³²

Perhaps this judicial perception of exaggeration was offset by the witness' 'genuine and spontaneous' emotional responses. As the judge noted:

Many of [the complainant's] ... answers gave me the impression of unconscious reconstruction or even confabulation. At times, he appeared to "switch off", occasionally in mid-answer. Despite my initial scepticism, I came to accept that that he did indeed suffer from the "flashbacks" which, when asked to explain what he was feeling, he said he was experiencing.¹³³

¹²⁶ *Blenner-Hassett v Murray Goulburn Co-Operative Co Ltd & Ors* [1999] VCC 6.

¹²⁷ *W v Abrob Pty Ltd t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11.

¹²⁸ *Bailey v Peakhurst Bowling & Recreation Club Ltd* [2009] NSWDC 284, 5.

¹²⁹ *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914, 33.

¹³⁰ *Paul Baker v Australian Guarding Services Pty Ltd* [2007] AIRC 543.

¹³¹ *Ibid*, 143.

¹³² *Naidu v Group 4 Securities Pty Ltd and Anor* [2005] NSWSC 618, 13.

¹³³ *Ibid*, 18.

And, in *Ferguson*, although finding in his favour, Her Honour Judge Millane was not impressed with the plaintiff's evidence. This was the case in which a male tradesman/fitter and turner experienced long-term bullying (listed earlier), such as insults, verbal abuse, physical abuse by male managerial staff:

At times during the hearing, the plaintiff appeared confused and he had difficulty placing events and responding to some of the questions asked. There were inconsistencies in his evidence and discrepancies in the histories recorded by various doctors, to some of which cross-examination was directed, although not in a manner which satisfied me that the plaintiff generally recalled or accepted that in each case the doctor's record accurately summarised matters reported by him.¹³⁴

In an unsuccessful matter, a complainant witnesses was described as 'doing herself a disservice in the manner in which she has presented her case' with evidence redolent of 'hyperbole, the hubris and the extravagant (and at times embarrassing) language'.¹³⁵ The testimony of another unsuccessful victim witness was found to be 'contradictory, confusing, evasive, non-responsive and at worst, disingenuous'.¹³⁶ Evasiveness was mentioned too in *Bau*,¹³⁷ while exaggeration was also raised in *Pacenka*:

I conclude that Ms Pecenka is an emotional person who is susceptible to persons challenging her or criticising her. She is also inclined to give exaggerated descriptions of events and attach exaggerated importance to minor conflicts or challenges to her position.¹³⁸

VI CONCLUSION: WHO WALKS (BEST) ALONG THE LEGAL PATHWAYS?

In examining legal remedies in bullying cases, our first observation is how few cases appear to go down the various legal pathways. This conclusion is of course qualified by the limits of the methodology. And, as we remarked earlier, it is possible that a high percent of bullying complaints are settled informally outside of court or tribunal.¹³⁹ More research would be needed to test that hypothesis.

If there are in fact relatively few victims pursuing a legal remedy, this is no doubt a reflection at least in part of the nature and the effects of the bullying behaviour. The people most vulnerable to violence are those without power. That powerlessness becomes exacerbated by bullying behaviours and is coupled with feelings of anxiety and low self-confidence¹⁴⁰ that are not conducive to disclosure. Plus, as noted above, there are many bullying behaviours that are covert and may become a normative part of the workplace environment. Neither the target nor the employer may see these behaviours as injurious to workplace safety. For these and many other reasons, including financial costs and fear and lack of knowledge about appropriate pathways, it would seem that reporting of bullying is uncommon although the actual incidence is high.

¹³⁴ *Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184, 7.

¹³⁵ *Penhall-Jones v State of New South Wales (No.2)* [2006] FMCA 927, 115.

¹³⁶ *D'Urso v Peninsula Support Service Inc (Anti-Discrimination)* [2005] VCAT 871, 22.

¹³⁷ *Bau v State of Victoria* [2009] VSCA 107, 45.

¹³⁸ *Pecenka v Minister for Health* [2010] WADC 163, 229.

¹³⁹ For instance, we do know a public apology was given by the company and that there was a confidential settlement in one extremely brutal bullying case that included being hit in the head with a 30 cm piece of wood with such force that it induced vomiting, having his thumb and wrist broken in two places after using a machine which was not safe to use and having his pay docked for taking a fellow employee to hospital during work hours after a workplace accident. See Ben Schneiders, 'Public Apology to Bullying Victim', *The Age* (online), 9 September 2010 <<http://www.theage.com.au/victoria/public-apology-to-bullying-victim-20100908-151bq.html>>.

¹⁴⁰ Maarit Vartia 'Consequences of Workplace Bullying with Respect to the Well-being of its Targets and the Observers of Bullying,' (2001) 27(1) *Scand J Work Environ Health* 2001, 63.

Our second observation is that if one does report or if the bullying is identified by other employees or the employer, then there are a number of legal options available, but each has its limitations. There is no remedy for bullying *per se* and so victims need to use the facts of their matter to create a narrative arguing that bullying resulted in a breach of a particular piece of legislation or the common law. The ability to make the facts constitute an infringement of the particular law may be problematic. For instance, in a recent case, the complainant argued that bullying behaviour such as being threatened with dismissal, being shown no respect and being yelled at, being ignored, being punished for doing work she was directed to perform and not keeping a complaint confidential constituted sex discrimination, contrary to s 25(2)(c) of the *Anti-Discrimination Act 1977* (NSW).¹⁴¹ The bullying behaviours alleged by her, even if made out, had to be shown by the applicant to have been made because she was a woman, and that a male comparator would not have been treated in the same way. This matter was dismissed, as were more than half (52%) of the matters in our AustLII case sample.

Thirdly, we have observed that there tends to be a certain type of person and particular contextual background factors that are seen as more serious, believable and meriting a legal remedy. In our sample the victim most likely to be successful in his legal case was a young male from a blue-collar workplace whose victimisation had included acts of physical assault perpetrated by more than one man in a senior position to him. This physical abuse was rarely a one-off incident but most often long-term: a part of an environment marked with intimidation, verbal abuse and other repeated and unreasonable controlling actions. Those targeted for three months or longer were more than twice as likely to have a favourable legal outcome.

Somewhat unexpectedly we did not find a correlation between rapid reporting and having the complaint upheld. If the complainants only had the bully to complain to or if there was knowledge within the workplace community about the bullying, the adjudicators appear to have been persuaded that, despite a delay in disclosure, the bullying allegations were still believable.

We also found that if the matter is heard in a tribunal, it was more likely to be upheld than if heard in a court. Our initial assessment was that this could be because the more informal jurisdictions are not in theory bound by rules of evidence. However, analysis of the judgment material showed that in actual practice there may be little difference in the interpretation and application of these rules. The greater likelihood of success in a tribunal could reflect the relatively high success rate for bullying victims who are arguing that they were unfairly dismissed. We must note though that the number of cases we examined is too small for a statistically significant effect to be detected and this indication of a difference would need to be assessed in a larger sample.

Aside from having the matter heard in a commission or tribunal, being the 'right' sex, age, social class, and experiencing the 'right' kind of bullying, what else have we found to correlate with success for the target? We have identified that adjudicators do seem to measure credibility in part from the demeanour and the presentation of the victim witness. This is not surprising since we know from research on sexual assault and sexual harassment matters that

¹⁴¹ *Chacon v Rondo Building Services Pty Ltd* [2011] NSWADT 72.

there does seem to be a ‘right’ (calm and consistent) way for these victims to present evidence;¹⁴² for instance, an ‘even’ presentation is good, but ‘studied’ responses perhaps not so much. And, ‘one can be too “even” and not emotional enough’.¹⁴³ However, one should not be so emotional that one’s focus seems to be disturbed.¹⁴⁴ In the bullying matters that we examined, similarly, limited displays of distress (‘genuine and spontaneous’ emotion) appeared to be regarded as acceptable. ‘Measured’ and not ‘exaggerated’, ‘dignified’, ‘direct’ and not evasive, simple and not too confused, and of course internally ‘consistent’ were all mentioned as contributing to judicial perceptions of credibility.

Fourthly, we found (not surprisingly) that the type and amount of compensation differed significantly depending upon the legal avenue. Victims who follow the discrimination or IR paths will not ‘win’ as much of a monetary payout as the substantial damages awarded on occasion under torts and contracts law. The amount granted seems to be influenced by the expert witnesses’ assessment of injury and the strength of their argument of a causal link of injuries with bullying behaviours. These damages ultimately then reflect the decision-makers’ measurement of harm. It would seem that behaviour involving physical violence is normally seen as having more long-term traumatic effects than the trauma resulting from verbal abuse.¹⁴⁵ What about the price put on the ultimate physical injury—death? In the OH&S matter following the suicide of Brodie Panlock, the defendants were fined a total of \$335,000.

This brings us to our fifth point: there are no laws specifically responding to bullying in the workplace and it seems that tragedies have to take place to act as catalysts for the enactment of more appropriate legal remedies. In Victoria, for instance, we have seen how Brodie’s suicide contributed to the movement to amend the *Crimes Act* to recognise bullying behaviour. A workplace bully could now be sentenced to ten years of imprisonment. Another example from that Victoria: an independent review conducted in 2004 resulted in the *Occupational Health and Safety Act 2004* recognising the importance of psychological health at work.¹⁴⁶ The review was purportedly prompted at least in part by the suicides of other young workers and adolescents bullied in school.¹⁴⁷

It is a sad commentary on Australian society that these few attempts at legislative reform had such tragic underpinnings. Workplace bullying does appear to be fairly commonplace. There is an urgent need for more research that unearths both the obstacles to reporting and to access to justice along the different legal pathways. More policy changes and law reform are sorely

¹⁴² Denise Lievore ‘Victim Credibility in Adult Sexual Assault Cases’ (2004) *Trends and Issues in Crime and Criminal Justice No 288* (Canberra: Australian Institute of Criminology) 4.

¹⁴³ Patricia Easteal and Keziah Judd “‘She Said, He Said’” Credibility and Outcome in Sexual Harassment’ (2008) 31(5) *Women’s Studies International Forum*, 341.

¹⁴⁴ *Ibid.*

¹⁴⁵ This prioritising of physical over psychological injuries conforms with the substantial literature on domestic violence and the systemic institutional minimising of the long-term impact and harms of emotional violence. See, eg Jennifer Hickey and Stephen Cumines *Apprehended Violence Orders: A Survey of Magistrates*, Judicial Commission of New South Wales, (1999); Belinda Carpenter, Susan Curry and Rachael Field ‘Domestic Violence: Views of Queensland Magistrates’ (2001) 3 *Nuance*, 15.

¹⁴⁶ Chris Maxwell, *Occupational Health and Safety Act Review* (2004) <[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/MaxwellReport_06Apr04/\\$File/MaxwellReport_06Apr04.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/MaxwellReport_06Apr04/$File/MaxwellReport_06Apr04.pdf)>.

¹⁴⁷ Stuart McGregor, apprentice chef; Angela McGregor, schoolyard bullying; Helen Weseterman, ‘In Harms Way’ *The Age* (online), 10 March 2010 <<http://www.theage.com.au/small-business/in-harms-way-20100309-pvxxm.html>>.

needed but should be extracted from a solid foundation of empirical research. Our five conclusions are a start in that direction. These findings need to be built upon to provide a knowledge base for further legal reform.

“DID YA WIN?”

THE (UN)SUCCESSFUL RURAL WORKPLACE SEXUAL HARASSMENT COMPLAINANT

PATRICIA EASTEAL AM AND SKYE SAUNDERS*

ABSTRACT

In this paper we examine the variables that appear to impact the outcome of sexual harassment complaints. We have analysed 68 sexual harassment matters heard across Australia over the six year period between 2005 to 2010. In doing so, we have ascertained the apparent differences between the urban cases and the rural cases which might account for the relatively high percentage of successful rural matters. We did this in two ways. We first investigated whether the nature of the workplace and the type of harassment complained of differed between the urban and rural cases and if so, how these attributes might correlate with an upheld complaint. We also looked at the presence or absence of variables found in other studies to correlate with success (age, ethnicity, prompt reporting, corroboration, credibility as a witness).

I INTRODUCTION

In the following paper we are examining what elements contribute to a successful outcome for a sexual harassment complainant. In comparing urban with ‘rural’ or ‘regional’ or as ‘non-metropolitan’ workplaces¹ outcomes for another research project, we discovered that rural complainants were successful in 8 out of the 11 (73%) as compared to only 40% of the urban workplace matters (23:57).² This is a significant difference in outcome and raises the

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¹ We are defining ‘rural’, ‘regional’ or ‘non-metropolitan’ as townships that are located at least 30kms from the nearest metropolitan centre with populations of less than 70,000. Gympie – approximately 160 km north of Brisbane and population is approximately 16,454; Mooloolaba – approximately 100 km north of Brisbane and population is approximately 17,500; Bribie Island – approximately 65 km north of Brisbane (over connecting bridge) and population is approximately 15,595 in total; Mossman – approximately 75 km north of Cairns and population is approximately 1800 people; Bourke – approximately 800 km north-west of Sydney and population is approximately 3,500 people; Avalon – approximately 9 km from the small town of Lara, which is approximately 62 km south west of Melbourne and population is approximately 8179; Maitland – approximately 163 km north of Sydney and 32 km north-west of Newcastle and population is approximately 61,431; Richmond – approximately 65 km from Sydney CBD and population is approximately 5560; Norfolk Island – approximately 2-2.5 hours flight time from Sydney or Brisbane and population is approximately 2,000 plus; Adelaide Hills – approximately 40 km from Adelaide and population is approximately 69,000 plus; Huonville – approximately 38 km south-west of Hobart, population is approximately 1600.

² Skye Saunders and Patricia Easteal ‘Sexual Harassment in Rural Australia: Predicted Nature, Reporting, Employment Policies and Legal Response’, presented at the National Rural Regional Law and Justice Conference, Warrnambool, 19- 21 November 2010. Note though rural success did not translate into higher compensation. Of the cases found in favour of complainants, 87% of rural cases and all of the urban ones resulted in monetary damages. The significantly higher urban mean amount (\$37,739 compared to \$20,866) could be the effect of a couple of urban cases such as *Lee v Smith & Ors* [2007] FMCA 59 and *Poniatowska v*

question of ‘Why?’ We look here at what differences were apparent between the urban cases and the rural sample that might account for the higher percent of rural matters upheld. Firstly, we identify if the nature of the workplace and the type of harassment differed between the urban and rural cases and if so, how these attributes might correlate with an upheld complaint. Secondly, we look at the presence or absence of variables found in other studies to correlate with success (age, ethnicity, prompt reporting, corroboration, credibility as a witness). A brief overview of these previous findings is presented next.

A Correlates of credibility and success

‘Reasonableness’ is a part of the test for whether an action or environment constituted sexual harassment. For instance, s 28A of the *Sex Discrimination Act 1984* (Cth) states that:

- 1) For the purposes of this Division, a person sexually harasses another person (the person harassed if:
 - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
 in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

However, it must be noted that:

Many commentators ... argue that the reasonableness standard is itself gendered; that it is male experiences, views and perspectives that are embodied in the notion of reasonableness and how it is applied.³

Accordingly, in determining what is ‘reasonable’ and indeed in assessing whether the behavior was sexual and unwelcome and resulted in humiliation, it would seem from prior research of sexual harassment judgments that it is often the identity, history and behaviour of the complainant that is scrutinised and evaluated.⁴ The most credible female victims are those for whom it is difficult to impute any provocation.⁵ Youth can enhance the complainant’s credibility if the alleged harasser is older.⁶ In both rape and harassment, whether the victim witness is deemed believable has also been found to be a consequence of the victim or the complainant’s behaviour before, during and after the assault or incident. For instance the ‘credible’ victim fights back,⁷ reports immediately⁸ and is consistent in her evidence,⁹ is able

Hickinbotham [2009] FCA 680 in which the employer respondent was ordered to pay exceptionally high amounts: \$387,422 and \$466,000 respectively. Lower compensation in rural cases could be a consequence too of less loss in future earnings or it could be reflective of a less punitive attitude in rural cases.

³ Fiona Pace ‘Concepts of “Reasonableness” in Sexual Harassment Legislation: Did Queensland get it Right?’ (2003) 3(1) *QUT Journal of Law and Justice* 189, 192.

⁴ Patricia Easteal and Keziah Judd ‘“She Said, He Said” Credibility and Outcome in Sexual Harassment’ (2008) 31(5) *Women’s Studies International Forum* 336.

⁵ *Ibid*, 347.

⁶ Deb Tyler and Patricia Easteal ‘Sexual Harassment in the Tribunals: The Credibility Gap’ (1998) 23 (5) *The Alternative Law Journal* 211.

⁷ Mary Heath ‘Women and Criminal Law: Rape’, in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis, 2010) 88, 90.

⁸ *Ibid*, 90. This implies that delay in reporting is ‘indicative of fabrication’ according to Caroline Taylor *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 278.

⁹ Patricia Easteal and Keziah Judd, above n 4.

to particularise¹⁰ and testifies either in a non-aggressive and not too 'smart' manner or makes an argumentative presentation coupled with confidence.¹¹

Prior research has also highlighted the expected correlation between corroboration and a successful outcome.¹² In the context of sexual harassment matters, corroborative evidence can be used to prove (under a civil standard) that the incident(s) of harassment took place and/or that the action or behaviour caused the individual humiliation and distress. In fact, the absence of corroboration often leads to the matter being declined for conciliation and to the dismissal of complaints in the Federal (Magistrates') Court since it is 'word against word'.¹³ Studies have shown it is normative to have witnesses in these matters who provide evidence that the complainant had an appropriate emotional, physical health and/or psychological response to the harassment¹⁴ with the voice of an 'expert' being the most compelling.¹⁵

B METHODOLOGY

We focused on a sample of sexual harassment matters heard across Australia over the six year period of 2005 to 2010 that were found using the online legal database AustLII, searching with the keywords 'sexual' AND 'harassment'. Of those identified, some were not suitable for inclusion in our analysis since they were leave or other procedural matters.¹⁶ The following findings reflect data from the 68 cases determined to be relevant for our analysis. Note that, given the small size of the sample, results must be seen as suggestive only. The cases were heard in New South Wales, Queensland, Victoria, Tasmania, South Australia, Western Australia and the Commonwealth. There were no reported sexual harassment matters in the Australian Capital Territory or the Northern Territory in the time period examined.

II DIFFERENCES BETWEEN URBAN AND RURAL CASES: POSSIBLE CORRELATES OF SUCCESS

A 'Hard at it' – The workplace

Only one rural complainant (9%) was from a professional occupation compared to 16% of urban complainants.¹⁷ This rural matter was unsuccessful as were 78% of the urban professional complainants. A higher percent of urban complainants were employed in a clerical role: only one of the 11¹⁸ rural as compared to 14 of the 57 urban. Although the rural complainant was successful, clerical workers in urban areas tended to have their complaints

¹⁰ Patricia Easteal and Christine Feerick 'Sexual Assault by Male Partners: Is the License Still Valid?' (2005) 8 (2) *Flinders Journal of Law Reform* 185, 202.

¹¹ Denise Lievore 'Victim Credibility in Adult Sexual Assault Cases,' (2004) *Trends and Issues in Crime and Criminal Justice No 288* (Canberra: Australian Institute of Criminology) 4.

¹² Deb Tyler and Patricia Easteal, above n 6, 215.

¹³ *Ibid.*

¹⁴ Patricia Easteal and Keziah Judd, above n 4, 338.

¹⁵ *Ibid.*, 342.

¹⁶ We have also excluded those in which the geographical area is unclear since we are comparing urban and rural matters.

¹⁷ This includes lawyers, teachers, social workers and a doctor. Of these nine professional urban complainants, seven were unsuccessful matters. Of the 41 'other' (non- professional) urban matters, 25 were unsuccessful (61%).

¹⁸ *Cross v Hughes & Anor* [2006] FMCA 976.

dismissed: of the 14 relevant cases 12 were unsuccessful (86%). A further two of the 11 complaints (18%) categorised as being ‘rural’ took place in the retail industry.

There was also a relatively higher proportion of rural complainants employed in the hospitality sphere: three worked in hotels and one in a club. One example was *Fischer v Byrnes* in which a ‘mature age’ female Gympie hotel employee, Ms Fischer, was ‘subjected to ongoing humiliation and intimidation on an almost daily basis for a period of approximately 5 months.’¹⁹ Ms Fischer began to feel ‘degraded, dirty and upset’ when Mr Byrne also began regularly ordering her to go and ‘make up a room’ and then to ‘be on the bed’ for him.²⁰ In ‘response to her query about what he would like for a meal’ Mr Byrnes would declare that he wanted sex. On other occasions he would say to her that he wanted ‘you on toast’ or ‘you on a plate’ or ‘a head job would do’.²¹

It is possible that ‘blue collar’ employers like these are less likely to provide working environments that ‘discourage harassment from occurring in the first place, that have a just way of dealing with the harassment that does occur, and that are open to the scrutiny of the public justice system when they fail.’²² Possibly of interest is that almost half of the rural employers (45%) were deemed liable for the actions of their employees in contrast to only about one third of employers in the urban cases (32%). This finding needs to be understood in the context of another study, which found that the Federal Court and Federal Magistrates Court was interpreting the two tests of vicarious liability broadly.²³ Therefore when an employer is found to be liable it is a good indication that their policies and practices are not reasonably addressing the harassment.²⁴ Perhaps that failure contributes to positive judicial outcomes for the rural complainants.

Accordingly, in one of the three rural dismissals, the employer’s lack of liability was stressed:

For staff has demonstrated that it has a Code of Conduct covering employee behaviour which prohibits, amongst other behaviour, sexual or other unlawful harassment in the workplace. Forstaff has established that the existence and content of the Code of Conduct is covered in the induction of all employees. It is widely known amongst employees that Forstaff policy is that pornographic material is not permitted at the workplace.²⁵

B ‘I barely even touched her’ – The nature of the alleged harassment

Eight of the rural matters (73%) involved more than one type of sexual harassment as compared to 34 of the urban cases (60%). Most of the rural multiple manifestations did include a sexually permeated environment. A sexually permeated workplace might be one in which pornographic material was obviously displayed or in which rude jokes were frequently

¹⁹ *Fischer v Byrnes* [2006] QADT 33.

²⁰ *Ibid*, [9].

²¹ *Ibid*, [11].

²² Christine Parker, ‘Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation’ (1999) 5 *Australian Journal of Human Rights* 6
<<http://www.AustLII.edu.au/journals/AJHR/1999/6.html>>.

²³ That the harassment took place ‘in connection with employment’ and that all reasonable steps had been taken by the employer to prevent the behaviour from taking place: Patricia Eastal and Skye Saunders ‘Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases’ (2008) 33(2) *Alternative Law Journal* 75.

²⁴ *Hunt v Rail Corporation of New South Wales* [2007] NSWADT 152, [197], citing *Dee v Commissioner of Police and Anor* [2003] NSWADT 217.

²⁵ *Mohican v Chandler Macleod Ltd (Anti-Discrimination)* [2009] VCAT 1529, [56].

told. A high occurrence of this type of workplace in rural workplaces was not unexpected, given the prevalent rural culture marked by an ethos of masculinity and male dominance.²⁶

It is possible that having experienced more than one type of harassment is more likely to result in success for a complainant: Of the 23 successful urban matters, 16 involved more than one type of harassment (70%). Five of the eight rural complaints upheld included multiple manifestations whilst in two of the rural cases where the complainant was unsuccessful, the sexual harassment alleged was limited to unwelcome verbal remarks.

In the test for harassment the judicial officer must ensure that the offending behaviour could be defined as an ‘unwelcome sexual advance, or an unwelcome request for sexual favours.. or other unwelcome conduct of a sexual nature in relation to the person harassed.’²⁷ It makes sense that there would be a correlation between number of incidents or types of harassment and a positive finding for the complainant because of the presence of a range of behaviours which might constitute sexual harassment. In one of the two rural matters that were dismissed, the court’s dismissal appears to have arisen from the question of whether the alleged behaviour was a one-off incident and therefore neither sexual nor serious enough to cause distress:

The issue is whether it was conduct of a sexual nature. It will not always be immediately apparent whether an attempted or actual kiss constitutes conduct of a ‘sexual nature’. It depends on the context. Mr Slym said that it was a one-off incident; he attempted to place the kiss on Ms Brown’s cheek and did not embrace or restrain her or attempt to do so. If that account is accepted, we do not believe that the conduct could be said to have the necessary sexual character. In addition, it seems to us that the second element of the test would not be satisfied, that is, a reasonable person could not have anticipated that Ms Brown would have been offended, humiliated or intimidated.²⁸

C ‘What are you askin’ me for?’ – Who is the harasser?

In almost all of the rural cases (10:11), the alleged offender was in a senior position to the complainant as compared to 44 of the 57 (77%) of the alleged urban offenders. In seven of the eight matters in which the claim of sexual harassment was upheld, the respondent was in a position of seniority. About three quarters (17:23) of the successful urban complainants were in a junior position to the harasser. Perhaps judicial officers were more likely to interpret action by a person with more power than the recipient of the behaviour as constituting ‘circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or *intimidated*.’²⁹ The case of *Cross v Hughes & Anor*³⁰ is an example.

Ms Cross was employed as an office administrator. In the course of her employment, she experienced sexual harassment by her boss, Mr Hughes, who was the sole shareholder of the company. He indicated that she was to accompany him to Sydney for business to assist with

²⁶ See for example Sanjay Sharma and Susan Rees ‘Consideration of the Determinants of Women’s Mental Health in Remote Australian Mining Towns’ (2007) 15 (1) *Australian Journal of Rural Health* 1; Elaine Barclay et al (eds) *Crime in Rural Australia* (Federation Press, 2007); Russell Hogg and Kerry Carrington *Policing the Rural Crisis* (The Federation Press, 2006).

²⁷ *Sex Discrimination Act 1984* (Cth), s 28A(1)(a), s 28A(1)(b).

²⁸ *Brown v Richmond Golf Club & Anor* [2006] NSWADT 104, [30].

²⁹ Seniority though was just one of a number of variables that seemed to affect the outcome. Thus only 17 of the 44 ‘more senior’ urban matters were successful matters (39%); five of the nine ‘equal position’ matters were successful (56%) and the single ‘more junior’ matter was unsuccessful.

³⁰ *Cross v Hughes & Anor* [2006] FMCA 976.

some meetings. When she arrived at the hotel she was aghast to discover that ‘she was booked into a single hotel suite with two bedrooms with the first respondent.’³¹ Later that day she was informed that there were actually no meetings scheduled for the next day and it was ‘suggested to her that she and the first respondent attend a live sex show. She refused.’³² This suggestion was made a number of times the following day. During this trip, the respondent made other offensive and unwelcome remarks and stripped to his underpants and had ‘placed his pillows on her bed’.³³ As discussed further later in this article, the complaint was upheld.

III VARIABLES FOUND IN OTHER RESEARCH THAT CORRELATE WITH OUTCOME

A ‘She’s a feisty young thing’ – Age

As mentioned earlier, extreme youth has been found to correlate with success in sexual harassment matters. In the current project, our ability to analyse this variable was limited by the lack of specificity about age in the judgments.³⁴ Of the matters in which age was mentioned in the urban dataset, five complainants were between the ages of 16 to 19 years of age – that is 9%, whilst in 18% of the rural cases (two of the 11) the extraordinary youth of the complainants was mentioned.

For example, in a 2006 Queensland case three young female complainants (all aged 15 or 16) were employed in a Mooloolaba news agency.³⁵ They were subjected to numerous incidents of sexual harassment involving unwelcome sexual touching of the complainants’ bottoms, being exposed to pornographic images by the employer and being subject to unwelcome verbal sexual harassment such as the employer telling one employee, ‘I think your boobs would be tear drop shape and you would have perky nipples.’³⁶ The harasser was ordered to pay \$24,437.00 (plus costs) to the first complainant, \$23,305.00 (plus costs) to the second and \$21,819.00 plus costs to the third complainant.

B ‘She just doesn’t get it’ – Ethnicity

As we found with ‘age’, judges seemed to only comment on ethnicity when there was something ‘significant’ to say about it—that is judges did not specifically say that a complainant was from an ‘Anglo’ background whereas they might if the person was non-Anglo. For instance, of the rural cases *Salt & Anor*³⁷ was the only matter in which ethnicity was mentioned. It was one of the three rural matters in which the person alleging harassment lost. The complainants, Mr Shaw and Ms Salt were both from an Aboriginal background and employed as teachers at Bourke Public School. Amongst other complaints, Ms Salt reported that she had been the victim of sexual harassment when her superior, Mr Loxley, was said to have ‘unbuttoned his trouser button in front of her’ and taking his shirt out before ‘stuffing it back in.’³⁸ The court held that:

³¹ Ibid, [14].

³² Ibid.

³³ Ibid, [16].

³⁴ It may be that age is only mentioned when it is of ‘significance’ by falling outside of the ‘expected’ norms.

³⁵ *Dale, Larkin and Loffler v Shearer and Anor* [2006] QADT 1.

³⁶ Ibid, [69].

³⁷ *Salt & Anor v NSW Department of Education and Training* [2006] NSWADT 326.

³⁸ Ibid, [72].

... the failure to adequately deal with the culture of hostility and distrust that developed between Mr Shaw and Ms Salt and the rest of the staff at Bourke Public School is evident in the way in which a petition was circulated by the staff ...³⁹ The staff friction that developed over time was often seen as the fault of Ms Salt and Mr Shaw rather than of other staff members.⁴⁰

In contrast to the rural sample, about one quarter of the urban matters (15:57 – 26%) involved non-Anglo complainants. Most were either from East or South Asia. In seven of the 15 the complainant was successful (47%) as compared to 38% of the Anglo urban complainants. This relatively high success rate for non-Anglos does not correlate with the relative high dismissal rate found in earlier research.⁴¹ One case, *Nguyen v Frederick*,⁴² though does provide an example of how language barriers can impact on credibility and may be indicative of a contributor to the lower success rate for urban complainants. The judge included discussion of the respondent's view of the 'significant inconsistencies' in the quality of the complainant's evidence possibly derived from whether she was writing on her own without assistance or with help. Perhaps then the non-Anglo complainants in the first study whose complaints were dismissed could have been less fluent English-speakers than those in the current sample.

C 'She never said nothin'' – Promptness of reporting

The judicial officers did not always comment on when the harassment was reported. Prompt reporting was mentioned in only 20 of the 57 urban matters (35%) as compared to seven of the 11 rural cases (64%). As we would expect, a higher percent of the matters in which the complainant reported quickly were successful: in six of these rural seven, the complaint was upheld.⁴³ The case of *Frith v The Exchange Hotel & Anor*⁴⁴ is an example.

In the course of her work as an employee of the Exchange Hotel in a North Queensland country town (where she also lived) Ms Frith was sexually harassed by Mr Brindley, a director of the hotel company.⁴⁵ The harassment was manifested when he offered to drive her to Cairns so that she could attend her aunt's funeral. En route, he described times when he had hired prostitutes and taken them to a hotel.⁴⁶ He then insisted on making accommodation arrangements for her in Cairns, telling her that she could 'pay him back' when she returned to the workplace.⁴⁷ He booked a single room for them both to stay in overnight, saying that, 'There was only one room left available.'⁴⁸ That evening when they were in their separate beds, 'Mr Brindley told her that she was perfect for the job but she would have to please him personally as well as professionally as he was a man of power who had to have his needs met.' He then said words to the effect that 'if she did not have sex with him, that she could not work for him.'⁴⁹

³⁹ Ibid, [50].

⁴⁰ Ibid, [49].

⁴¹ Patricia Easteal and Keziah Judd, above n 4.

⁴² *Nguyen v Frederick* [2006] WASAT 14.

⁴³ Fifty-five percent of urban matters reported immediately were upheld compared to only 18% of those who were noted as not having been reported promptly.

⁴⁴ *Frith v The Exchange Hotel & Anor* [2005] FMCA 402.

⁴⁵ Ibid, [3].

⁴⁶ Ibid, [16(o)].

⁴⁷ Ibid, [16(p)].

⁴⁸ Ibid, [16(q)].

⁴⁹ Ibid, [16(s)].

Ms Frith testified that ‘she was horrified by his words and that she grabbed her bag and ran out of the bedroom while still wearing her pyjamas.’⁵⁰ Whilst in a distressed state in the hotel lobby, she met two strangers who helped her and following this encounter she telephoned one of the managers of the hotel to report the harassment. At the manager’s insistence, she then phoned Mr Brindley’s wife to tell her about the encounter before fleeing the hotel and, having nowhere to go, ultimately went to the police station to report the situation. This action of immediate disclosure correlates with perception of credibility.

D ‘Everyone knows she’s a liar’ – Corroboration

Eight of the 11 rural complainants (73%) and 72% of urban complainants had witnesses to corroborate their claim. All of the rural complaints with witnesses were upheld. While just over half (54%) of the urban cases with witnesses were upheld, in only one of the 16 without witnesses was the complainant successful. It appears that, as expected, corroborative evidence is important.

The chance of success were increased by a family member testifying about the effects of the harassment and/or what the complainant had disclosed:

I also found the evidence given by the Complainant’s parents and witnesses to be reliable and I accept their evidence. I note that despite Mr and Mrs Supplice’s relationship with the Complainant they struck me as having an objective perspective in relation to the Complainant and their observations of her. For example, they gave evidence that demonstrated that they had been critical of their daughter’s reluctance to work until she confided in them and told them about the comments the First Respondent had been making to her.⁵¹

As in another rural matter, the family member may be able to testify as an eye-witness to the harassment.⁵² In this example, a hairdresser who was employed on a part-time basis in a Maitland hair salon went to her workplace accompanied by her teenage daughter in order to get her pay. ‘The complainant’s daughter recalled that whilst she and her mother stood waiting for the pay packet, her mother’s employer “put the pay packet down the front of his pants. He was laughing thinking it was funny.”’ She deposed that her mother’s employer then said words to the effect of:

Oh wait I have a better idea’ and ‘undid the fly on his pants and stuck the pay packet in his open fly. He lent back on his chair with his hands behind his head in a suggestive manner ...’⁵³

In addition to providing corroboration, the daughter’s presence was considered as relevant in the Federal Magistrate’s reasoning: ‘It did occur in front of her teenage daughter. It was totally inappropriate behaviour on the part of Mr Davies.’⁵⁴

Expert evidence was relied upon in 20 urban cases (35%); in 13 of these matters (65%) the complaint was upheld as compared with success for only 27% of the urban complaints without expert witness(es). An expert testified in five of the 11 rural cases (45%): a psychiatrist in two,⁵⁵ a psychologist,⁵⁶ a general practitioner⁵⁷ and a medical report from an

⁵⁰ Ibid, [16(t)].

⁵¹ *Supplice v Skalos* [2007] TASADT 4 [23].

⁵² *Hewett v Davies & Anor* [2006] FMC 1678.

⁵³ Ibid, [2].

⁵⁴ Ibid, [19].

⁵⁵ *VM v MP, KP, K t/as P, and DS* [2009] QADT 1; *Frith v The Exchange Hotel & Anor* [2005] FMCA 402.

⁵⁶ *Hewett v Davies & Anor* [2006] FMC 1678.

⁵⁷ *Cross v Hughes & Anor* [2006] FMCA 976.

unknown type of practitioner.⁵⁸ In four of the five (80%) the complainant was successful. In one of the four matters for instance, expert medical evidence was used by a very young female complainant to demonstrate that although she had suffered depression throughout her life to date, the incidents of workplace sexual harassment that she endured had aggravated her symptoms.⁵⁹ In another, the general practitioner's report was seen as corroborating 'her tearful and anxious state in the two months following the events, but does not contain any diagnoses of or opinion in relation to the existence of any clinical condition.'⁶⁰

In the rural case that was dismissed despite expert evidence, the issue was inconsistency between the expert's testimony with that of the complainant:

Dr TH, the psychiatrist engaged on behalf of the Complainant for the purpose of preparing reports for use in this proceeding, confirmed (during cross-examination) that, when he interviewed the Complainant on 23 May 2005, she told him that she had started work in July and things started to deteriorate in the first two to three months. The timeframe recorded by Dr TH is, I consider, inconsistent with that alleged by the Complainant – her version being that harassing events occurred some two to three weeks after she commenced her employment. The Complainant explained this discrepancy by saying that Dr TH must have made a mistake or that there was miscommunication between the two of them.⁶¹

The lack of an expert can also make it harder for the decision-maker to calculate damages:

A decision as to the appropriate damages for the breach of s 28B(1)(a) has been made difficult by the absence of the psychologist.⁶²

However, not having an expert witness may work in the complainant's favour as illustrated in an urban case in which the judge made an interesting statement in support of the complainant's choice not to have sought the help of an expert following her (serious) experience of being sexually harassed. In this matter, a senior doctor sexually harassed a more junior doctor.⁶³ In awarding the complainant \$100,000, the judge stated:

It was submitted that the lack of evidence of professional counselling, particularly in the immediate aftermath of the alleged event, rendered it less likely that the event had taken place at all ... In the context of the view I have formed of this Complainant, I find her refusal to seek professional assistance to be completely in character and not a fact which, in the circumstances of this case, renders it less likely that the event alleged did occur.⁶⁴

Interestingly the judge went to explain this conclusion by referring to the testimony of another witness, a friend of the complainant.

And it is not of course just complainants' witnesses that can impact on outcome. Those appearing for the respondent may influence the judicial officer in dismissing the matter. This was evident in one urban case—*Summerville v Department of Education & Training & Ors*:⁶⁵

It was not simply the number of witnesses who refuted Ms Summerville's evidence but their demeanour, their directness, and their general authenticity. The demeanour of Ms Summerville, on the other hand, and the many inconsistencies in her evidence which on their own may not have

⁵⁸ *Dale, Larkin and Loffler v Shearer and Anor* [2006] QADT 1.

⁵⁹ *Ibid*, [74].

⁶⁰ *Ibid*, [29].

⁶¹ *VM v MP, KP, K t/as P, and DS* [2009] QADT 1 [27].

⁶² *Hewett v Davies & Anor* [2006] FMC 1678 [19].

⁶³ *Tan v Xenos (No 3) (Anti-Discrimination)* [2008] VCAT 584.

⁶⁴ *Ibid*, [3].

⁶⁵ *Summerville and Department of Education & Training & Ors* [2006] WASAT 368.

been significant but when taken together did bear on her credibility and led to the conclusion that her evidence simply cannot be relied on.⁶⁶

E ‘As if anyone is gunna listen to her, anyway!’ – Credibility as a witness

In all 11 rural matters and in 49 of the 57 urban cases (86%), the judicial officer made comments about the credibility of the complainant. These remarks were sometimes about the Court’s assessment of the witness’s truthfulness in describing the sexual harassment and/or the judicial officer’s view of the believability of the seriousness of the effects of the sexual harassment. The latter was discussed in *Cross v Hughes & Anor*.⁶⁷

The evidence the applicant gave at the undefended hearing before me was essentially limited to the question of her damage. I did not find her to be an impressive witness. That is not to say that I found her to be untruthful. She simply did not provide any particularly convincing or coherent evidence in relation to the impact of these events upon her. Whilst she referred to being depressed and tearful and referred to such things as loss of appetite and increase in smoking and drinking, she was unable to provide any contextual embedment for these complaints in respect of the way in which they impacted upon her daily life. She was slow to answer the questions put to her by her counsel in respect of these matters. I take into account a nervousness associated with the giving of evidence in legal proceedings and I also take into account the fact that she may continue to find a recollection of these events distressing. But even allowing for those matters, her evidence was unconvincing as to the level of the impact of these events upon her. That is not to say that I do not accept that they had some impact. It is simply to say that she did not impress in the witness box as someone who was profoundly affected by the events described.⁶⁸

This case was undefended though and the complainant was ultimately successful and awarded \$11,822.

In some cases, the decision-makers reflected upon what constitutes an honest and credible delivery of evidence. For example in *Supplice v Skalos*.⁶⁹

I found the Complainant was an honest and reliable witness. She gave her evidence in a down to earth, forthright and understated manner without any apparent embellishment. Her account seemed limited to her recollection and she showed no signs of exaggeration or reconstruction. While there was no challenge to her account by cross-examination I scrutinised her evidence and found her evidence persuasive. I accepted the Complainant’s evidence.⁷⁰

That matter involved a 16 year old girl who worked at ‘Legs & Breasts Chicken Shop’ in Huonville, Tasmania. She was subjected to ongoing sexual harassment of a verbal nature by one of the partners in the business (who was also her supervisor) saying things like: ‘You’re just strutting your stuff so I can see your arse wobble’; ‘You’re a dick tease’; and ‘I know you want me, I can tell by the way you’re looking at me.’⁷¹ He also made remarks such as, ‘You’re a spoilt little bitch, but if that’s what you think you’ve got to do, that’s fine’ which were said to have been part of his course of conduct in harassing and humiliating her because they formed a backdrop of ‘contemptuous and belittling behaviour towards the Complainant’.⁷²

⁶⁶ Ibid, [141].

⁶⁷ *Cross v Hughes & Anor* [2006] FMCA 976.

⁶⁸ Ibid, [23].

⁶⁹ *Supplice v Skalos* [2007] TASADT 4.

⁷⁰ Ibid, [23].

⁷¹ Ibid, [26].

⁷² Ibid, [61].

As illustrated in *Supplice v Skalos* there does seem to be an ideal way of giving testimony. This includes consistency, a lack of embellishment but a sufficient amount of detail (eg ‘The Tribunal found Ms Hsu’s oral evidence vague and lacking in detail ...’) ⁷³ and as illustrated in *Perry*, a certain low-key almost passive manner: emotional but not too emotional:

Generally I regarded the complainant as an unreliable witness. She was very emotional about her case and interrupted her evidence several times to cry ... upset and distressed out of all proportion to the events which occurred, or which she was describing – see for example her reaction to having a post it note put on the back of her chair as an office joke, below under the heading ‘Eat Me’.⁷⁴

These attributes or their absence were evident in other urban cases where the witnesses were seen as incredible. For instance like Ms Hsu above, the witness might be perceived as having an emotional response on the stand that shows an exaggeration of the actual complaint:

The complainant’s facial expressions, hand gestures and voice were all emotionally overwrought during her evidence. She gasped and sobbed many times. At times she became very angry: standing in the witness box, yelling, swearing, pointing aggressively at the respondent and banging one fist into her other hand or banging a thick wad of paper loudly against her hand, knee or the top of the witness box. *The emotion displayed was disproportionate to the factual matters the complainant recounted. Events are inflamed and exaggerated in the complainant’s mind and her evidence is therefore unreliable.* (emphasis added).⁷⁵

Or as in *Treacy v Williams* the complainant was seen as evasive and aggressive:

In general terms I found the Applicant Ms Treacy’s evidence lacking credibility as she was evasive and unresponsive to questions and at others provided gratuitous information. Her evidence was inconsistent and she displayed a somewhat aggressive demeanour.⁷⁶

This last quote includes a reference to consistency in testimony. This is undoubtedly a contributor to assessment of credibility. It is difficult though to analyse the frequency of judicial comment about the consistency of evidence given that sometimes judges make express comments about consistency and sometimes the consideration of such is implied. In some judgments, the element of consistency seems to be particularly weighted in the decision-making. The bottom line is that a good witness is consistent in their evidence:

Her account of what occurred sounded internally consistent and although some parts of her evidence were not contained in her witness statement this might be because the witness statement itself was not particularly detailed.⁷⁷

One more example comes from the rural matter, *Brown v Richmond Golf Club & Anor*.⁷⁸ In this case, Ms Brown complained that she had been sexually harassed when a senior member of staff, Mr Slym, ‘Called her “Babe” and stroked her hair’,⁷⁹ called her ‘Babe and Sexy’⁸⁰ and ‘kissed her in an amorous fashion without her consent’.⁸¹ He claimed that he did nothing more than attempt to give her a ‘good night kiss’. In deciding on this matter the tribunal members indicated that Ms Brown’s account was ‘broadly consistent’ with the earlier account that she had provided to the police.⁸²

⁷³ *Hsu v BHB Australia Pty Ltd trading as Far West Consulting & Anor* [2007] NSWADT 125 [57].

⁷⁴ *Perry v State of Queensland & Ors* [2006] QADT 26 [10], [13].

⁷⁵ *Foran v Bloom* [2007] QADT 31 [14].

⁷⁶ *Treacy v Williams* [2006] FMCA 1336 [15].

⁷⁷ *Laviya v Aitken Greens Pty Ltd (Anti-Discrimination)* [2010] VCAT 1233 [15].

⁷⁸ *Brown v Richmond Golf Club & Anor* [2006] NSW ADT 104.

⁷⁹ *Ibid*, [18].

⁸⁰ *Ibid*, [32].

⁸¹ *Ibid*, [18].

⁸² *Ibid*, [18].

Not surprisingly then, inconsistency was seen as contributing to an image of untruthfulness: 'Her oral evidence was confused and at times contradictory.'⁸³ And another:

The demeanour of Ms Summerville, on the other hand, and the many inconsistencies in her evidence which on their own may not have been significant but when taken together did bear on her credibility and led to the conclusion that her evidence simply cannot be relied on.⁸⁴

Outcome was not just influenced by perception of the complainants' credibility and/or consistency. When cases were decided against the complainant, it was not uncommon to find judicial comments about the *respondents'* credibility. For instance:

However, the onus of proof rests on Ms Salt and in a situation where Mr Loxley is believed to be just as credible as she is, it must be found that she failed to prove her case on the balance of probabilities.⁸⁵

And, in another rural workplace (*Mohican v Chandler Macleod Ltd*⁸⁶) the male complainant, employed as an aircraft maintenance engineer by Forstaff Aviation, complained that (among other issues of bullying, discrimination and victimisation) he was sexually harassed in the course of his employment by members of staff and that the sexual harassment had taken different forms. The tribunal in dismissing the complaints, concluded that:

The evidence given by Forstaff's managers, as well as all of its employees, was consistent and the Tribunal concluded that Mr Mohican's allegations that sexual acts and pornography were openly discussed at the workplace and that pornographic magazines were openly displayed at the workforce, was completely unfounded in fact.⁸⁷

IV CONCLUSION

In our sample, rural complainants were more likely to have their complaints upheld. What can we conclude from our findings about why this was the outcome? Given the small sample size, the higher success rate for rural cases could of course be an anomaly. We did find though that the rural matters were more likely to involve elements that logically could lead to judicial reasoning in their favour. These included vicarious liability by the employer, multiple manifestations of harassment and offenders in a senior role to the complainant. And, we also identified that a higher proportion of the rural cases possessed the attributes found in other research to correlate with success for complainants. These included extreme youth, Anglo background, prompt reporting, corroboration and perception of credibility in how evidence is given.

Therefore, rural cases may have a higher success rate because those matters that proceed to adjudication may constitute more solid complaints than urban cases. It is possible that rural employers are less likely to participate in conciliation so that equivalent urban matters could be settling in the complainants' favour at that stage of dispute settlement. Or, perhaps victims of harassment in a rural workplace are more disinclined to report than their urban 'sisters' and only those with the most confidence in their 'case' go ahead with reporting. Such low disclosure would fit with what we know about domestic violence in rural areas,⁸⁸ isolation

⁸³ *Zhang v Kanellos & Anor* [2005] FMCA 111, [67].

⁸⁴ *Summerville v Department of Education & Training & Ors* [2006] WASAT 368 [141].

⁸⁵ *Salt & Anor v NSW Department of Education and Training* [2006] NSWADT 326, [76].

⁸⁶ *Mohican v Chandler Macleod Ltd* [2009] VCAT 1529.

⁸⁷ *Ibid*, [60].

⁸⁸ See, eg, Margaret Alston 'Violence Against Women in a Rural Context' (1997) 50(1) *Australian Social Work* 15, 16.

and conservative attitudes about violence against women,⁸⁹ the cultural context of gossip,⁹⁰ an ethos of self-reliance and in the context of the tradition of gender role segregation in the bush:⁹¹

In all of these accounts, a similar story is told: the rural factors of distance, male-dominated institutions, concerns about anonymity and privacy, and economic considerations all affect the access that women have to specialist services (where they exist) and mainstream helping agencies, including those in the justice system.⁹²

Accordingly, one study of rural nurses found that ‘there is a culture of non-reporting, denial and minimisation of the importance of such episodes both by nurses and management.’⁹³

It makes sense then that the people in rural areas who do report are possibly those who have the strongest cases and are also likely due to their young age, multiple manifestations of the sexual harassment and the seniority of the offender, to see themselves as less vulnerable to victim-blaming or to having their victimisation minimised. Complainants’ confidence in their ‘case’ may correlate with consistency in their testimony and with delivery of a believable story with the amount of emotion seen as correlating appropriately with the degree of injury. This is extremely important since the manner of giving evidence can affect the judicial officers’ perception of witnesses’ credibility and thus ultimately affect the outcome.

⁸⁹ Alexandra Neame and Melanie Heenan ‘Responding to Sexual Assault in Rural Communities’ Briefing Paper No. 3, Australian Institute of Family Studies, (2004) 1.

⁹⁰ See, eg, Chelsea Eacott & Christopher Sonn, (2006) ‘Beyond Education and Employment: Exploring Youth Experiences of their Communities, Place Attachment and Reasons for Migration’ (2006) 16(2) *Rural Society* 199, 200, 208.

⁹¹ Margaret Alston *Women on the Land: The Hidden Heart of Rural Australia* (University of NSW Press, Kensington, 1995) 143.

⁹² Robyn Mason ‘Do Everything, Be Everywhere’ (2008) 23(58) *Australian Feminist Studies* 485, 489.

⁹³ Rosemary Green, Raeleene Gregory and Robyn Mason ‘It’s No Picnic: Personal and Family Safety for Rural Social Workers’ (2003) 56(2) *Australian Social Work* 94, 96 citing J Fisher, J Bradshaw, BA Currie, J Koltz, K Reid Serle & J Smith ‘Violence and Remote Area Nursing’ (1996) 4(3) *Australian Journal of Rural Health* 190; K Kelly, ‘Responding to Job Related Trauma in Remote Areas: Only Fools would Rush in’ in 4th Biennial Australian Rural and Remote Health Scientific Conference, Toowoomba, Queensland 1998. Proceedings, Rural and Remote Health Papers. National Rural Health Alliance, Toowoomba [CD Rom].

STARING DOWN THE ITAR: RECONCILING DISCRIMINATION EXEMPTIONS AND HUMAN RIGHTS LAW

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ABSTRACT

Court and tribunal decisions around Australia have granted exemptions from anti-discrimination legislation, allowing defence manufacturers to lawfully discriminate on the basis of race. The first such decision made under a human rights law, of only two to date, was *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* which was decided under the *Human Rights Act 2004* (ACT). The exemption was granted, and the *Human Rights Act* had no effect on the reasoning. How can racial discrimination – outright prejudice – be permitted under the combined operation of an anti-discrimination law and a human rights law? The answer seems to lie in a confused application of human rights law and, perhaps, in a concern to reach an outcome that responded to the ‘public interest’ arguments that have been mounted in favour of the successful exemption applications elsewhere. A correct application of the *Human Rights Act* would have excluded the so-called ‘public interest’ arguments, limiting the exercise of the exemption power to considerations which were consistent with the human rights-compliant, anti-discrimination purpose of the legislation.

I THE NEED FOR AN EXEMPTION

The US International Traffic in Arms Regulations (‘the ITAR’) are export regulations, promulgated under the United States *Arms Export Control Act*.¹ In the name of ‘world peace, or the national security or the foreign policy of the United States’,² the ITAR prescribe the agreement under which defence-related material can be exported from the United States.³ The agreement affects the importer of defence-related material by prohibiting that material from being ‘transferred to a person in a third country or to a national of a third country’ except as authorised or with Department of State approval.⁴ There are very substantial penalties (such as multi-million dollar fines) for breach of the agreement.

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¹ 22 USC §2778(a)(1); and see Code of Federal Regulations (CFR) Title 22 – Foreign Relations, Chapter I, Subchapter M.

² See, eg, 22 CFR §127.8(a), 126.7(a)(1), 120.5.

³ For a detailed account of the operation of the ITAR, see Simon Rice, ‘Discriminating for World Peace’ in Jeremy Farrall and Kim Rubenstein (ed), *Sanctions, Accountability and Governance in a Globalised World*, (Cambridge University Press, Cambridge) 355-377; Sandra Sperino, ‘Complying with Export Laws without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules’ (2007-8) 52 *Saint Louis University Law Journal* 375; Lorena Allam, *Background Briefing: Defence and Discrimination* (2008) ABC Radio National

<www.abc.net.au/rn/backgroundbriefing/stories/2008/2339793.htm>.

⁴ 22 CFR §124.8(5).

Australian-based companies, usually subsidiaries of United States companies, engage extensively in defence manufacturing, and import defence material under the ITAR-prescribed agreements. The discriminatory nature of the importing regime is clear: workers at the offices and factories of importing defence manufacturers, who are not Australian or US nationals, are treated less favourably than workers who are. The Australian defence manufacturers seem to be in a dilemma: they ‘cannot avoid discriminating [in breach of anti-discrimination legislation] if they are to comply with the United States export laws and meet their contractual obligations’.⁵ The companies have so far avoided the dilemma by obtaining an exemption from anti-discrimination legislation, allowing them to discriminate lawfully.

In Australian discrimination law, exemption applications ‘are usually, but not necessarily, made for activities that might be described as “special measures”’,⁶ and special measures are ‘for the benefit of some people with an attribute which is protected by that legislation in order to overcome disadvantage which has been experienced by those people because of their shared attribute’.⁷ But an exemption application to enable ITAR compliance is in a very different spirit: it seeks permission not to benefit people and overcome disadvantage, but to discriminate against them, causing disadvantage.

In their exemption applications the employers have emphasised that they are seeking the exemptions reluctantly, and in approving the applications the tribunals have similarly been at pains to limit the scope of the exemptions to accommodate the ITAR only as far as necessary. Nevertheless, the discriminatory conduct that is permitted by the exemptions is wide ranging. In 2004, for example, an exemption that allowed a defence manufacturer to discriminate among employees on the basis of nationality permitted the company to identify, ‘by means of a badge, inclusion in a list or otherwise’, workers whose nationality or national origin gave them access to imported United States technology, so as to distinguish them from workers of another nationality or national origin.⁸ In Queensland, workers can be required to wear a special badge ‘to indicate that the holder does not have export privileges and that the employee is a foreign person’.⁹ Similar steps have been taken in Western Australia,¹⁰ and in Canada where employees have also been ‘barred from certain parts of the workplace, and in some companies are escorted by a security guard at all times’.¹¹

Almost every application for an ITAR-related exemption in Australia has been granted.¹² An application was not granted in Queensland because it was considered unnecessary in the

⁵ *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21 [15.1].

⁶ Nick O’Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2004) 547.

⁷ Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (2008) 455.

⁸ *ADI Ltd (Exemption)* [2004] VCAT 1963 [8b].

⁹ *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21 [11.3b].

¹⁰ *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259 [5b].

¹¹ Jasmin Legatos, ‘Settlement Reached in Bell Helicopter Discrimination Case: Company Denied Haitian-Born Canadian a Place in its Internship Program’, *The Gazette* (Montreal), 18 January 2008.

¹² For example: *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21; *ADI Ltd (Exemption)* [2004] VCAT 1963; *Exemption Order (Re Boeing)*, NSW Government Gazette 2005 No 25, p 391; *Exemption Order (Re ADI)*, NSW Government Gazette 2005 No 81, 3495-6; *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259; *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261; *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* [2007] VCAT 532 HRA; *Raytheon Australia Pty Ltd and Others Exemption Application* [2007] VCAT 2230; *ADI Ltd (Anti-Discrimination)* [2007] VCAT 2242; *Exemption application re: Raytheon Australia Pty Ltd & Ors* [2008] QADT 1; *BAE Systems Australia Ltd (Anti-Discrimination)* [2008] VCAT 1799; *BAE Systems Australia Ltd*

circumstances,¹³ and would it would have been refused in the Northern Territory had it not been withdrawn.¹⁴ In the Australian Capital Territory (ACT), an application was refused; on review it was granted,¹⁵ and that review decision, *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission*,¹⁶ (*Raytheon v ACT HRC*) is the subject of this article.

The significance of *Raytheon v ACT HRC* is that it was decided under human rights legislation, the *Human Rights Act 2004* (ACT) (*HRA*). At the time of writing, the only other ITAR-related exemption to have been decided in Australia under human rights legislation is the later case of *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*,¹⁷ decided under the *Charter of Human Rights and Responsibilities 2006* (Vic) (*Charter*), and this article refers to that case, and its scant reasoning.

II RAYTHEON V ACT HRC

In 2007 a defence manufacturer, Raytheon Australia Pty Ltd (Raytheon), sought an exemption under s 109 of the *Discrimination Act 1991* (ACT) (*DA*) so that it could discriminate against workers who are not nationals of Australia or the US. Such treatment is racial discrimination, which is expressly proscribed by the *DA*.¹⁸ The ACT Human Rights and Discrimination Commissioner (*the ACT HRD Commissioner*) refused the application in an administrative decision, advised to Raytheon in a letter.¹⁹ The ACT HRD Commissioner's decision was the subject of a merits review application to what was then the Australian Capital Territory Administrative Appeal's Tribunal (*the Tribunal*);²⁰ those review proceedings were *Raytheon v ACT HRC*.

In the review proceedings the Tribunal started again, putting itself in the shoes of the original decision maker to come to what it considered the correct or preferable decision on the basis of the material it had before it.²¹ Raytheon was the applicant in the merits review proceedings and the ACT HRD Commissioner responded to the application.²²

Raytheon's argument for an exemption was the same as that which had succeeded in other exemption cases: that the 'public interest' required an exemption to be granted. In fact, it seems to have been this superficial similarity with other cases which persuaded the Tribunal to grant the exemption. One difference was, or should have been, that evidence in one case is

[2008] SAEOT 1; *Raytheon Australia P/L Ors* [2008] SAEOT 3; *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796; *Re: BAE Systems Australia Limited* [2011] SAEOT 3; *ASC Pty Ltd, ASC Shipbuilding Pty Ltd & ASC AWD Shipbuilder Pty Ltd* [2011] SAEOT 4; *Raytheon Australia Pty Ltd* [2011] SAEOT 6.

¹³ *Boeing Australia Holdings Pty Ltd & related entities (No. 2)* [2008] QADT 34.

¹⁴ *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027.

¹⁵ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19; a subsequent matter, *BAE Systems Australia Limited v ACT Human Rights Commission* [2011] AACT 53 records the agreed terms of an exemption in settlement of an application to review the initial refusal of an exemption.

¹⁶ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19.

¹⁷ *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796.

¹⁸ Dictionary, and ss 7, 8(1), 10 and 13.

¹⁹ Letter from the ACT Human Rights Commission to Mr Peter Arthur, 20 November 2007, <www.hrc.act.gov.au/content.php/category.view/id/105>.

²⁰ *Discrimination Act 1991* (ACT), s 110.

²¹ *Environment Protection Authority v Rashleigh* [2005] ACTCA 42, [25]-[30].

²² The author was one of the ACT Commissioner's legal representatives.

not evidence in another, and that whatever moved a tribunal or court to accept that a matter such as the ‘public interest’ had been established once, somewhere, is irrelevant to whether evidence in this case is probative and sufficient.

But a very significant difference was – or should have been – that none of the previous exemption cases had been decided in a jurisdiction which required the exemption provision to be read in light of a human rights law. Differently from any other such decision in Australia at that time, the decision in *Raytheon v ACT HRC* was made in the context of local human rights legislation, the *HRA*. As a result, the Tribunal had to understand the interaction between the *HRA* and the exemption power in the *DA*. This article explores how the Tribunal approached that task, and suggests how, in light of both the terms of the legislation, and the subsequent decision of the High Court in *Momcilovic v The Queen*,²³ that interaction should properly be understood.

III APPLYING THE ‘JUSTIFIABLE LIMITS’ AND ‘COMPATIBLE INTERPRETATION’ PROVISIONS

The key to the interaction between a discrimination exemption power and a human rights law lies in the way that the interpretation provision and the ‘justified limits’ provision of human rights law operate on the discrimination exemption power. What has been uncertain is the order in which those provisions are applied to the legislation under scrutiny; the question arises because in both the *HRA* and the *Charter* the provisions are separate, and no explicit guidance is given on how they are to interact and operate.

As a point of reference for this article, recognition of justifiable limits on human rights is found in s 28 of the *HRA* and s 7(2) of the *Charter*, and the requirement to interpret legislation compatibly with human rights, so far as it is possible to do so consistently with its purpose, is in s 30 of the *HRA* and s 32 of the *Charter*.

One approach is first to inquire whether the legislation under scrutiny justifiably limits human rights and, if it does not, then to give, as far as possible, a purposive and human rights compatible interpretation to the legislation. This might be called the *Hansen* approach, after the 2007 New Zealand Supreme Court decision in *Hansen v The Queen*,²⁴ under the *New Zealand Bill of Rights Act 1990*.

On the *Hansen* approach, a court first considers whether the intended meaning of a provision is a justified limit on a human right. Only if the intended meaning of the provision is not a justified limit would there be an inquiry into whether a human rights-compatible meaning could be found. The *Hansen* approach, which considers whether the purposive meaning of a provision imposes justifiable limits, has been held in the ACT to be the correct one,²⁵ and a substantially similar approach has been adopted in Victoria.²⁶

²³ *Momcilovic v The Queen* [2011] HCA 34.

²⁴ *Hansen v The Queen* [2007] NZSC 7; (2007) 3 NZLR 1.

²⁵ *R v Fearnside* [2009] ACTCA 3, [98]; see generally Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) 99-109.

²⁶ See discussion of the ‘Hong Kong’ approach in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381; *RJE v Secretary to the Department of Justice* [2008] VSCA 265; *RJE v Secretary to the Department of Justice* [2008] VSCA 265, relying on *HKSAR v Lam Kwong Wai and Lam Ka Man* [2006] HKCFA 84. It appears to have been the approach in the discrimination exemption decision of *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869.

Differently from the *Hansen* approach, it is possible first to give, as far as possible, a purposive and human rights compatible interpretation to the legislation under scrutiny, and then to inquire whether, so interpreted, the legislation under scrutiny imposes a justifiable limit on human rights. This was the approach preferred by Elias CJ in dissent in *Hansen*, saying that:²⁷

The first question is the interpretation of the right. In ascertaining the meaning of the right, the criteria for justification are not relevant. The meaning of the right is ascertained from the cardinal values it embodies. Collapsing the interpretation of the right and the ... justification is insufficiently protective of the right. The later justification is according to a stringent standard, in which a party seeking to justify must show that the limit on a fundamental right is demonstrably justified in a free and democratic society.

In March 2010 the Victorian Court of Appeal, in *R v Momcilovic*,²⁸ rejected the *Hansen* approach and preferred the dissenting view of Elias CJ, saying that the step of identifying a purposive and human rights-compatible meaning is logically distinct from the step of justifying reasonable limits, and that justification becomes relevant only after the meaning of the challenged provision has been established.²⁹ The Court of Appeal agreed with Elias CJ when she referred with approval to the approach adopted in Canada, under which the question of justified limits under s 1 of the Canadian Charter of Rights and Freedoms is a distinct and later enquiry,³⁰ and said that:³¹

If the reasonable limits provision had to be applied before the meaning of legislation was finally ascertained, there would inevitably be inconsistencies in its application and uncertainties in interpretation. Judges and tribunal members, as well as public officials, would have to determine whether the relevant provision imposed a justifiable limit before determining finally how the provision was to be interpreted. We cannot accept that this is what Parliament is to be taken to have intended.

Debeljak has subjected the Victorian Court of Appeal decision to close scrutiny and strong criticism, saying that ‘despite clear parliamentary intent to the contrary it has sanctioned a rights-reductionist method to the statute-related *Charter* mechanisms, undermined the remedial reach of the ... interpretation obligation, sidelined the core issue of justification for limitations on rights, and considerably muted the institutional dialogue envisaged under the *Charter*’.³²

In November 2010 the ACT Supreme Court, in *In the Matter of an Application for Bail by Isa Islam (Islam)*,³³ followed the Victorian Court of Appeal’s approach in *R v Momcilovic*, attracted to it because it retains primacy of the legislature to legislate, even if at times incompatibly with human rights, it avoids an inquiry into justifiable limits if an interpretation can be found that is both consistent with legislative purpose and human rights-compatible, and is a better allocation of tasks as between the courts and the legislature.³⁴

²⁷ *R v Momcilovic* [2010] VSCA 50, [109].

²⁸ *Ibid.*

²⁹ *R v Momcilovic* [2010] VSCA 50, [105].

³⁰ *Ibid.*, [109].

³¹ *Ibid.*, [110].

³² Julie Debeljak, ‘Who is Sovereign Now? The Momcilovic Court Hands Back Power Over Human Rights That Parliament Intended it to Have’ (2011) 22 *Public Law Review* 15, 16; the merits of Debeljak’s critique are beyond the scope of this article, which is concerned with exploring how anti-discrimination law is to be read with human rights law in Australia.

³³ *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.

³⁴ *Ibid.*, [224]-[231].

In April 2011 the Victorian Civil and Administrative Tribunal, in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*,³⁵ granted an ITAR-related exemption and, on its reading of the Victorian Court of Appeal decision in *R v Momcilovic*, it too undertook the interpretation task before the justification task.³⁶ At that time, therefore, the dissenting view of Elias CJ in *Hansen*, endorsed by the Victorian Court of Appeal's approach in *R v Momcilovic*, was the prevailing view as to the order in which the interpretation and justified limits provisions were to be applied to the legislation under scrutiny. But an appeal against *R v Momcilovic* was pending.

In September 2011, in *Momcilovic v The Queen*, a majority of the High Court rejected the Victorian Court of Appeal's approach in *R v Momcilovic* and preferred the *Hansen* approach. Gummow J,³⁷ with whom Hayne J agreed on this point,³⁸ Hayden J³⁹ and Bell J,⁴⁰ each preferred the *Hansen* approach. In the minority on this issue, French CJ, and Crennan and Kiefel JJ, supported the approach in *R v Momcilovic*. French CJ said that '(t)he question whether a relevant human right is subject to a limit ... can only arise if the statutory provision under consideration imposes a limit on its enjoyment. Whether it does so or not will only be determined after the interpretive exercise is completed'.⁴¹ Similarly, Crennan and Kiefel JJ said that whether a relevant human right is subject to a limit has no bearing upon the meaning and effect of a statutory provision, which are derived by a process of construction, not any enquiry as to justification.⁴²

While *Momcilovic v The Queen* appears to offer the authoritative position, there are at least three qualifications to its ready acceptance. One is that the New Zealand Supreme Court in *Hansen*, when it distinguished a different, earlier approach in *Moonen v Film and Literature Board of Review*,⁴³ acknowledged that there may be 'good reason to adopt [that earlier] approach depending on what was in issue'.⁴⁴ In other words, the *Hansen* approach may not be the correct approach in every case.⁴⁵ Another qualification is that to count Hayden J among the majority in *Momcilovic v The Queen* glosses over the fact that his view was *obiter*, as he (alone) found that the interpretation and justified limits provisions are invalid because they confer on the courts a legislative function.⁴⁶ Finally, the High Court did not rely on the *Charter* to decide the appeal, so that it could be argued that all its views on the operation of the *Charter* are *obiter*.⁴⁷

³⁵ *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796.

³⁶ *Ibid*, [22]; the Victorian Tribunal makes no mention in its reasons of *Raytheon v ACT HRC*, the only other exemption application considered under a human rights law.

³⁷ *Momcilovic v The Queen* [2011] HCA 34, [164]-[168].

³⁸ *Ibid*, [280].

³⁹ *Ibid*, [427].

⁴⁰ *Ibid*, [675]-[684].

⁴¹ *Ibid*, [35].

⁴² *Ibid*, [572].

⁴³ *Moonen v Film and Literature Board of Review* [2002] NZLR 9.

⁴⁴ *Hansen v The Queen* [2007] NZSC 7; (2007) 3 NZLR 1, 115, [94].

⁴⁵ *R v Fearnside* [2009] ACTCA 3, [98], citing H Wilberg, 'The Bill of Rights and Other Enactments' [2007] NZLJ 112.

⁴⁶ *Momcilovic v The Queen* [2011] HCA 34, [432]-[436]; [441]-[454].

⁴⁷ Mark Hosking, *High Court Affirms Constitutionality of Charter and Considers Key Interpretative Provisions* (2011) Human Rights Law Centre <<http://www.hrlc.org.au/jurisdiction/australia/momcilovic-v-the-queen-2011-hca-34-8-september-2011>>.

It seems, however, that the *Hansen* approach has been endorsed by the High Court, and the alternative approach – taken by the Victorian Court of Appeal in *R v Momcilovic* and the ACT Supreme Court in *Islam* – has been rejected.⁴⁸ This means that a court first considers whether the intended meaning of a provision is a justified limit on a human right and, if it is not, the court considers seeks an interpretation which is, as far as possible, consistent with the law’s purpose and compatible with human rights.

IV THE REASONING IN *RAYTHEON V ACT HRC*

The Tribunal in *Raytheon v ACT HRC* had in fact followed the *Hansen* approach in that it first considered the justifiable limits question and then considered the requirement to interpret a Territory law, as far as possible, consistently with the law’s purpose and compatible with human rights. But the Tribunal’s reasoning was flawed in a number of respects: it failed to decide the purpose of the relevant law (the *DA*), it erroneously applied authority to say that the purpose of *DA* was effectively unbounded, it did not ask the correct question concerning justifiable limits on human rights, it did not consider the prescribed criteria to decide whether there was a justifiable limits on human rights, and it did not attempt to interpret in a way that, as far as possible, is consistent with both the *DA*’s purpose and human rights.

The task facing the Tribunal in *Raytheon v ACT HRC* was to work out the meaning of the exemption power in s109 of the *DA* in light of the *HRA*. The first step was to determine the *DA*’s purpose. Section 109 of the *DA* empowers the ACT Human Rights Commission (‘HRC’) to exempt a person from the operation of the *DA*, and says that in the exercise of that power the matters to which the HRC must have regard include ‘the need to promote an acceptance of, and compliance with the *DA*, and the desirability ... of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination’.⁴⁹ Clearly s 109 *DA* permits conduct that would otherwise be unlawful under the *DA*. Beyond that, however, the provision has two available meanings: either it permits any such conduct, regardless of its inconsistency with the purposes of the *DA*, or it permits only such conduct that is consistent with the purposes of the *DA*.

When working out the meaning of an Act in the ACT,⁵⁰ s 139 of the *Legislation Act* (‘*LA*’) requires that ‘the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation’.⁵¹ In this case the Act is the *DA* and, according to its statutory objects,⁵² the *DA*’s purpose is:

- (a) to eliminate, so far as possible, discrimination to which this Act applies in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs; and
- (b) to eliminate, so far as possible, sexual harassment in those areas; and
- (c) to promote recognition and acceptance within the community of the equality of men and women; and

⁴⁸ Notably, the High Court decision in *Momcilovic v The Queen* makes no reference to occasions when Australian courts and tribunals have considered the issue, other than in the decision under appeal, such as the extensive deliberation by the ACT Supreme Court in *Islam*.

⁴⁹ *Discrimination Act 1991* (ACT), s 109(3).

⁵⁰ *Legislation Act 2001* (ACT), s 138.

⁵¹ See, eg, *Kingsley’s Chicken Pty Ltd and Queensland Investment Corporation and Canberra Investments Pty Ltd* [2006] ACTCA 9.

⁵² *Discrimination Act 1991* (ACT), s 4.

- (d) to promote recognition and acceptance within the community of the principle of equality of opportunity for all people.

The Tribunal found wiggle room in these statutory objects,⁵³ seizing on the phrase ‘so far as possible’ to say that the statutory objects are not expressed in absolute terms. The Tribunal’s reasoning is neither detailed nor explicit, but it seems to have read the phrase ‘so far as possible’ not as practical recognition that legislation alone cannot achieve the objects in s 4 of the *DA*, but as a positive statement that a result other than achieving those objects is also within the objects of the *DA*. As a result, the Tribunal ‘arrived at the conclusion that, in addition to the objects of the *Discrimination Act* specified in section 4, it is not its purpose to exclude all forms of discrimination and that in relation to the forms of discrimination to which it applies it confers a broadly-based discretion to exempt persons from the application of its provision’.⁵⁴

In widening the purposes of s 109 of the *DA*, the Tribunal relied not only on wiggle room in the statutory objects, but also on the High Court in *Stevens v Kabushiki Kaisha Sony*⁵⁵ to say that ‘[i]n determining what is the purpose of the *Discrimination Act* ... it is necessary to avoid fixing upon the statement of objectives contained in section 4 ... and to have regard to the broader operation of the Act as a whole’.⁵⁶ This approach misunderstands what the High Court was saying and doing in *Stevens v Kabushiki Kaisha Sony*.

First, the observations in the joint decision in *Stevens v Kabushiki Kaisha Sony* were explicitly concerned with ‘the present case’,⁵⁷ in which the Court was dealing with amendments to an Act. The amendments were not encompassed by the Act’s statement of objects, and extrinsic materials did not give any clear indication of how the amendments took their final form.⁵⁸ It was in those circumstances that the joint decision cautioned against ‘fix[ing] upon one ‘purpose’ and then bend[ing] the terms of the definition to that end’.⁵⁹ This observation is both narrower than the broad claim made by the Tribunal, and in much less definitive terms than the Tribunal’s rephrasing.

Secondly, the uncertainty that resulted from looking at extrinsic materials in *Stevens v Kabushiki Kaisha Sony* led the Court to focus on the text of the provisions themselves as ‘the best – and certainly the preferable – guide to the meaning of the relevant provisions’.⁶⁰ This is no warrant at all for the licence that the Tribunal in *Raytheon v ACT HRC* took from the decision, ‘to avoid fixing upon the statement of objectives’ when determining the purpose of a statute. In any event, at no stage did the Tribunal say what it believed the purpose of the *DA* to be. Rather, having freed itself from relying on the *DA*’s stated objects, the Tribunal simply

⁵³ For use of the term ‘wiggle room’ when engaged in statutory interpretation, see *PNJ v The Queen* [2008] HCATrans 370 (12 November 2008), per French CJ; for reference to ‘wiggle room’ in statutory interpretation, see R Gregory, ‘Overcoming Text in an Age of Textualism: A Practitioner’s Guide to Arguing Cases of Statutory Interpretation’ (2001-2002) 35 *Akron Law Review* 451, 465, 484.

⁵⁴ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [80].

⁵⁵ *Stevens v Kabushiki Kaisha Sony* [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850.

⁵⁶ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [43].

⁵⁷ *Stevens v Kabushiki Kaisha Sony* [2005] HCA 58; (2005) 224 CLR 193, 208 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁵⁸ *Ibid*, 207 [32] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁵⁹ *Ibid*, 208 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁶⁰ *Ibid*, 232 [129] (McHugh J); and see 208-209 [35]-[47] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

relied on like cases in other jurisdictions to say that the exemption power ‘could be exercised even where the justification for doing so was beyond ... anti-discriminatory objectives’.⁶¹

It is notable that in the 2011 Victorian decision of *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*, the Victorian Tribunal arrived very quickly at the same position on the equivalent exemption provision in Victoria, saying simply that the discretion to grant the exemption is ‘unconfined’.⁶² In doing so the Victorian Tribunal purported to find support in *Lifestyle Communities (No 3)*,⁶³ which, as is noted below, in fact supports exactly the opposite view.⁶⁴

Because it found a purpose for the *DA* that is effectively unconfined, the Tribunal did not have to choose between two possible meanings for s 109 of the *DA* – the breadth of the purpose that was found negated any real difference between the two meanings. The Tribunal therefore found no work for s 139 of the *LA*,⁶⁵ and proceeded on the basis that, whatever the purpose of the *DA* is, it includes permitting discriminatory conduct without qualification.

Consistently with the *Hansen* approach the Tribunal then considered the operation of the justifiable limits provision in the *HRA*. Section 28(1) of the *HRA* states that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the *HRA* requires that when deciding whether a limit is reasonable, certain matters be considered:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Tribunal gave scant attention to these mandatory considerations, failing to methodically identify and address them, and there must be some doubt as to whether the Tribunal’s conclusion was in fact reached, as it claimed, ‘[h]aving regard to the matters specified in section 28(2)’.⁶⁶

The Tribunal concluded that ‘the exemption would subject the human rights in issue to limits which are demonstrably justified in a free and democratic society’.⁶⁷ This is quite simply the wrong test. Section 28 of the *HRA* is concerned with the reasonableness of limits imposed by *Territory laws*. The Tribunal instead considered the reasonableness of limits that would be imposed *by the exemption were it granted*. Section 28(2)(a), for example, requires consideration of the nature of the right affected by s 109 of the *DA*, not by the proposed exemption, and so on for each of the considerations in s 28(2) of the *HRA*. The Victorian Tribunal made the same error in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity*

⁶¹ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [47].

⁶² *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [10].

⁶³ *Lifestyle Communities (No 3)* [2009] VCAT 1869.

⁶⁴ See text below associated with fn 76, and 113-115.

⁶⁵ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [37]-[48].

⁶⁶ *Ibid*, [68].

⁶⁷ *Ibid*, [33]-[68].

and Human Rights Commission, looking not at whether the relevant law subjected a human right to reasonable limits,⁶⁸ but at whether the proposed exemption did.⁶⁹

Had the Tribunal in *Raytheon v ACT HRC* asked the right question, it would have asked whether s 109 DA subjects human rights to reasonable limits that can be demonstrably justified in a free and democratic society. The human rights that might be limited are the rights set out in Part 3 HRA,⁷⁰ which include, relevantly for the DA, the right to equal and effective protection against discrimination on any ground.⁷¹ The HRA gives discrimination because of race as an example of discrimination against which people are protected.⁷²

Even on a narrow reading of s 109 DA – that it permits only conduct which is consistent with the purposes of the Act – it subjects human rights to limits. The DA itself gives examples of such conduct (as matters the ACT Human Rights Commission must have regard to):⁷³ conduct which promotes an acceptance of and compliance with the DA, and conduct which redresses the effects of past discrimination. For s 109 of the DA to operate this way is likely to be seen as a reasonable limit on human rights that can be demonstrably justified in a free and democratic society. Under the *Hansen* approach favoured in *Momcilovic v The Queen*, the next step – interpretation consistent with human rights as far as possible – is unnecessary.

On the other hand, the meaning of s 109 DA may be, as the Tribunal in *Raytheon v ACT HRC* found, that any conduct is permissible, unconfined by the purposes of the Act. Understood in that way, s 109 of the DA clearly subjects human rights to limits – to such extreme limits, in fact, that the human right to equal and effective protection against discrimination on any ground can be entirely negated. It allows, for example, outright prejudicial treatment of people because of, say, their race or sex. The question under s 28 of the HRA is whether this can be demonstrably justified in a free and democratic society.

Crucially, this is not answered by going to evidence from the parties; rather, it is decided on the terms of the particular legislation. Section 28 is concerned with limits ‘set by Territory laws’, not by, for example, ‘the effect of the operation of the law in the circumstances’. The point was made by Bell J in *Momcilovic v The Queen* when she said that the question is whether ‘the ordinary meaning of the provision would place an unjustified limitation on a human right’.⁷⁴ The Tribunal’s reasons do not make clear the purpose for which it considered evidence of the ‘public interest’ (discussed further below), but if it was as evidence of justifiable limits on human rights then it was mistaken in doing so.

An interpretation of s 109 of the DA which permits an exemption allowing any discriminatory conduct, entirely negating protection against discrimination – such as outright prejudice – cannot be demonstrably justified in a free and democratic society. An attempt must therefore be made under s 30 of the HRA to ‘[s]o far as it is possible to do so consistently with its purpose, [interpret it] ... in a way that is compatible with human rights’.

⁶⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

⁶⁹ *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [51]

⁷⁰ HRA, s 5.

⁷¹ *Ibid*, s 8(3).

⁷² *Discrimination Act 1991* (ACT), s 8.

⁷³ *Ibid*, s 109(3).

⁷⁴ *Momcilovic v The Queen* [2011] HCA 34, [684], emphasis added.

For s 109 of the *DA* the interpretation exercise returns to the question of the Act's purpose, which the Tribunal avoided. The Act's essential purpose is a human rights one – the elimination of discrimination – and a human rights-compatible meaning of the Act will trim back the 'unbounded' purpose found by the Tribunal to its human rights core. In other words, s 30 of the *HRA* operates as a remedy for the unjustifiable limits on human rights imposed by the very broad terms (as the Tribunal chose to see them) of s 109 of the *DA*.

Had the Tribunal used s 139 of the *LA* it would have reached the same conclusion; because the *DA* itself has a human rights purpose it does seem that s 30 of the *HRA* adds nothing to s 139 *LA*. But the equivalence of s 139 of the *LA* and s 30 of the *HRA* arises only because the *DA* is a human rights law. There is no necessary conflation more generally,⁷⁵ and when the law in question is not a human rights law – as is usually the case – interpretation under s 30 of the *HRA* will be a far more difficult exercise.

The Tribunal in *Raytheon v ACT HRC* was mistaken when it read the phrase 'consistently with its purpose' in s 30 of the *HRA* as having an obvious connection to s 139 of the *LA*, and when it concluded that s 30 of the *HRA* therefore merely requires a purposive interpretation. In the Victorian Civil and Administrative Tribunal Bell J was understandably concerned that the approach in *Raytheon v ACT HRC* sets the wrong example, and quite rightly saw it as suggesting that a human rights law makes no difference to the operation of the exemption power, reduced to 'do[ing] little if any more work than the standard principles of interpretation, when it was intended to go further in the direction of human rights'.⁷⁶ Limiting the scope of s 30 of the *HRA* to the purposive rule in s 139 of the *LA* is not warranted by the relevant *Explanatory Statement*, which makes no explicit reference to s 139 *LA*. Rather, the *Explanatory Statement* says that s 30 of the *HRA* 'clarifies the interaction between the interpretive rule and the purposive rule',⁷⁷ and 'draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557'.⁷⁸ The effect of s 30 of the *HRA* is that unless the law is intended to operate in a way that is inconsistent with the right in question, *the interpretation that is most consistent with human rights must prevail*.⁷⁹

In summary, there were two paths the Tribunal in *Raytheon v ACT HRC* could have travelled, and they would have led to the same position: a reading of s 109 of the *DA* that was human rights-compliant and consistent with the *DA*'s purpose. Understanding s 109 of the *DA* in this way means that the exemption sought by *Raytheon* would have to have been refused. *Raytheon* did not pretend that it was seeking an exemption to promote the objects of the *DA*; rather, it was seeking an exemption for an unrelated purpose (to operate its business) said to

⁷⁵ See the discussion of 'Reconciling s 30 and s 139' in *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147, [208]-[220].

⁷⁶ *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [103].

⁷⁷ The Legislative Assembly for the Australian Capital Territory, *Human Rights Amendment Bill 2007 Explanatory Statement*, 2007, emphasis added.

⁷⁸ The way in which *Ghaidan* should be understood and applied is a current and difficult issue: in Australia, for example, see *Momcilovic v The Queen* [2011] HCA 34; *In the Matter of an Application for Bail by Isa Islam (Islam)* [2010] ACTSC 147; Michael Stanton, 'Fighting Phantoms: A Democratic Defence of Human Rights Legislation', (2006) 32(3) *Alternative Law Journal* 138; generally, for example, see Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70(2) *Modern Law Review* 294; Alison Young, '*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap' [2005] *Public Law* 23.

⁷⁹ *Ibid*, emphasis added.

be in the ‘public interest’, discussed below. For political and practical reasons, refusing the exemption may not have been the preferred result, but it would have been the correct result under anti-discrimination and human rights law. As the Tribunal in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* quite rightly said (before granting an exemption): Whether or not ‘[the discrimination] prohibitions may be considered uncomfortable or inconvenient, Parliament has enacted them’.⁸⁰

V RAYTHEON’S ‘PUBLIC INTEREST’ EVIDENCE

The Tribunal in *Raytheon v ACT HRC* dealt at a very early stage in its reasons with Raytheon’s argument that there was a substantial public interest in granting the exemption.⁸¹ It seems to have done so for one of two reasons, both mistaken.

The Tribunal may have taken account of evidence of the ‘public interest’ as part of the s 28 *HRA* assessment of whether the s 109 of the *DA* exemption power is a justifiable limit on human rights; this was an error, as the question of justifiable limits is assessed by reference to the terms of the relevant law.⁸² Alternatively, the Tribunal may have taken account of evidence of the ‘public interest’ when exercising the discretion under s 109 of the *DA*; this was an error, as the issue is not whether there is a public interest in granting an exemption, but whether an exemption should be granted taking into account the considerations that are appropriate under 109 of the *DA*.

In an inclusive list, the only two prescribed considerations under 109 of the *DA* are the need to promote an acceptance of and compliance with the *DA*, and the desirability, if relevant, of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination.⁸³ Because the Tribunal considered that s of the 109 of the *DA* was broad enough to encompass reasons for an exemption beyond the *DA*’s anti-discriminatory objectives,⁸⁴ it was open to receiving evidence which addressed reasons for the exemption other than to promote the objects of the *DA*. Those other reasons were made more palatable, and even persuasive, by being said to be in the ‘public interest’. If, however, s 109 of the *DA* is given a meaning that accords with a narrower, human rights purpose, evidence of non-human rights implications of an exemption is irrelevant.

In any event, the Tribunal heard Raytheon’s argument that there was a substantial public interest in granting the exemption,⁸⁵ that is, in allowing it to discriminate on the ground of a person’s race. On its face, this is a bold argument. It says, in effect, that the public interest is served by allowing racial discrimination. The public interest said by Raytheon to be served by allowing racial discrimination was, first, avoiding an adverse impact on Australia’s defence capability and readiness.⁸⁶ This gives the public interest argument a sense of overwhelming import, suggesting that no argument can succeed when the security of the state is at stake; indeed, it seems that the Tribunal had exactly that sense. But such a claim demands very good evidence if it is to be established: it is easy to make grand claims of

⁸⁰ *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [15].

⁸¹ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [25].

⁸² See text associated with above n 74.

⁸³ *Discrimination Act 1991* (ACT), s 109(3).

⁸⁴ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [47].

⁸⁵ *Ibid*, [25].

⁸⁶ *Ibid*, [25].

possible doom; a tribunal should of course be careful in concluding that such claims have substance, let alone that they can be shown to be likely.

There was, however, scant evidence before the Tribunal that refusing an exemption – and so requiring Raytheon to comply with the DA's prohibition against racial discrimination – was likely to have an adverse impact on Australia's defence capability and readiness. The only evidence was affidavit evidence of two of the respondent's lawyers, who made untested claims that without access to ITAR controlled material Raytheon would not be able to keep a NASA site operational, would experience difficulties in managing its business and in running some classified programs, and may not be able to complete its contracts, all of which could compromise Australia's defence capabilities and, in some instances, affect the readiness of its defence forces. Similarly, in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* the applicant, with the same legal representatives, relied on the same general and untested assertions.⁸⁷

None of the lawyers' evidence was probative of the public interest claim Raytheon relied on; it failed the Rice-Davies test: 'He would say that wouldn't he'.⁸⁸ At its highest, the evidence was assertions that there could be some unspecified consequences, made by people who were not obviously qualified or well-placed to say so. On an ordinary standard of proof, the balance of probabilities,⁸⁹ the evidence lacks probity. Having regard to the nature of the subject matter and the gravity of what was in issue⁹⁰ – permitting race discrimination – the evidence was (or should have been) entirely unpersuasive. The Tribunal reasoned that 'the evidence of neither [witness] was challenged in these proceedings, save as to its sufficiency, and the Tribunal should, therefore, accept and act on it'.⁹¹ It is impossible to see how, if evidence is challenged as to its sufficiency, it should 'therefore' be accepted and acted on.

It was that very insufficiency of evidence that led the Northern Territory Anti-Discrimination Commissioner to say in 2007 that 'Raytheon has failed to convince me that Australia would be any less secure nationally without the ... exemption'.⁹² In seeking an ITAR-related exemption from the *Anti-Discrimination Act* (NT), Raytheon had asserted 'that a failure to grant the exemption would substantially undermine Australia's defence capabilities', but the assertion was found to be 'unproven and unsupported by evidence'.⁹³ The NT Commissioner observed that 'the important subject of national security deserves a rigorous analysis ... [but that] Raytheon has made no attempt beyond mere assertion to convince me of the accuracy of this proposition'.⁹⁴ In a Queensland case where the application for the exemption was not decided because it was considered unnecessary in the circumstances, the Tribunal said that it

⁸⁷ *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [35]-[39], [41].

⁸⁸ Based on the response 'He would, wouldn't he', given by the courtesan Mandy Rice-Davies when told in court that Lord Astor had denied having met her; see A Partington (ed), *The Oxford Dictionary of Quotations* (Revised 4th ed, Oxford, 1996) 540; the expression 'imputes interests to those who claim to be disinterested': P. Heelas, *Religion, Modernity, and Postmodernity* (Wiley-Blackwell, 1998) 32.

⁸⁹ See eg *Evidence Act 2011* (ACT), s 140(1).

⁹⁰ See eg *ibid*, s 140(2); *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537, 577 (Branson J).

⁹¹ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [64].

⁹² *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027, [7.13].

⁹³ *Ibid*, [7.12].

⁹⁴ *Ibid*, [7.13].

would have refused the application on its merits as the arguments were unpersuasive and supported by scant evidence.⁹⁵

The ACT HRD Commissioner was of the same view when making the decision that was subject to review in *Raytheon v ACT HRC*, saying that ‘although Raytheon and other submissions have asserted that the grant of this exemption is vital to ... the delivery of a range of defence, scientific and intelligence services to the Australian Government, I am not fully persuaded that this is the case’.⁹⁶ In observing that the threshold for limiting the right to equality and non-discrimination on racial grounds is high, the ACT HRD Commissioner may have had in mind the *Briginshaw* principle that the seriousness of the issues is a factor when assessing the strength of the available evidence,⁹⁷ but an awareness of this principle is starkly absent from the Tribunal’s evaluation of the evidence in *Raytheon v ACT HRC*.

A second ‘public interest’ that Raytheon claimed was served by allowing racial discrimination was avoiding ‘loss of employment opportunities for a significant number of people [already] employed’.⁹⁸ Even if, for the sake of argument, people’s loss of employment is a matter of public interest and it is proper to take account of matters of public interest in deciding an exemption application, the evidence in support of the claim was inadequate.

The lawyers’ affidavits claimed that without access to the ITAR-related material, employees would not be able to ‘keep the [Tidbinbilla] site operational’, that employees at Raytheon’s head office needed the material to do their work, and that work would ‘likely’ be sent offshore. As well they claimed that failing to comply with the ITAR licence means that Raytheon’s authority ‘could’ be revoked, that Raytheon ‘could’ be barred from using or receiving ITAR-related materials, and that US exporters to Raytheon ‘could’ be prosecuted.

These general and conditional claims fall well short of an ordinary standard of probative evidence, and fail completely to respond to the nature of the subject matter and the gravity of the matters.⁹⁹ However, even if the evidence had some probative value, the Tribunal should have weighed Raytheon’s professed concern for loss of jobs against the position taken by the workers’ representatives. The granting of an exemption was opposed by Unions ACT, on behalf of the Communication Electrical Plumbers Union, the Community and Public Sector Union, the Australian Manufacturing Workers’ Union and the Australian Workers Union, all representing several hundred workers who may be affected by an exemption. Independently of this submission, the Australian Manufacturing Workers’ Union also opposed the granting of an exemption. The unions’ opposition was known to the Tribunal, having been set out in the decision under review,¹⁰⁰ but the Tribunal made no reference to it.

The Tribunal felt justified taking account of these public interest matters because of the broad meaning it gave to s 109 of the *DA*, but also because of some idea it had of national

⁹⁵ *Boeing Australia Holdings Pty Ltd & related entities (No. 2)* [2008] QADT 34, [83(f)].

⁹⁶ Letter from the ACT Human Rights Commission to Mr Peter Arthur, 20 November 2007, <www.hrc.act.gov.au/content.php/category.view/id/105>.

⁹⁷ See eg references at above n 90.

⁹⁸ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [26]; and see similarly *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [38]-[39], [41].

⁹⁹ See eg references at above n 90.

¹⁰⁰ Letter from the ACT Human Rights Commission to Mr Peter Arthur, 20 November 2007, <www.hrc.act.gov.au/content.php/category.view/id/105>.

consistency: the Tribunal took comfort in the fact that in all the other exemption decisions ‘the same kinds of grounds that are relied upon for the grant of an exemption in this case were regarded as a sufficient justification for exemption by the decision-maker in each of those cases’.¹⁰¹ It followed, therefore, that the same approach of ‘having regard to broad considerations of public interest’¹⁰² should be taken in *Raytheon v ACT HRC*, ‘in the interests of uniformity and comity’.¹⁰³ In doing so, the Tribunal abdicated any responsibility for analysing and giving effect to the specific provisions of the ACT legislation, quite apart from analysing whether the approach taken in the other jurisdictions was warranted. Similarly, the Victorian Tribunal in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*, seems to have been swayed by the fact that similar exemptions had been granted elsewhere.¹⁰⁴

VI REFLECTING ON THE FAILURE TO STARE DOWN THE ITAR

Despite its thin and confused reasoning, *Raytheon v ACT HRC* is important as the first and, so far, only attempt under the *HRA* to reconcile a discrimination exemption provision with human rights law. The merits of the decision were not reviewed; the ACT HRD Commissioner’s appeal was dismissed because the issues that were said in the Notice of Appeal to be questions of law were found not to have been framed as such.¹⁰⁵ A more recent application to review a refused exemption in the ACT was settled by an agreement which allows racial discrimination in defined circumstances,¹⁰⁶ an apparent concession by the ACT HRD Commissioner that the poorly-reasoned decision in *Raytheon v ACT HRC* stands in the way of a human rights compatible interpretation of the exemption power.

As noted above, Bell J in Victoria has already expressed concern that the approach in *Raytheon v ACT HRC* sets the wrong example.¹⁰⁷ Despite the uncertain future of the *Charter* in Victoria,¹⁰⁸ the first and, so far, only ITAR-related decision under the Victorian *Charter*, *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* is also troubling in its approach and in its ready adoption of public interest arguments.

With other decisions that have considered similar exemption applications, *Raytheon v ACT HRC* invites speculation on the extent to the decision makers have been conscious of the pressure on them to grant the exemption. In the face of alleged risks to national security, business viability and employment, it must be hard for a court or tribunal to stand by the purpose of anti-discrimination legislation, no matter how clearly it is stated in all jurisdictions, and even when reinforced by human rights laws as in the ACT and Victoria.

Courts and tribunals have been left to cope with pressure which is not a technical legal one but is ITAR-induced, and which has political, diplomatic and economic dimensions that

¹⁰¹ *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [47].

¹⁰² *Ibid*, [44].

¹⁰³ *Ibid*, [49].

¹⁰⁴ *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [40]

¹⁰⁵ *ACT Human Rights Commission v Raytheon Australia Pty Ltd & Ors* [2009] ACTSC 55.

¹⁰⁶ *BAE Systems Australia Limited v ACT Human Rights Commission* [2011] AACT 53.

¹⁰⁷ Above n 76.

¹⁰⁸ Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, Parliament of Victoria, September 2011, Recommendation 13: ‘that the justifiable limits provision be redrafted’, and Recommendation 35: ‘that [the] interpretation of laws [provision] ... be repealed’.

should properly be taken up by the Australian Government.¹⁰⁹ Courts and tribunals have characterised the exemption question as one which asks whether ‘[t]he public interest in granting the exemption outweighs the public interest and other interests in not granting it’.¹¹⁰ But in reality they have had little real choice, in the face of employers’ (poorly substantiated) claims that without the exemption the defence contracts will be breached with serious consequences, including the loss of jobs.

The newly-discovered broad ‘public interest’ criterion has distorted discrimination law, undermining conventional acceptance that ‘temporary exemptions were expected to promote the aims of the Act [and that] commercial disadvantage was deemed not constitute a proper purpose’.¹¹¹ The broad ‘public interest’ criterion has opened up the exemptions power so widely that what a discrimination statute promises in one part, it takes away in another. This was acknowledged openly in Western Australia, for example, when the defence manufacturers conceded that in their exemption application they could not invoke the ‘spirit’ of the *Equal Opportunity Act 1984* (WA), and the Tribunal concluded that ‘the grant of the exemption would not fit within the objects’ of the Act.¹¹² This ‘expansive view’ has been criticised as irreconcilable with ‘the primary purpose of the equal opportunity legislation’.¹¹³ Bell J is right to reject the proposition – central to the way that courts and tribunals have tried to manage the confronting demands of the ITAR – that the exemption power in anti-discrimination laws can be exercised to achieve ‘convenient, economic and practical outcomes’,¹¹⁴ and says that to exercise the power to that end is a matter of ‘expedience’ which is ‘inconsistent with the principled purposes of the legislation, even given the provisions for exceptions and exemptions’.¹¹⁵

It should be the case that human rights laws in the ACT and Victoria give decision makers the strength they need to stand by the spirit of anti-discrimination laws, and to stay within the objects of those laws. That has indeed been the case so far under the Victorian *Charter* for non-ITAR related exemptions.¹¹⁶ Bell J has observed that ‘[t]he discretion ... to grant an exemption must be exercised compatibly with the human rights in the *Charter*, especially the equality rights’,¹¹⁷ and Harbison J felt bound by the *Charter* to ‘not make an exemption unless I am sure that the proposed exemption is justified by the purpose of the Equal Opportunity Act, and that the granting of the exemption is compatible with human rights’.¹¹⁸

An ITAR-related exemption which is sought genuinely, and not for convenience,¹¹⁹ may indeed raise concerns about security, defence, business viability and employment. If it is refused because of the proper operation of the exemption power, then the solution for those

¹⁰⁹ See Simon Rice, ‘Discriminating for World Peace’ in Jeremy Farrall and Kim Rubenstein (ed), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, Cambridge) 355-377, 362-364.

¹¹⁰ *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259, [161].

¹¹¹ Margaret Thornton, ‘Excepting Equality in the Victorian Equal Opportunity Act’, (2010) 23 *Australian Journal of Labour Law* 240, 246, citing *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782.

¹¹² *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259, [111].

¹¹³ *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [65].

¹¹⁴ *Ibid*, referring to *Boeing Australia Holdings Pty Ltd* [2007] VCAT 532, [35].

¹¹⁵ *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [65].

¹¹⁶ See eg *Ibid*; *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415; see also Thornton, above n 111.

¹¹⁷ *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [75].

¹¹⁸ *Royal Victorian Bowls Association Inc* [2008] VCAT 2415, [47].

¹¹⁹ *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027, [7.19].

who insist they need an exemption lies with the parliament and the view it takes on how that power should operate in future.

There is now a much clearer path to reconciling discrimination exemptions and human rights law than there was at the time of *Raytheon v ACT HRC*. It is important for the integrity of anti-discrimination law and human rights law in Australia that courts and tribunals follow the path clearly marked by the legislature, since explicated in *Momcilovic v The Queen*. The political and pragmatic pressures of the ITAR exemption cases are such that unless there is fidelity to the statutory regime, ‘judges [and tribunals] may be suspected of tailoring their approaches in order to produce a desired outcome’.¹²⁰

¹²⁰ *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57, [68] (Kirby J).

JUSTICE, THE INDIVIDUAL AND THE COURTROOM: COMMENT ON BONYTHON; AILWOOD; KUKULIES-SMITH AND PRIEST

MARGARET THORNTON*

I SEEKING JUSTICE

The scenarios presented in these three papers are all concerned with the search for justice through law. While popular culture typically depicts justice and law as synonymous, they rarely are, although the societal ideal is a fusion of the two. Justice, however, is a vexed and elusive concept, which is now heard only faintly in public discourse. Aristotle famously conceptualised justice as treating like cases alike;¹ Julius Stone, following Aristotle, regarded equality as the test of justice;² John Rawls never abandoned the idea of justice as fairness,³ while Bentham believed that every object of law should be adjudged in terms of the maximisation of happiness based on the utility principle.⁴

More recently, Amartya Sen has suggested that justice needs to be ascertained in terms of a person's capabilities, which takes into account their heterogeneous personal and social circumstances.⁵ Sen's conceptualisation of justice represents a radical departure from the more conventional theories because he challenges the idea of justice as an abstraction that can be applied universally. Rather than empty formalism, Sen makes it clear that justice cannot be indifferent to the lives that people actually live.⁶ He recognises, furthermore, that to attain justice for the individual, we need the support of institutions which promote justice rather than trusting the institutions themselves as the manifestations of justice.⁷ I suggest that Sen's theory of justice is salutary in light of the symposium theme of 'Justice Connections', as characteristics of identity, including sex, race, sexuality and disability, cannot be ignored in the constitution of substantive justice.

As it is, there is an inevitable tension between the individualistic and subjective understanding of justice, on the one hand, and the objective and universal understandings underpinning our legal system, on the other. The three presentations on which I have been

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¹ Aristotle, *Politics* (ed and trans J Warrington) (Everyman's Library, 1961), J M Dent & Sons, §1282b.

² Julius Stone, *Human Law and Human Justice* (Maitland Publications, 1966) 332.

³ John Rawls, *A Theory of Justice*, (Oxford University Press, 1971).

⁴ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon, [1823] 1907) 2, 170.

⁵ Amartya Sen, *The Idea of Justice*, (Belknap Press of Harvard University Press, 2009). See also Martha C Nussbaum and Jonathan Glover (eds), *Women, Culture, and Development: A Study of Human Capabilities*, (Clarendon Press, 1995).

⁶ *Ibid.*, 18.

⁷ *Ibid.*, 82.

asked to comment involve quite different scenarios, but all highlight this tension, together with a desperate desire for *individual justice* in a context of *institutional in-justice*.

In one sense, these tensions are unsurprising as litigation — both civil and criminal — involves a conflict of values between opposing interests within an adversarial setting. While a court must make a determination, the outcome necessarily favours one party over the other, which may not accord with any of the iterations of justice mentioned. What is more, our judicial system favours procedural regularity, which is all too often confused with justice. Litigants, like the wider community more generally, are primarily concerned with achieving a substantively just resolution of a dispute.

Let me turn to the papers, which all support the proposition that procedural and substantive justice are not synonymous.

A Wendy Bonython: ‘The Standard of Care in Negligence: The Elderly Defendant with Dementia’

This paper is concerned with the law of torts and involves a person with a mental illness or dementia who has caused harm to others. While excused by the criminal law, this is not the case in negligence according to prevailing Australian law, although the very word ‘negligence’ is curiously inapposite as it suggests a capacity for forethought on the part of the alleged wrongdoer.

The fundamental policy question which lies at the heart of negligence law is: who should bear the loss? Finding the mentally ill or cognitively impaired defendant liable would seem to be relatively unproblematic if the injury occurred in a situation where the loss was covered by insurance, as with a motor vehicle or workplace accident. However, this is not necessarily the case, as may be seen from *Carrier v Bonham*.⁸ While the court found that the plaintiff bus driver was prevented from working again because of psychological trauma, the mentally ill defendant lost his house and was presumably reduced to reliance on social welfare for the rest of his life. Was that a just outcome? Didn’t it compound the injustice of finding him negligent to start with? Wouldn’t it have been preferable for the bus driver’s insurer (motor vehicle or WorkCover) to bear the loss?

Fifty years ago, the High Court saw fit to adjust the ordinary standard of care to cater for the limitations based on foresight and prudence according to the age of a child (*McHale v Watson*),⁹ but courts have not been prepared to make a comparable degree of adjustment for the mentally ill or cognitively impaired person. I found the reasoning of McMurdo P in *Carrier v Bonham* rather odd, to say the least, as the analogistic reasoning she purports to rely on is not carried through to its logical conclusion. The judge says that while there is an objective standard to be expected of an ordinary reasonable child of comparable age, there is no objective standard of an ordinary reasonable person suffering from a mental illness in view of variations in the condition. Because of this epistemological difficulty, the objective standard expected of the ordinary reasonable person becomes the default position and no cognisance whatsoever is taken of the impaired reasoning ability of the mentally ill person. Just as regard is paid to the subjectivity of the child tortfeasor, does justice not also require that regard be paid to the subjectivity of the mentally ill or cognitively impaired tortfeasor?

⁸ *Carrier v Bonham* [2001] QCA 234.

⁹ *McHale v Watson* (1966) 115 CLR 199.

Thus, while at criminal law, a mentally ill person is deemed incapable of forming the relevant mens rea, that person's mental state is deemed irrelevant civilly which, as Wendy Bonython points out, is both bizarre and inconsistent. I suggest that it is also grossly unjust because all the attributes associated with reason, including reasonableness and the reasonable foreseeability of harm, are assigned to a mentally ill or cognitively impaired person. This person is deemed objectively to understand who is their neighbour according to Lord Atkin's formulation.¹⁰ Here, we see the way the legal system invariably favours the universal over the particular, even if it distorts the outcome.

Is this just? It certainly does not satisfy the basic Aristotelian idea of treating like cases alike. Indeed, the universal application of the principles of negligence law, with its preoccupation with reason, reasonableness and ordinariness, appears to be manifestly unjust when applied to a person with a mental illness or cognitive impairment. The outcome seems to fail in respect of all understandings of justice. Rather than engage in an artificial exercise to assign fault, the anomaly in the case of those who are seriously cognitively impaired points to the desirability of a universal no-fault compensation scheme. However, the chances of reviving the call for such a scheme in the current neoliberal climate appear slim.

B Sarah Ailwood: 'Women's Voices Within and Beyond the Courtroom: Tegan Wagner's Story'

The facts of this scenario depart sharply from those dealt with by Wendy Bonython. They deal with the sexual assault of a 14 year-old girl — or really the aftermath of the assault — and the way in which she sought to attain a modicum of justice beyond the courtroom, not just for herself but for other young survivors of sexual assault. Sarah Ailwood adopts an original and uplifting approach to a depressingly familiar story by focusing on an examination of the role of autobiographical theory. Consequently, Sarah's paper does not focus on the well-known difficulties that inhere within sexual assault trials, although reference is made to the 're-traumatising' experience of the courtroom, including the fact that the young woman, Tegan, was subjected to almost 2,000 questions in cross-examination over three days. While two of the three brothers charged with sexual assault were convicted in what is, somewhat euphemistically, referred to as 'the criminal *justice* system', the injustice of what occurred within the courtroom led Tegan to seek substantive justice elsewhere.

Sarah shows how the young woman endeavoured to transcend the shame and indignity of the courtroom by writing a memoir, which acted as a cathartic aid to recovery. The memoir allowed her to present an alternative identity to that of the stereotypical rape victim constructed by defence counsel — she asked for it, she had been engaging in risky behaviour by drinking, etc, etc. The memoir acts as a counterpoint to the rigid 'question-and-answer' model which constrains the victim's testimony in the courtroom. The creation of a different self is thereby a means of securing a substantive understanding of justice, as opposed to the arid formalism of the courtroom. Sarah also argues that the autobiography facilitates a shift in focus from the victim to the perpetrators. This is something that feminist critics have long sought to do in the conduct of sexual assault trials but have been thwarted by the constraints of legal formalism and the historic weight of a masculinist bias in this area of law.

¹⁰ *Donoghue v Stevenson* [1932] AC 562.

From the dispiriting experience of the courtroom, the young woman was prompted to begin her quest for justice. As Julius Stone reminds us, justice can be found in the most inhospitable places, including in the wilderness.¹¹ Thus, while the re-traumatising experience of the trial produced only a formulaic and shadowy sense of justice, Tegan's memoir was able to produce a more satisfying realisation of substantive justice and closure. Her empowerment through the writing of a memoir is a manifestation of Amartya Sen's understanding of justice as capabilities. Here is a young woman who refused to be cowed and who proceeded to write compellingly, not only from the perspective of her own sense of injustice in the courtroom but out of a desire to ensure justice for other young women. Tegan Wagner's memoir allowed her to imagine justice by writing creatively about her personal experience of the criminal justice system.

C Wendy Kukulies-Smith and Susan Priest: 'No Hope of Mercy for the Borgia of Botany Bay: Louisa May Collins, the last woman executed in NSW, 1889'

When we come to Wendy and Susan's paper, we are confronted with a very crude understanding of justice, for the choice before the criminal law was guilt or innocence — death or life. The authors tell us at the outset that the 'Crown had conducted itself in the ardent pursuit of justice', which seems to mean that a conviction was sought at all costs. We can only speculate as to the reasons for this. Although we are told that Louisa Collins was constructed as an aberrant example of womanhood, which was undoubtedly the case, we need to have more evidence before accepting that was why a conviction was so relentlessly pursued. It may also be that a culprit needed to be found to allay unease and restore harmony to the community following a suspicious death.

The understanding of justice underpinning the case appears to be the ancient one of *lex talionis* — an eye for an eye, a tooth for a tooth — ie a punishment should equal the injury sustained. This understanding of punishment as retaliation derives from tribal lore. It does not comport with any of the more sophisticated theories of justice that I adverted to at the outset. The Louisa Collins case underscores not only the uncivilised and unjust nature of state legitimised violence but the way injustice is compounded when a conviction is flawed.

Wendy and Susan undertook extensive archival research relating to the multiple trials of Louisa Collins to present an intriguing narrative based on the circumstantial evidence that was used to convict her. They do not speculate as to whether they believed Louisa was in fact responsible for the death of her husband. It is left for the reader to weigh up the equivocal evidence. Nevertheless, the case raises a number of pointed concerns regarding procedural justice which, as Amartya Sen intimated, is a prerequisite for the realisation of substantive justice.

The role of Chief Justice Darley is worthy of comment as he not only appears to have been one who 'sought a conviction at all costs', but he also either contributed to or compounded several procedural errors. First of all, in passing sentence, he made a gratuitous and improper remark to the effect that poison might also have been responsible for the death of Louisa's first husband, even though the jury could not agree on a verdict in that trial. Secondly, he plays a key role as an appellate judge, despite being the sentencing judge. Although Darley CJ and the two judges who presided over the first two trials comprised the appellate bench,

¹¹ Julius Stone, *Social Dimensions of Law and Justice*, (Maitland Publications, 1966) 798.

this glaring conflict of interest was not challenged. Thirdly, it was Darley CJ who advised the Governor through the Executive Council that there were no grounds for the exercise of the prerogative of mercy.

This case highlights the most powerful argument against capital punishment — ie, if a mistake has been made in the conviction, it can never be remedied and the so-called ‘justice system’ itself is permanently tarnished. The horror of capital punishment together with its propensity to commit further grievous wrongs violates all the basic tenets of justice. It causes a loss of faith in the judicial system, which must adhere to procedural regularity in order to produce just outcomes.

II CONCLUSION

Thus, while the three scenarios presented are quite different, they all underscore society’s longing for justice — that it will seamlessly merge with the desire for procedural regularity. The hope is that procedural and substantive justice will not continue to operate as two parallel lines on a railway track — never meeting except as an illusion on the horizon. While fusion may be an ideal that is never in fact attainable, as the system is administered by flawed human beings, the three presentations remind us that we must not turn away from the bright star of substantive justice — the telos of any self-respecting legal system. I thank the presenters for eloquently reminding us of this important goal.

THE STANDARD OF CARE IN NEGLIGENCE: THE ELDERLY DEFENDANT WITH DEMENTIA IN AUSTRALIA

DR WENDY BONYTHON*

ABSTRACT

To date, there are no reported cases addressing negligent acts or omissions committed by an elderly defendant with dementia. Demographic and epidemiological data indicate that it is a question of when, rather than if, the courts encounter a defendant with these characteristics. This paper seeks to explore the options open to the courts in dealing with such a defendant, by examining the modifications considered to the objective 'reasonable person' test to determine the appropriate standard of care, including defendants with mental illness, physical incapacity, and child defendants, each of which class of defendant bears similarities to an elderly defendant with dementia. The paper argues that while extending the existing law relating to the liability of mentally ill defendants may *prima facie* appear to be an attractive option, it is an area of law which is overdue for reform in and of itself, and extending it to apply to elderly defendants with dementia should be resisted.

I INTRODUCTION

In determining whether a defendant has behaved negligently, the defendant's conduct is compared with the conduct of a hypothetical 'reasonable person' in the same circumstances as the defendant, thereby benchmarking the conduct against an objective standard. If the defendant's conduct matches or exceeds the level of care exercised by the 'reasonable person', then the defendant has met the requisite standard of care; if the defendant's conduct falls short of the objective standard, then other questions addressing the possible negligence of the defendant are considered by the court.

In *Blyth v Birmingham Waterworks Co*, Alderson B defined negligence as '... the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do'.¹ Although the statement predates the availability of negligence as an action, the 'reasonable man' test has been adopted as the basis for determining the appropriate standard of care in negligence.

So who exactly is the 'reasonable man'? He has variously been described as 'the man on the Clapham omnibus',² the 'man on the Bondi tram',³ and the 'reasonable man of ordinary

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¹ *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 156 ER 1047, 784.

² *McGuire v Western Morning News Co Ltd* [1903] 2KB 100, 109.

³ *Papatonakis v Australian Telecommunications Commission* (1985) 156 ZCLR 7, 36.

intelligence and experience'.⁴ *Vaughan v Menlove*⁵ established that it is an objective test, which does not permit consideration of an individual's personal idiosyncrasies.

The 'reasonable man' test of a standard of care has traditionally been viewed as inviolable – something which cannot be modified or adjusted for fear of unravelling the very fabric of negligence law. However this view represents something of a legal fiction – the 'reasonable man' has morphed into the 'reasonable person' (in name if not in fact), and other adjustments to the standard of care in limited circumstances have been permitted by the courts. Accordingly, the test has frequently been criticised for failing to accurately reflect reality – it has been applied by judges who tend to be male, well-educated, and from narrow cultural backgrounds, and ignores issues such as gender. Although the test is now referred to as a 'reasonable person' test, there is still considerable debate about whether the change in name reflects a deeper change in the characteristics of the objective standard, or whether it is merely another example of politically correct window-dressing.⁶

Other amendments to the 'reasonable person' test have clearly had greater impact. The test for determining the appropriate standard of care has been modified by statute in many jurisdictions to provide greater protection to medical practitioners⁷ and 'good Samaritans' behaving altruistically but negligently,⁸ from being sued; likewise, under the common law, several other categories of defendant have raised questions about the justice of holding all defendants to the same standard. In the case of minors, the test has been adjusted to a 'reasonable child of comparable age and experience';⁹ in the case of physically disabled defendants, some circumstances, such as sudden physical incapacity, may relieve the defendant of liability.¹⁰ In contrast, mentally ill defendants have traditionally been held to the same standard as a defendant without a mental illness in most common law jurisdictions, regardless of the defendant's capacity to achieve that standard.¹¹

The position the courts will adopt with respect to an elderly defendant with dementia is as yet untested, however the epidemiological data on the incidence of dementia against the background of an aging population, such as Australia is facing, makes it likely the courts will be required to consider it sooner rather than later. A report by public policy research group

⁴ *Glasgow Corporation v Muir* [1943] AC 448, 457.

⁵ *Vaughan v Menlove* (1837) 132 ER 490.

⁶ Discussed in Conaghan J, 'Tort Law and the Feminist Critique of Reason' in A Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (University of Kent, 1996) 51-58, extracted in Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, 'Torts: Commentary and Materials' (Lawbook Co, 10th ed, 2009).

⁷ Eg *Civil Liability Act 2002* (NSW), s 50(1).

⁸ Eg *Civil Law (Wrongs) Act 2002* (ACT), s 5(1).

⁹ *McHale v Watson* (1966) 115 CLR 199.

¹⁰ Eg *Scholz v Standish* [1961] SASR 123: the defendant driver was not liable for damage resulting from driving into a tree after being stung by a bee as the loss of control of the vehicle was both immediate and unavoidable. Contrast with *Leahy v Beaumont* (1981) 27 SASR 290, where a driver suffering a coughing fit, which eventually caused him to lose consciousness and control of the vehicle, was found liable because he had had sufficient time to pull over and stop the car prior to the accident.

¹¹ For detailed reviews of the case law on mentally ill defendants in trespass and negligence in USA, Canada, Ireland and the UK, and Australia, see Francis Bohlen, 'Liability in Tort of Infants and Insane Persons' (1924-1925) 23 *Michigan Law Review* 9; Pamela Picher, 'The Tortious Liability of the Insane in Canada' (1975), 13 *Osgood Hall Law Journal* 193; Stephanie Splane, 'Tort Liability of the Mentally Ill in Negligence Actions' (1983-1984), 93 *Yale Law Journal* 153; The Law Reform Commission (Ireland), 'Report on the Liability in Tort of Mentally Disabled Persons' (LRC 18-1985); Nikki Bromberger, 'Negligence and Inherent Unreasonableness' (2010) 32 *Sydney Law Review*, 411-435.

Access Economics predicts that by 2050, there will be 1.13 million people with dementia in the Australian population, based on existing epidemiological data.¹² Factors contributing to this predicted increase are the increasing age of Australia's population, and increasing life expectancy of elderly Australians: more people are living to the age where they are at risk of developing dementia, and, once they develop it, they are living for longer, as a result of improved physical health. Other policies, such as deinstitutionalisation, mean that more elderly people are active participants in the community. Some of these elderly people will have early stage or undiagnosed dementia, while others may have relatively advanced dementia, but lack appropriate levels of community care to prevent them from causing harm or damage to others.

Dementia has a somewhat uncertain status as a disorder. It is a broad term, which encompasses a number of 'diseases', including Alzheimer's Disease, vascular dementia, and dementias associated with other diseases, such as Huntington's Disease and Creutzfeldt-Jakob Disease. Key symptoms are cognitive decline and behavioural changes.¹³ Although it is included in the Diagnostic and Statistical Manual of Mental Disorders (DSM), which is traditionally regarded as a handbook of all recognised mental illnesses, there is widespread recognition by health professionals that dementia is a physical, rather than a mental, disease,¹⁴ a position supported by clearly identified physical causes for the cognitive and behavioural disturbances, including deposition of protein plaques in the brain, which are detectable at autopsy.¹⁵ Research has also identified a number of candidate genes which may be responsible for development of various dementias.¹⁶ Diagnosis of dementia is currently done by psychiatric interview; however advances in medical imaging technology make it likely that diagnosis based on physical manifestations prior to death will become routine in future. Cognitive behaviour levels of dementia patients are often described by comparison with the cognitive development levels of a child of a particular age, as is common practice with other forms of cognitive impairment.

These indeterminate features of dementia could arguably support a court dealing with a negligence matter electing to treat the question of the appropriate standard of care for defendants of this class the same way as minor defendants, mentally ill defendants, physically incapacitated defendants, or indeed in a completely novel way. Some courts dealing with other areas of law have indicated their willingness to treat dementia as a physical, rather than mental, illness.¹⁷

¹² *Keeping Dementia Front of Mind: Incidence and Prevalence 2009-2050* (2009) Access Economics <<http://www.apo.org.au/research/keeping-dementia-front-mind-incidence-and-prevalence-2009-2050>>. This report predicts a 4-fold increase in the numbers of Australians suffering from dementia between 2009 to 2050, from 245,400 to 1.13 million.

¹³ *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, text revision, American Psychiatric association) (DSM-IV-TR) [290.10-290.43].

¹⁴ Ticehurst, Stephen, 'Is Dementia a Mental Illness?' (2001) 35 *Australian and New Zealand Journal of Psychiatry* 716; Bromberger (above n 11) considers dementia to be a mental illness, in contrast with the view taken by this paper.

¹⁵ Alois Alzheimer, Rainulf Stelzmann, H. Norman Schnitzlein, and F. Reed Murtagh, 'An English Translation of Alzheimer's 1907 Paper, "Über eine eigenartige Erlranliung der Hirnrinde"' (1995) 8 *Clin Anat* 429.

¹⁶ Recent reviews include Paul M. Thompson, Nicholas G. Martin, and Margaret J. Wright, 'Imaging Genomics' (2010) 23 *Curr Opin Neurol* 368; Karolien Bettens, Kristel Slegers, and Christine Van Broeckhoven, 'Current Status on Alzheimer Disease Molecular Genetics: From Past, to Present, to Future' (2010) 19 *Hum Mol Genet* R1, R4-R11.

¹⁷ Reviewed in Ticehurst, above n 14.

In this paper, I will discuss the strengths and weaknesses of the existing law in each of these areas, focusing on Australian law as it relates to negligence, although historical developments from trespass and action on the case, and other jurisdictions, will be discussed where appropriate.

It is also important to remember that the critical question underpinning any adjustment to standard of care is the individual's capacity to achieve that standard. Not all patients with dementia will require a modified standard of care, any more than all defendants with mental illness, or all defendants with physical disability, because some of them will have the capacity to reach the standard expected of the 'reasonable person'. Clearly determination of the issue of an individual's capacity will be a question for the courts to determine on the facts of the case.

II HISTORICAL DEVELOPMENT OF THE STANDARD OF CARE

Although the law in Australia and many other common law jurisdictions currently differs with respect to the three classes of defendants with special characteristics considered (defendants with mental illness, child defendants, and defendants suffering a physical impairment), this has not always been the case. Early laws dealing with trespass treated all three categories of defendant in the same way, along with all other defendants. To understand the development of the differences, therefore, it is worthwhile to briefly consider their common origins.

Many scholars consider that the earliest form of trespass (trespass *vi et armis*) originated as a tort of strict liability, where the mens rea of the defendant was not relevant. Trespass on the case, which is more closely related to the modern tort of negligence, in contrast to trespass *vi et armis*, always required that negligence be established in order to make out the claim. Consideration of the defendant's mental state was introduced in the decision in *Weaver v Ward*, which Bohlen considers was a turning point in the development of trespass, as it recognized 'inevitable accident', and marked the transition of trespass from a tort of strict liability to one for which defences were available.¹⁸

The purpose of torts law is also relevant to its development with respect to the standard of care.

RAP v AEP and Another (1982) 2 NSWLR 508; *CCR v PS and Another (2)* (1986) 6 NSWLR 622. In these cases, Powell J considered that the applicants, who both had dementia, did not meet the conditions required for detention as 'mentally ill' persons under the *Mental Health Act 1958* (NSW). The Act itself did not provide a clear definition of mental illness, instead referring to schedules equating 'mentally ill' with terms including insanity, lunacy, and incapability. Based on consideration of the common law dealing with these terms, Powell J found that detention orders under the Act required some evidence that the applicant was suffering delusions, hallucinations, or some other psychotic behaviour, although he did not rule out the possibility that the applicants could still be subject to orders issued under the Act on the basis that they were 'incapable'. Powell J also stated that dementia was an 'organic', rather than 'functional', disease, thereby recognising the underlying physical causes and manifestations of dementia, and distinguishing it from mental illnesses. Although the decision in *CCR v PS* was subsequently overturned, the reasoning behind it remains sound.

¹⁸ Discussed in Bohlen, above n 11. Picher, above n 11, discusses an alternative viewpoint, that of Milsom, who argued that although not reflected in the pleadings for trespass *vi et armis*, juries did consider the moral culpability of the defendant, and so it was never a tort of strict liability in practice.

One view is that the primary role of torts law is to compensate plaintiffs for the wrong they have suffered, independent of culpability. Torts of strict liability, including early actions in trespass, where liability falls on the party responsible for the tortious act, regardless of their moral blameworthiness, support this view. According to this view, torts law is designed to protect the plaintiff from the financial consequences of the negligent act that injured them or their interests. This is an approach with origins in mediaeval torts law, and has frequently been relied upon by the courts in seeking to extend liability to defendants whose actions occur in the absence of fault.¹⁹

The counterview is that the purpose of torts law to punish conduct which is in some way blameworthy or culpable, with the punitive element being an award of damages against a defendant.²⁰ An extension argument, that the punitive function also serves as a deterrent to others considering similar conduct, also arises, although evidence in support of this argument is not strong.²¹ This is a position summarised by the maxim ‘no liability without fault’, a sentiment which first appeared in *Weaver v Ward*, and has been quoted many times since:

... therefore no man shall be excused of a trespass ... except it may be judged utterly without his fault ...²²

As history has clearly demonstrated, neither view of the purpose of torts law is without limitations. Plaintiffs with a good cause of action can be left bearing the financial consequences of a negligent act due to lack of a solvent defendant, and there have been instances where the court’s decision to award damages to a plaintiff has resulted in the defendant filing for bankruptcy, leaving the plaintiff with a pyrrhic victory at best. Similarly, the award of damages may not be enough to support the plaintiff for the remainder of their days if the compensation is for serious injury, and medical expenses are not adequately allocated.²³ Additionally, if an innocent plaintiff suffers injury or loss caused by another’s negligence, the plaintiff’s loss is not lessened simply because the defendant is a child, or was suffering from a sudden physical incapacity at the time.

In all of these situations, the compensation view of torts, rather than recognition of moral wrongdoing, is problematic. In response to these problems, many jurisdictions have implemented compulsory insurance schemes under legislation, to ensure that, in the event of a motor vehicle or workplace accident, a plaintiff who is injured as the result of negligence has some avenue for recovering costs. Of course, insurance schemes themselves raise two significant issues: firstly, they create inequities between blameless plaintiffs who are distinguished only by the nature of the negligent act they suffered, ie, one covered by insurance, such as driving a registered motor vehicle, compared with one not covered by insurance, such as a pedestrian walking out into traffic, the effects of which are compounded by the courts’ tendency to ignore insurance; and secondly, the validity of arguments that the purpose of torts law is to ‘punish’ morally blameworthy conduct on the part of the defendant are somewhat blunted by the distributive nature of insurance payouts.

Of course, the moral culpability argument raises the question of whether it is right to punish defendants for failing to achieve a standard of conduct it is impossible for them to achieve. If

¹⁹ Wolff SPJ in *Adamson v Motor Vehicle Insurance Trust* (1956) 58 WALR 56.

²⁰ Goudkamp, James, ‘The Spurious relationship between moral blameworthiness and liability for negligence’ (2004) *Melbourne University Law Review* 11.

²¹ Sappideen, Vines, Grant and Watson, *Torts: Commentary and Materials* (Lawbook Co, 10th ed) [1.30].

²² *Weaver v Ward* (1616) Hobart 134.

²³ Eg *Thurston v Todd* [1965] NSW 1158.

they lack the capacity to reach that standard, is it just to punish them for failing to achieve the impossible? In the case of *Williams v Hays*, which is frequently used as authority for the proposition that there is no defence of insanity in negligence cases, Haight J specifically stated that ‘there is no obligation to perform impossible things’. If the purpose of torts law, particularly with respect to negligence, is punitive, rather than compensatory, as is indicated by Lord Atkin in *Donoghue v Stevenson* (‘The liability for negligence whether you style it such or treat it as in other systems as a species of ‘culpa’, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay’),²⁴ and reflected locally by Deane J in *Jaensch v Coffey* (a finding of negligence may be based on a ‘general public sentiment of moral wrongdoing’),²⁵ then clearly law holding incapacitated defendants categorically liable in the same way as defendants with full capacity is inconsistent with at least some authority.

Modern Australia decisions dealing with the three key categories of incapacitated defendants have differed in their outcomes. Since *McHale v Watson* (discussed below),²⁶ children in Australia have had their negligent actions judged against the standard of a reasonable child of the same age. Defendants with physical incapacities have, under some circumstances, also been judged against a reduced standard of care which takes into account the effect of their physical incapacity. In considering defendants with a mental illness in negligence, however, the courts have been resolute in their determination to cling to the early law of trespass *vi et armis*, preferring that to the law requiring consideration of the defendant’s mental state or intention, arising from trespass/action on the case.

A Child defendants

The rationale for adjusting the requirements relating to children are based on age, and, arguably, could be equally applicable to the elderly in general.

In *McHale v Watson*²⁷ the court addressed the situation where a child defendant threw a pointed metal object at a post. That object deflected off the post, and struck another child, blinding her permanently in the struck eye. At first instance, Windeyer J found that the child defendant did owe the plaintiff a duty of care, based on the vague concepts of proximity that had developed around interpretation of the neighbour principle, but also found that the appropriate standard of care for a child was that of a reasonable child of the same age. In doing so, he relied on Lord Macmillan’s view in *Glasgow Corporation v Muir*,²⁸ which said: ‘The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.’

In reaching his decision, Windeyer J stated that: ‘I do not think that I am required to disregard altogether the fact that the defendant Barry Watson was at the time only twelve years old. In remembering that I am not considering “the idiosyncrasies of the particular person”. Childhood is not an idiosyncrasy.’²⁹

²⁴ Ibid.

²⁵ *Jaensch v Coffey* (1984) 155 CLR 549, 607.

²⁶ *Jaensch v Coffey* (1984) 155 CLR 549 at 607.

²⁷ *McHale v Watson* (1966) 115 CLR 199.

²⁸ *Glasgow Corporation v Muir* [1943] UKHL 2.

²⁹ *McHale v Watson* (1964) 111 CLR 384.

Windeyer J's adjustment to that standard of care, namely that of a reasonable child of the defendants age and experience, was upheld by the High Court, the justification for this decision probably best described by Kitto J, who said:

The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal. By doing so he appeals to a standard of ordinariness, to an objective and not a subjective standard. In regard to the things which pertain to foresight and prudence – experience, understanding of causes and effects, balance of judgment, thoughtfulness – it is absurd, indeed it is a misuse of language, to speak of normality in relation to persons of all ages taken together.³⁰

This decision created a precedent for an adjustment to be made to the standard of care of certain defendants, provided the appropriate standard could be determined based on what was expected of people belonging to the same class of persons as the defendant, thus providing an objective standard. Similar adjustments to the standard of care a child is compared with have also been made in other common law jurisdictions.³¹

It could, therefore, be argued that High Court's reasoning in *McHale v Watson* does not limit the adjustment to the standard of care exclusively to children, but instead was based on the recognition that people of different ages have differing capacities to meet the standard, as a normal function of their age. Following this line of argument, it becomes clear that, for many elderly people, cognitive decline, caused by dementia or other age-related diseases, is simply a consequence of their age, and as such should permit their conduct to be judged against an age-appropriate standard at the very least, if not a standard that also adjusts for their cognitive decline.

An argument against adjusting the standard to reflect the advanced age of the defendant could be that to do so would be to treat elderly defendants as if they were children, thereby denying them respect for their autonomy. This argument is, however, somewhat superficial, for at least two reasons: firstly, it misses the fact that the reasoning underpinning *McHale v Watson* relates to the normality of the defendant's conduct relative to their developmental stage, rather than the fact the defendant was a child per se; secondly, it disregards the legislative reforms which have modified the standard of care required of other classes of defendant, such as good Samaritans and medical practitioners, and common law decisions permitting modifications to the standard for some physically incapacitated defendants. Modified standards of care are no longer the exclusive right of child defendants, and to equate a modified standard of care with a child defendant is to ignore developments in several fields of negligence related law.

A further, practical issue for consideration is that it would be a matter for the defendant to raise the issue of a modified standard of care. If an elderly defendant felt particularly strongly that having their conduct judged against that of someone of comparable age would demean them, they could simply elect not to raise age as a factor in their argument at trial.

³⁰ *McHale v Watson* (1966) 115 CLR 199, [6] (Kitto J).

³¹ Richard Franzke, 'Infants' Liability for Intentional Torts and Negligence' (1960) *Ins. L.J.* 771.

B Physically incapacitated defendants

Although the causes and manifestations of dementia are such that it is viewed as a physical, rather than mental, illness, albeit one with cognitive and behavioural symptomology, reliance on the courts' approach to dealing with physically incapacitated defendants is unlikely to be appropriate for a defendant with dementia.

Many of the cases involving physically incapacitated defendants have arisen in the context of motor vehicle accidents where the defendant was in control of a vehicle. Therefore, the existence of insurance may potentially have influenced their outcomes, either consciously or otherwise. More relevantly, however, a key consideration emerging from the decisions is the suddenness of the incapacity. Examples include drivers affected by coughing fits,³² strokes,³³ heart attacks,³⁴ and bee stings.³⁵ The critical question considered by the courts is whether defendants had an opportunity to avoid the accident before they lost consciousness or not. If they did have the opportunity, but failed to take advantage of it, they will be held liable. If the effect of the physically incapacitating event was instantaneous, they will not.

Dementia alone does not cause instantaneous incapacity in the same way that some physical causes of incapacity do; additionally, the (relatively) gradual onset of symptoms provides potential defendants with dementia the opportunity to abstain from driving before they are affected- as such, it would be inappropriate to allow development of this area of law to be influenced by the existence of insurance. For these reasons, the law regarding physically incapacitated defendants is not appropriate under these circumstances.

C Mentally ill defendants

Weaver v Ward,³⁶ widely regarded as a key transitional case in the development of trespass, did not directly deal with the issue of insanity; however, it was referred to, somewhat ambiguously, in dicta, and has been relied on as foundational justification for the liability of mentally ill defendants ever since.

... if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass ... except it may be judged utterly without his fault.

The ambiguity of this statement is obvious: on face value, it determines that insanity will not excuse a defendant of liability for his actions; however, for fault to be established, it must be determined that the defendant had the requisite intention, something many mentally ill defendants (or 'lunatics') lack the capacity to form under the law. Judgments dealing with mentally ill defendants in many common law jurisdictions since this case have relied on the simplistic portion of the judgment referring specifically to 'lunatics', without considering the changes that have occurred since this decision with regard to establishing fault.³⁷

In Australia currently, as remains the case in many common law jurisdictions, a mentally ill defendant whose negligent act causes harm or damage to others will be treated in the same

³² *Leahy v Beaumont* (1981) 27 SASR 290.

³³ *Roberts v Ramsbottom* [1980] 1WLR823.

³⁴ *Waugh v James K Allan Ltd* [1964] SC 102.

³⁵ *Scholz v Standish* [1961] SASR 123.

³⁶ *Weaver v Ward* (1616) Hobart 134.

³⁷ Picher, above n 11, 203.

way as a defendant without mental illness, and their actions will be judged against the actions of a 'reasonable person' in the same circumstances.³⁸ This occurs regardless of whether or not the defendant had the capacity to act rationally (or 'reasonably'), or exercise the foresight required to identify and mitigate any negative consequences of their actions. Effectively, the law holds a mentally ill defendant to a standard of conduct it may simply be impossible for them to reach.

Unsurprisingly, the apparent injustice of this has been criticised and commented on extensively by legal scholars, although it appears to have attracted less critical analysis by the bench. Criticism of the law relating to mentally ill defendants in trespass cases predates the development of negligence as a cause of action; yet many of these early criticisms remain valid today. Little has been written specifically about Australian cases dealing with mentally ill defendants under any tortious cause of action, possibly because of the paucity of cases. It is not the intention of this paper to conduct a comprehensive review of this area of the law throughout common law jurisdictions, as this has been done extensively elsewhere;³⁹ however, much of the critical analysis relating to mentally ill defendants in negligence, trespass or trespass on the case, from other common law jurisdictions, is equally applicable to the Australian decisions, illustrating why this area of the law is unsatisfactory and in need of reform, and why extending it to encompass elderly defendants with dementia should be resisted.

III THE KEY AUSTRALIAN CASES

In spite of the sizeable body of case law dealing with mental and psychological injury to plaintiffs resulting from acts of negligence, there is very little case law available in Australian dealing with mentally ill defendants. In 1970, Windeyer J described law as 'marching with medicine but in the rear and limping a little' when discussing the law's traditional reluctance to recognize psychological and mental harm to plaintiffs.⁴⁰ Indeed, the legislative reforms in various jurisdictions in the wake of the Ipp review⁴¹ seeking to limit the scope of claims for pure psychological harm indicate that the legislatures remain cautious about recognising such claims, even brought by 'blameless' plaintiffs, without clear legislative boundaries, fearing a floodgates effect.⁴² Little wonder, then, that mentally ill defendants, with the nasty aroma of 'moral culpability' hanging around their supposed actions, are treated the way they are in the existing policy environment.

In the original Australian case dealing with mentally ill defendants, *White v Pile*, the court considered the defendants' mental illness in finding him not liable in negligence; this decision was ignored in the subsequent cases of *Adamson v Motor Vehicle Insurance Trust*, and *Carrier v Bonham*.

³⁸ *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56; *Carrier v Bonham* [2001] QCA 234 .

³⁹ See above n 11.

⁴⁰ *Mt Isa Mines v Pusey* (1970) 125 CLR 383 at 393.

⁴¹ Australia, *Review of the Law of Negligence: Final Report* (September 2002) (Ipp report) 140.

⁴² eg *Civil Law (Wrongs) Act 2002* (ACT), s 34; *Wrongs Act 1958* (Vic), s 73; *Civil Liability Act 2002* (NSW), s 30.

A *White v Pile*

In *White v Pile*,⁴³ while on short-term release from a mental hospital, the defendant, a schizophrenic with a history of delusions, attacked the plaintiff. At the time of the attack, the defendant was suffering from a delusion that the plaintiff was his wife. In response to the question of whether the defendant would have known that what he was doing was wrong, medical evidence presented to the court stated that the defendant would not have had ‘any full appreciation of what he was doing’.

In finding for the defendant, O’Sullivan DCJ found, on the evidence, that the defendant met the requirements of rules analogous to those used to establish a defence of insanity in criminal cases, the M’Naghten Rules – namely, the defendant either did not know what he was doing, or did not know that what he was doing was wrong. He stated:

To maintain an action for injury to the person the injurious act must either be wilful, or the result of negligence. On these authorities, therefore, some element of intent, actual or imputed, is necessary to establish this tort. If that be so then it would follow that a person whose act was completely involuntary, eg an epileptic in convulsion or a somnambulist walking in his sleep, would not be answerable for injuries caused to another person whilst in that condition. On this reasoning a lunatic whose condition was such as to deprive him of all powers of volition would escape liability for a tort committed by him whilst in that state.

O’Sullivan DCJ rejected American and New Zealand precedents rejecting adjustment of the standard, preferring his perception that recent opinion was changing in favour of granting immunity to mentally ill defendants on the basis of similar criteria to the M’Naghten Rules. He also commented on the inconsistency of a defendant being held civilly liable when he would have been able to rely on a defence against a criminal charge. The decision was subsequently criticised by academics, and was either not followed, or not considered, in other common law jurisdictions, as well as Australia.

B *Adamson v Motor Vehicle Insurance Trust*

In *Adamson v Motor Vehicle Insurance Trust*⁴⁴, the facts were as follows: A schizophrenic (Burt), suffering from ‘a frenzied fear that his workmates were going to kill him’,⁴⁵ causing him to experience ‘an irrational compelling impulse to get away at all costs to save his life’,⁴⁶ stole a car and drove it through an intersection against the directions of the traffic pointsman on duty, knocking down a cyclist and the plaintiff, Adamson. The driver drove off without stopping, later claiming that his failure to stop was because he was unfamiliar with the operation of the gears of the car.

He was subsequently interviewed by police, charged, and remanded to a mental hospital, where the treating psychiatrist diagnosed him with schizophrenia. He was discharged from the hospital in an improved, rather than cured, state, and the criminal charges against him were withdrawn. He then disappeared, leaving the Motor Vehicle Insurance Trust to be sued as the defendant, under the insurance legislation in operation at the time of the accident.⁴⁷

⁴³ *White v Pile* 68 W.N. (N.S.W) 176 (1950).

⁴⁴ *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56.

⁴⁵ *Ibid.*, 60.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 59; *Motor Vehicle Insurance Act 1943-1954* (WA), s 7(2).

Wolff SPJ found that the defendant insurer was liable as the statutory underwriter of Burt's conduct, on the basis that insanity was not a defence against a claim of negligence. In reaching this conclusion in the absence of case authority dealing with insanity in negligence claims, Wolff SPJ considers previous authority dealing with the liability of 'lunatics' in relation to the non-negligent torts, and authorities drawn from criminal and divorce law. He quotes Holdsworth, quoting Hale, in *History of English Law* (Vol III – The Mediaeval Common Law at page 375), as stating:

... such incapacities as infancy, madness compulsion, or necessity, do not excuse the person suffering from them from liability to a civil action for damages for the wrong done "because such a recompense is not by way of penalty but a satisfaction of damage done to the party".⁴⁸

Wolff SPJ again quotes from Holdsworth (at page 376):

... the law declined to excuse lunatics and infants who by their acts had damaged another. The State might remit penalties, but they were civilly liable, like anyone else, to pay damages to the injured party. Bacon in his maxims accurately summed up the law as it existed then and in his day. "In capital cases in favorem vitae the law will not punish in so high a degree except the malice of the will and intention do appear, but in civil trespasses and injuries that are of an inferior nature the law doth rather consider the damage of the party wronged than the malice of him that was the wrongdoer".

He also cites similar, more modern, views on the liability of lunatics for tortious act attributed to Clerk & Lindswell, Salmond, and particularly Winfield who, commenting on the US decision of *Williams v Hayes* suggests that there are several reasons why lunatics should be held liable for their negligent acts: 1) that if both parties are innocent, the one who caused the loss should bear it; 2) a public policy based argument designed to encourage 'the relatives to keep the lunatic under restraint', and to prevent defendants from seeking to avoid liability by pretending to be insane; and 3) that 'the lunatic must bear the loss occasioned by his torts as he bears his other misfortunes'. It is the first of these justifications offered by Winfield that Wolff SPJ most approves of, in the absence of any case authority dealing specifically with negligent acts committed by a person with mental illness.⁴⁹

Wolff SPJ also considered the treatment of insanity in criminal and divorce cases, and the applicability of the M'Naughten test for criminal responsibility in divorce cases based on cruelty, but rejected the idea that the M'Naughten test should be applied in determining liability in torts law, a position which echoed that of Lord Denning in *White v White*, whom he quoted with approval, when he rejected insanity as a defence on the grounds that the 'criterion of liability in tort is not so much culpability but on whom the risk should fall'.⁵⁰

So based on his analysis of academic authority, a large part of Wolff SPJ's reasoning seems to arise from the argument that lunatics and infants are both viewed in the law in the same way, and that neither infancy or lunacy relieves a defendant from liability for the consequences of his or her act, because the key purpose of tort law is compensation of the affected party, rather than punishment of the negligent party.

In reaching his finding, Wolff SPJ is treading in the footprints of judges from many common law jurisdictions, including the US, Canada, the UK and New Zealand. Judgments in all these jurisdictions have found mentally ill defendants liable for trespassory or negligent acts, and

⁴⁸ Ibid, 60.

⁴⁹ Ibid, 61-63.

⁵⁰ Ibid, 64.

many of the judgments cite the same reasoning and precedents. There is, however, a significant amount of legal research which indicates that in adopting these arguments, the decision simply further entrenches a body of bad law based on flawed analysis and legal reasoning.

C *Carrier v Bonham*

The decision in *Adamson v Motor Vehicle Insurance Trust* was cited with approval in the more recent case of *Carrier v Bonham*,⁵¹ in a decision which seemingly fails to recognise both the significance of the defendants' financial state and lack of insurance in the broader context of the function of torts law, as well as the intervening, and significant, adjustment to the standard of care requirements for child defendants, which effectively distinguished between the treatment of child and mentally ill defendants from 1966 onwards.

Carrier v Bonham dealt with a mentally ill defendant, John Bonham, who stepped out into the road into the path of an oncoming bus, driven by Keith Carrier, in an attempt to commit suicide.

Earlier on the night in question, Bonham had been admitted to the Royal Brisbane Hospital psychiatric ward. He had a long history of mental illness, having been diagnosed with chronic schizophrenia some 19 years earlier. At the time of the incident, the defendant was a regulated patient, and was liable to an ongoing involuntary detention order, although the admitting psychiatrist was unaware of the order at the time, and did not rely on the order in admitting the defendant. The psychiatrist ordered that the defendant be subject to quarter hourly observations; under this protocol, the defendant stated he was going outside to smoke, and it was at this time that he walked out of the hospital grounds, and in front of the bus driven by the plaintiff. He didn't succeed in his suicide attempt; however he did cause psychological harm to the plaintiff bus driver, which prevented Carrier from being able to work again.⁵²

At first instance, McGill DCJ found that Bonham was not liable to the plaintiff in negligence, rejecting Wolff SPJ's view in *Adamson v Motor Vehicle Insurance Trust* that insanity could not operate as a defence to negligence. He did, however, find in favour of the plaintiff against Bonham based on the tort established in *Wilkinson v Downton*,⁵³ summarising his position thus:

Liability for negligence does not depend just on causation of the injury to the plaintiff, it depends on an issue of fault, and the reasoning which justifies a lower standard of care as the test of the existence of fault in the case of children also justifies a lower standard of care as the test for the existence of fault in the case of persons of unsound mind. I prefer the approach of those decisions, and those academic writers who arrived at that conclusion. I note that a similar conclusion, that the defendant was liable in trespass but not liable in negligence, was reached by Paris J of the British Columbia Supreme Court in *Attorney General for Canada v Connolly* (1989) 64 DLR (4d) 84. I think it is easier to identify the presence of fault in the case of liability for intentional acts than liability for careless acts, which would explain why a situation could arise where a person would be liable for an intentional tort but not liable for negligence. To look at it another way, if a person of unsound mind inadvertently walks just in front of a bus because of an inability to appreciate the danger to himself posed by that course of action, he ought not to be liable in negligence for psychiatric injury caused to the bus driver, but I think there is a logical distinction

⁵¹ *Carrier v Bonham* [2001] QCA 234.

⁵² *Carrier v Bonham & Anor* [2000] QDC 226.

⁵³ *Wilkinson v Downton* [1897] 2QB 57.

between that situation and one where the person of unsound mind deliberately steps in front of a bus in order to cause a collision with the intention of thereby killing himself.⁵⁴

The decision was appealed to the Supreme Court of Queensland Court of Appeal, primarily on the grounds that the defendant's mental illness should not have affected his liability in negligence. In upholding the appeal, the judges found that there was no defence of insanity available for negligence claims, and that liability for the defendant's actions should be determined by reference to 'the standard (of care) of the ordinary reasonable person'.⁵⁵

Carrier v Bonham explicitly rejected the opportunity provided under *McHale v Watson* to adjust the standard, with McMurdo P stating as follows:

Whilst a child's actions in a negligence claim can be judged by the objective standard to be expected of an ordinary reasonable child of comparable age, the action of an adult lacking capacity because of mental illness in a negligence claim cannot be similarly judged by any objective standard of an ordinary reasonable person suffering from that mental illness; if the mental illness has deprived the person of capacity then the person has also been deprived of rationality and reasonableness. The standard of care must be the objective standard expected of the ordinary person.⁵⁶

McPherson JA, in his judgment, went on to state:

Unsoundness of mind is not a normal condition in most people, and it is not a stage of development through which all humanity is destined to pass. There is no such thing as a "normal" condition of unsound mind in those who suffer that affliction. It comes in different varieties and different shades or degrees. For that reason it would be impossible to devise a standard by which the tortious liability of such persons could be judged as a class. As Baron Bramwell once said, insanity is a misfortune and not a privilege. It attracts human sympathy but not, at least in the case of negligence, immunity under the law of civil wrongs.

In some of the discussions of the topic, there are appeals to the natural sentiment of sympathy for the wrongdoer and his family or dependants. Without invoking similar feelings for the victim and his family, it is relevant to mention the following point in the present case. Part at least of the reason why the defendant Bonham was able to escape from the hospital from which he absconded is that psychiatric practice no longer insists that persons in his condition be kept in strict custody. More humane methods of treatment now prevail, under which greater liberty of movement is, for their own perceived good, permitted to patients in this unhappy state. If in the process they take advantage of that liberty to venture, even if briefly, into "normal" society, it seems only proper that, in the event of their doing so, their conduct should be judged according to society's standards including the duty of exercising reasonable foresight and care for the safety of others. If that principle is not applied, then it is only a matter of time before there is reversion to the older and less humane practices of the past in the treatment of mental patients.⁵⁷

Overtly, the court refused to adjust the standard of care for mentally ill defendants because they felt that to do so would be catering to a 'personal idiosyncrasy' of the defendant. However this denies the reality that mental illness is actually quite common within the population, and, if anything, appears to be increasing.⁵⁸ It is not so rare as to be a personal idiosyncrasy – indeed, it is surprising that judges, in 2001, considered that schizophrenia was

⁵⁴ *Carrier v Bonham & Anor* [2000] QDC 226, [75]-[76].

⁵⁵ *Carrier v Bonham* [2001] QCA 234, [37] (McPherson JA).

⁵⁶ *Ibid*, [8] (McMurdo P).

⁵⁷ *Ibid*, [35]-[36] (McPherson JA).

⁵⁸ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results 2007*, Report number 4326.0 (2008)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4326.0Main%20Features32007?opendocument&tabname=Summary&prodno=4326.0&issue=2007&num=&view=>>. This report estimated that 1 in 5 Australians experience a mental health disorder of some kind in any given year, while almost half of all Australians experience some form of mental illness during their lifetime.

so rare that the defendant's actions could not be judged by reference to the standard of care expected of a class of other people suffering from the same type of schizophrenia.

More subtly, however, the courts seem to be indicating that they feel it is beyond them to determine the appropriate standard of care to be expected of a person suffering the same condition of the defendant. In refusing to establish an adjusted standard of care for the defendant in *Carrier v Bonham*, the court was effectively refusing to do in a civil jurisdiction what it has been asking juries to do in a criminal jurisdiction for the past one hundred and fifty years at least – to establish, either objectively or subjectively, what is occurring in the mind of a mentally ill defendant at the time they committed the relevant act, and, based on that determination, establishing whether they should be held accountable for that act. Considering that claims in negligence are generally directed at a much lower grade of moral culpability than criminal cases, it seems both bizarre and inconsistent that the courts would, in effect, make no allowances for a defendant who has committed a less blameworthy negligent act as a result of circumstances beyond his or her control, but would if the same person had committed a truly grievous crime, such as murder, simply because it is too hard for judges to put themselves in the position of someone of the class to which the defendant belongs.

Clearly, *Carrier v Bonham* is a decision which is inconsistent with the reality of mental illness. It is a far more common part of society than the judges in *Carrier v Bonham* appreciate. Furthermore, its prevalence is such that there is no good reason why expert evidence could not be used to establish an objective standard based on the type and severity of the defendant's mental illness in the vast majority of cases. As such, it is an unsatisfactory area of law, and should not be extended to encompass elderly defendants with dementia.

Arguments in favour of treating elderly defendants according to the law regarding mentally ill defendants are mainly grounded in convenience, and are largely superficial. Dementia and age-based cognitive decline are included in the DSM, which is tacitly viewed as the court's handbook on mental illness. However, their inclusion in this publication is arguably an acknowledgement that the same groups of professionals (psychologists, psychiatrists) tend to treat both, rather than an acceptance that they are truly a form of mental illness – it is worth bearing in mind that although the DSM is relied on by the courts, the courts is not the primary purpose for which the DSM exists. Furthermore, it disregards the fact that the health sector itself tends to view dementia as a physical, rather than mental, disease.

Additionally, if the courts were to accept a modification to the standard of care for elderly defendants with dementia taking into account the impact of their diseases, the courts would have to place greater reliance on expert medical opinion to establish the standard, based on the facts of each case. Furthermore, this could lead to increased scrutiny of cases involving mentally ill defendants, and ultimately increase the medical evidence required in those cases. This is not, however, an unprecedented development – expert medical evidence is used in courts all the time to establish the capacity of mentally ill defendants in criminal matters, and matters before the guardianship and protective jurisdictions.

The benefits of supporting these views are, however, completely outweighed by the negative consequences of extending this position to encompass elderly defendants with dementia.

As the consequences of the decision in *Carrier v Bonham* demonstrated clearly, this is an unsatisfactory area of the law, whose expansion should be avoided at all costs. Mr Bonham's illness was such that his affairs were under the management of the Public Trustee; he had only one asset (his home) and as a pedestrian, he was uninsured. The judgment awarded against him exceeded the value of his asset, and can have been of limited deterrent or punitive value. Furthermore, in terms of compensation the decision fails, as it does not consider the defendant's ability to actually pay the compensation awarded, which in this case was limited, if not non-existent. Extending the law to include elderly defendants with dementia is likely to lead to similar unjust consequences of little benefit to either party.

IV CONCLUSION

Elderly defendants with dementia should not be held to the objective 'reasonable person' standard in actions for negligence if they can demonstrate that they are incapable of achieving the standard as a result of their condition. There are several models dealing with similarly incapacitated defendants that the courts could consider following to adjust the standard of care under these circumstances: minors, mentally ill defendants, and physically incapacitated defendants. This paper argues that the judgment outlining the adjustment to the test currently available for child defendants is sufficiently flexible to encompass cognitive decline/dementia occurring at the other end of life. To do so is not to treat defendants as children, but rather to focus on the reason the adjustment was permitted in the first place – the broader issue of the developmental stage of the defendant, as discussed by Kitto J, rather than just the infancy of the defendant.

The paper also argues that the other models available, those of physically incapacitated and mentally ill defendants, should be avoided, because they are inappropriate, and lead to unjust and out-dated outcomes, respectively. In particular, the law regarding the liability of mentally ill defendants is overdue for significant reform.

Finally, in order to avoid issues associated with lack of compensation available to plaintiffs injured by negligent elderly defendants with dementia, it is the view of this author that governments adopting a policy position of deinstitutionalization and community care, which leads to more defendants with dementia being in the community unsupervised and unsupported, as a corollary should earmark funds for compensation payouts for plaintiffs injured by defendants in these circumstances. This viewpoint also extends to compensation for plaintiffs injured by mentally ill defendants.

WOMEN'S VOICES WITHIN AND BEYOND THE COURTROOM: CREATING TEGAN WAGNER

DR SARAH AILWOOD*

I INTRODUCTION

This paper analyses forms of legal testimony through the lens of life writing theory and practice. Taking as its focus the case of Tegan Wagner, it explores two dimensions of the complex relationship between life narrative and the justice process: the construction of the sexual assault victim witness in courtroom testimony and in post-judicial memoir. Wagner's many voices – as a young and naïve rape victim, defiant victim witness, media spokeswoman for rape victims and reflective memoirist – make her case particularly apposite for exploring how self-construction is mediated in juridical and extra-judicial contexts.

In June 2002, fourteen-year-old Tegan Wagner and two friends were picked up by a group of young men in south-west Sydney. They were driven to a house and supplied with alcohol. Wagner was then raped, allegedly by three men, though only two were convicted when the case went to trial between May 2005 and April 2006. The identities of the men have been suppressed because two of them were under eighteen years of age at the time of the rape; however, they were known throughout the trial and in media coverage as MSK, MAK and MMK. During the trial Wagner was extensively cross-examined by counsel for the three defendants, an ordeal that lasted three days and involved almost two thousand questions. The trial, and particularly Wagner's cross-examination, were extensively covered in the media, particularly by the *Sydney Morning Herald* journalist Paul Sheehan, who in 2006 published *Girls Like You: Four Young Girls, Six Brothers and a Cultural Timebomb*.¹ Following the case Wagner went public about her experience as a rape victim and as a witness within the justice system. She effectively became the public face of rape survival and a public champion for the rights of sexual assault victims in the criminal justice system. In 2007 she also published a memoir, *The Making of Me: Finding My Future After Assault*.²

Tegan Wagner's case achieved such public interest that it became a factor in reform of sexual assault laws in New South Wales. As Penelope Pether notes, 'some of the recent statutory reforms were indeed directly responsive to Sheehan's and Wagner's (and other victims of the Skaf and K perpetrators) telling stories about rape, and law, and visions of justice rather than to the recommendations of professional law reformers'.³ In his Second Reading Speech in support of the Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006, which introduced greater protections for sexual assault victims, New South Wales MP Chris Hartcher directly referenced Wagner's case and triumphant public appearances:

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¹ Paul Sheehan, *Girls Like You: Four Young Girls, Six Brothers and a Cultural Timebomb* (Pan Macmillan, 2006).

² Tegan Wagner, *The Making of Me: Finding My Future After Assault* (Pan Macmillan, 2007).

³ Penelope Pether, 'What is Due to Others: Speaking and Signifying Subject(s) of Rape Law' (2009) 18(2) *Griffith Law Review* 237, 250.

In April 2006, the extraordinary cases involving some gang rapes in Sydney had been heavily reported in the media, and Tegan Wagner walked from the court and proudly spelt her name out loud to reporters after seeing the conviction of the brothers who had so disgracefully raped her. Sexual assault counsellors hailed her courage and the resulting publicity was a major turning point.⁴

In addition to prompting reforms in New South Wales and other jurisdictions, Wagner's case has also been analysed by Annie Cossins, who analyses the linguistic and rhetorical devices used by defence counsel in her cross-examination. Highlighting the rhetorical construction of 'scenarios that mirror commonly believed rape myths and stereotypes',⁵ Cossins argues that such questions 'are likely to confirm juror beliefs and prejudices where the complainant becomes confused, changes their testimony or retracts their complaint'⁶ and calls for further reforms to protect child sexual assault complainant witnesses from questioning that is designed to confuse.⁷

Rather than analysing legislative reform or the contest between the scrutiny of evidence and the protection of sexual assault complainant witnesses, this paper approaches Tegan Wagner's case from a different perspective, asking how theories of life writing and life narrative can be used to explore women's voices within and beyond the adversarial courtroom. Using ideas drawn from life writing theory, this paper highlights the dynamics of narrative and self-creation in the evidentiary process of the adversarial courtroom, contrasting them with the kinds of testimony and textual identity that are possible beyond the trial context.

II TEXTUAL SELF-CREATION AND TRAUMA IN LIFE WRITING AND LAW

In recent decades, life writing scholarship has recognised that the subject of autobiography is an authorial construct that is mediated through language and constituted in the text of the autobiography itself. Drawing on structuralist and post-structuralist analyses, theorists of life writing practice such as Sidonie Smith have influentially adopted the view that 'the autobiographical text becomes a narrative artifice, privileging a presence, or identity, that does not exist outside language'.⁸ This identity – or 'self' – that an autobiographer creates through language is understood 'not to be an a priori essence, a spontaneous and therefore "true" presence, but rather a cultural and linguistic "fiction" constituted through historical ideologies of selfhood and the processes of our storytelling'.⁹ It is created through a process 'of assigning meaning to a series of experiences, after they have taken place, by means of emphasis, juxtaposition, commentary, omission'.¹⁰ Shari Benstock takes a similar approach to theorising autobiography, arguing that 'autobiography reveals the impossibility of its own dream: what begins on the presumption of self-knowledge ends in the creation of a fiction

⁴ Mr Chris Hartcher MP, Second Reading Speech Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006, Wednesday 25 October 2006, 3404.

⁵ Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse' (2009) 33 *Melbourne University Law Review* 68, 88.

⁶ *Ibid.*, 90.

⁷ *Ibid.*, 99-101.

⁸ Sidonie Smith, *A Poetics of Women's Autobiography: Marginality and the Fictions of Self-Representation* (Indiana University Press, 1987) 5.

⁹ *Ibid.*, 45.

¹⁰ *Ibid.*, 45.

that covers over the premises of its construction'.¹¹ As Paul John Eakin succinctly states, 'the self that is the center of all autobiographical narrative is necessarily a fictive structure'.¹²

The process of selective inclusion, omission and emphasis that lies behind autobiography provides an author with power and control over their interpretation of experience, and over the self they create and publicise, constituted through the text. In her desire to impose 'narrative form on an otherwise formless and fragmented personal history',¹³ the autobiographer 'may even create several, sometimes competing stories about or versions of herself as her subjectivity is displaced by one or multiple textual representations'.¹⁴ Since the 1990s, there has been an explosion in the production, distribution and consumption of personal narratives in which authors reflect on their experience, particularly of trauma and persecution. Leigh Gilmore argues for the integral relationship between memoir and trauma: 'memoir in the '90s was dominated by the comparatively young whose private lives were emblematic of unofficial histories ... the memoir boom's defining subject has been trauma'.¹⁵ Kate Douglas and Gillian Whitlock also note this relationship, attributing the memoir boom to the culture of confession in the mass media and its production and distribution of stories of trauma, suffering and recovery, creating 'a market for personal story and a proliferation and innovation in genres of creative non-fiction that expand those with stories to tell, and those with the desire to read life-writing'.¹⁶

The power and control that life writing offers the autobiographer regarding the story they tell and the self they create possibly accounts for its popularity among victims of trauma. Leigh Gilmore attributes the relationship between memoir and trauma to the autobiographical subject's desire for healing: 'Telling the story of one's life suggests a conversion of trauma's morbid contents into speech, and thereby, the prospect of working through trauma's hold on the subject'.¹⁷ Suzette Henke argues for a similar function of life writing in relation to trauma recovery:

What cannot be uttered might at least be written – cloaked in the mask of fiction or sanctioned by the protective space of iteration that separates the author/narrator from the protagonist/character she or he creates and from the anonymous reader/auditor she or he envisages. Testimonial life-writing allows the author to share an unutterable tale of pain and suffering, of transgression and victimization ... It is through the very process of rehearsing and re-enacting a drama of mental survival that the trauma narrative effects psychological catharsis.¹⁸

The temporal and psychological distance between the trauma victim/survivor and the self they create in text makes autobiography an appealing form for victims of trauma. It enables them to interpret and reflect on traumatic experience and to construct a self that is dictated by themselves rather than by external, often traumatic events and influences.

¹¹ Shari Benstock, 'Authorizing the Autobiographical' in Shari Benstock (ed), *The Private Self: Theory and Practice of Women's Autobiographical Writings* (University of North Carolina Press, 1988) 10, 11.

¹² Paul John Eakin *Fictions in Autobiography: Studies in the Art of Self-Invention* (Princeton University Press, 1988) 3.

¹³ Suzette A. Henke *Shattered Subjects: Trauma and Testimony in Women's Life-Writing* (St. Martin's Press, 1998) xiv.

¹⁴ Smith, above n 8, 47.

¹⁵ Leigh Gilmore, 'Limit-Cases: Trauma, Self-Representation, and the Jurisdictions of Identity' (2001) 24(1) *Biography* 128, 128.

¹⁶ Kate Douglas and Gillian Whitlock, 'Trauma in the Twenty-First Century' (2008) 5(1) *Life Writing* 1, 2.

¹⁷ Leigh Gilmore, above n 15, 129.

¹⁸ Henke, above n 13, xix

Arguably, this dynamic relationship between narrative, self-creation and trauma is not only present in reflective memoirs and other autobiographies that offer ‘an interpretation of life that invests the past and the “self” with coherence and meaning that may not have been evident before the act of writing itself’.¹⁹ It is present in all personal narratives, which can, according to Sidonie Smith, be considered autobiographical: ‘autobiography can be defined as any written or verbal communication. More narrowly it can be defined as written or verbal communication that takes the speaking “I” as the subject of the narrative, rendering the “I” both subject and object’.²⁰ Such a definition of autobiography would include a range of personal narratives created in the course of the justice process, including statements provided to police, testimony given as evidence in court and victim impact statements. In each of these forms, the witness is both the author and the subject of the narrative. Such narratives are created through a paradigm of ‘truth’, key components in a process that ostensibly seeks ‘fact’. Yet, according to theories of life writing and narrative, such a goal is impossible; the textual self is always, to some extent, a fictive construct. It is created reflectively, through interpretation of events and experience, and does not come into being until it is spoken or written in text. What, then, are the challenges posed by legal testimony and autobiographical narrative in terms of truth and self-creation?

III CREATING A SELF IN THE COURTROOM

As in all forms of autobiography, the genre and the conditions through which the personal narrative is constructed in the courtroom impact the witness’s story and self-creation. Victims of crime may have some opportunities to tell their own stories to police or legal representatives, depending on the approach taken by the individuals involved. In the courtroom, however, the victim’s personal narrative and consequently their self-creation are constrained by the rules of the process. Ana Douglass and Thomas A. Vogler analyse some of these circumstances of production of courtroom testimony: In courts of law, where the referent of narrative is supposed to reign supreme, competing narrative discourses struggle in adversarial combat to produce ‘the facts’, or the story of ‘what really happened’. What is allowed to enter the discourse is based not solely on what happened but also on the rules of ‘evidence’ that determine what the jury is allowed to hear. It is not only the narrative referent that counts but the proper construction and presentation of stories.²¹

The witness’s story and therefore the self they create are limited to those parts of the narrative that law deems relevant to the guilt or innocence of the accused. In a case of sexual assault this amounts to the events of the assault itself and preceding it, with little or no interest in the aftermath of the assault for the victim until sentencing, should the defendant be convicted. In giving courtroom evidence the victim is asked to reflectively create, in testimony, a self that predates the trauma, excluding the impact of the trauma and its subsequent interpretation by the victim. Testimony is also constrained by a rigid question-and-answer model, in which the victim is only permitted to speak in response to questions by a legal representative or judge.²² In a traditional courtroom process, and in cross-examination, the victim’s self-creation is

¹⁹ Smith, above n 8, 46.

²⁰ Ibid, 19.

²¹ Ana Douglass and Thomas A. Vogler, *Witness and Memory: The Discourse of Trauma* (Routledge, 2003) 2.

²² Increasingly, sexual assault victims are able to provide their examination-in-chief through a pre-recorded statement or, in some jurisdictions, through a written rather than oral statement at the committal hearing. Further research is needed to ascertain whether such changes improve the victim’s experience with personal narratives in the justice process.

effectively controlled by legal representatives – the prosecution, defence counsel or the judge – rather than by the victim themselves. As ‘Lisa’, a sexual assault victim witness commented, ‘I wasn’t given the opportunity just to talk. I was asked questions and I responded to the questions I was asked’.²³

Arguably, all personal narratives presented as oral testimony – constructed through examination-in-chief and cross-examination – in the adversarial courtroom are subject to these conditions of production in terms of victim self-creation. However, this dynamic takes on additional complexities and effects in the context of sexual assault victim testimony for two reasons: first, sexual assault trials turn extensively on the characterisation of the victim – on the question of who the victim really is; and second, courtroom testimony for sexual assault victims is often a traumatic experience in itself, triggering retraumatisation of the assault.

A Who is Tegan Wagner?

As for many sexual assault victim witnesses, the question of Tegan Wagner’s character was at the centre of the trial of MAK, MSK and MMK. Studies have shown that factors relating to a victim’s character and credibility affect the outcome of sexual assault cases at each stage of the criminal justice process, including the decision to prosecute, conviction and sentencing. Such factors include whether the victim engaged in ‘risky behaviour’, the victim’s sexual experience, whether she was in a monogamous relationship and whether she had previously had consensual sex with the accused, whether she used drugs or alcohol prior to the sexual assault and inconsistencies in her story.²⁴ In the context of a sexual assault trial, both prosecution and defence will draw on these and other factors to create an image of the victim’s character: her identity, and a sense of who she really is. This version of the victim’s self is adduced by the prosecution and disputed by the defence, becoming a site of contest at the centre of the adversarial trial. Melanie Heenan notes that in most rape trials ‘the defence is likely to devote considerable attention to attacking the victim’s character and credibility’.²⁵ Cross-examination is the central tool by which this is achieved, as defence counsel challenges the victim’s self-creation, emphasising instead an alternative view of her identity consistent with the innocence of the accused.

Studies of defence counsel cross-examination of sexual assault victim witnesses have exposed some strategies used to render suspicious the character and credibility of the victim. Patricia Easteal, for example, argues that ‘rhetorico-grammatical processes can be especially effective in muting the complainant’s voice: these include ridiculing her testimony; attacking her character, asking questions in a way that only permits a ‘yes’ or ‘no’ response and may address events out of time sequence; interrupting often and asking the same questions repeatedly’.²⁶ Mary Heath also notes that defence counsel project the testimony of the victim witness into commonly-held myths about sexual assault: ‘defence lawyers undermine the credibility of complainant witnesses by implying that statistically common contexts for or

²³ ‘Lisa’, quoted in Patricia Easteal and Louise McOrmond-Plummer, *Real Rape Real Pain: Help for Women Sexually Assaulted by Male Partners* (Hybrid Publishers, 2006) 201.

²⁴ Brigitte Bouhours and Kathleen Daly, ‘Rape and Attrition in the Legal Process. A Comparative Analysis of Five Countries’ (2010) *Crime and Justice* 565, 613.

²⁵ Melanie Heenan, ‘Just “Keeping the Peace”: A Reluctance to Respond to Male Sexual Partner Violence’ (2004) 1 *Issues* (Australian Centre for the Study of Sexual Assault) 7.

²⁶ Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) 135-36.

responses to rape are unusual or inappropriate. Common characteristics of rape, such as delay in reporting or the absence of physical resistance or physical injury, alcohol use or a partner assailant may be portrayed as suspicious'.²⁷

These tactics of defence counsel cross-examination are clearly evident in Tegan Wagner's experience of testifying in the New South Wales Supreme Court. The bulk of Wagner's examination-in-chief was provided through the video-recorded interview she gave to police the day after she was raped. This video presented Wagner as a naïve and innocent fourteen year old girl who went out with two friends, was picked up by two brothers – the friends of one of her companions – taken to their house, plied with alcohol and brutally raped. In their cross-examination of Wagner defence counsel suggested instead that she had initiated and driven the events of the evening – that she had suggested they buy alcohol on the way back to the house, and was excited by the opportunity to drink it; that her nervousness in the car resulted from her anticipation of her first sexual encounter; that she had flirted with each of the brothers and initiated the sexual activity; that her reporting the rapes to the police afterwards was a cover because she was worried she would become pregnant. To Adam Morison, counsel to MAK, Wagner was a habitual liar seeking to blame others for her actions: he described her as changing 'from passionate, willingness, wanting to hysterical crying because you thought "My God, I could get pregnant!"'.²⁸ Annie Cossins has noted that despite the considerable efforts of defence counsel and the accused themselves to 'portray Tegan as the sexual aggressor who became deliberately drunk in order to overcome her inhibitions and then cried rape due to fears of pregnancy', her credibility 'remained intact because of her consistency in giving evidence, her immediate report to the police, the medical evidence and the bizarre and disruptive behaviour of the three accused during the trial'.²⁹

However, despite her success in maintaining her character and credibility under cross-examination, Wagner's memoir reveals its impact on her and the self she created through testimony: 'Morison made me feel like a little piece of dirt who'd decided to tell a whole lot of lies about a nice bunch of boys because I was such an evil, lying, filthy little slut'.³⁰ She expresses her frustration at being unable to contest the self created by defence counsel, and the self she was required to assume in the courtroom: 'It felt like the defence could say whatever they liked about me, and I couldn't do anything to hit back or even show how I felt, because it might harm my chances. I had to be sweet and nice and good and patient while the defence barristers made me out to be something I'm not'.³¹ Wagner clearly understands the dynamics of creating a public self – authorised as 'fact' by judicial process – in sexual assault trials:

When you're the victim in a rape trial, what you're experiencing is an argument about what kind of person you are: whether you're a naïve fourteen-year-old who let herself get drunk and was preyed upon by a group of guys who'd done this before and would do it again in the most ruthless manner. Or whether you're a slutty fourteen-year-old who couldn't wait to offer a sexual smorgasbord to a bunch of guys she'd only just met and whose only concern was that she might get pregnant.³²

²⁷ Mary Heath 'Women and Criminal Law: Rape' in Patricia Eastal (ed) *Women and the Law in Australia* (Butterworths, 2010) 88, 90.

²⁸ Quoted in Sheehan, above n 1, 220.

²⁹ Cossins, above n 5, 90.

³⁰ Wagner, above n 2, 159.

³¹ *Ibid.*

³² *Ibid.*, 241.

Although Wagner asserts that ‘it was an argument about who Tegan Wagner really was’,³³ ultimately Tegan Wagner is neither of the selves presented by either the victim or the defence counsel: neither are ‘real’, because both are fictive creations,³⁴ constructed reflectively for particular purposes, under the very specific conditions of legal and judicial process. At the heart of what purports to be a truth-seeking enterprise lie fictive constructs that, in sexual assault trials particularly, have been shown to profoundly impact the outcome of cases.

B Trauma and courtroom testimony

The second respect in which the dynamics of self-creation are particularly fraught in sexual assault trials concerns the relationship between trauma and testimony. The re-traumatising effect that courtroom testimony, and particularly cross-examination, has on sexual assault victim witnesses is well documented.³⁵ Wagner’s memoir registers the traumatising effect of cross-examination: ‘I felt like I was going to cry, but I didn’t want to cry in front of the boys. I’d been on the witness stand for a full day now and he’s just been repeating the same questions over and over and over again. The rapes themselves didn’t take that long’.³⁶ Indeed, in writing her memoir Wagner needed to refer to the transcripts: ‘The stress was so intense I’d simply shut down. I was still standing in the witness box, I was still answering questions, but I have no recollection of what was said to me or what I said in reply. (I’ve had to look at the court transcripts in order to write this chapter.)’³⁷

The impact of cross-examination does not only re-traumatise the victim. By requiring the victim to construct a self that predates the trauma and excludes its effects, the adversarial system denies the victim the opportunity for healing and recovery that other autobiographical forms, such as memoir, offer.³⁸ The restrained, controlled self that the victim is permitted to create in examination-in-chief is systematically destroyed by defence counsel in cross-examination, limiting the therapeutic possibility of testimony in the courtroom. The failure of the adversarial system in this regard may account for victims of sexual assault turning to other autobiographical forms, such as memoir, for recovery through story and self-creation.

IV CREATING A SELF BEYOND THE COURTROOM

The nature of the adversarial system and its treatment of victims means the process fails to provide the healing and recovery from trauma that, as a justice process and a species of autobiography, sexual assault victims might be entitled to expect. Having been failed in this respect by the justice system, Tegan Wagner turned instead to an alternative autobiographical genre, publishing *The Making of Me: Finding My Future After Assault* in 2007. Based on the Victim Impact Statement she read to the court at the sentencing hearing, this text continues to bear the marks of legal process: as two of the men were under eighteen years of age when the assault took place, their identities have been suppressed. Wagner, on the other hand, publicly named herself on her emergence from the courtroom when the sentences were handed down,

³³ Ibid.

³⁴ See Smith, above n 8; Eakin, above n 12.

³⁵ See for example Rebecca Campbell, ‘What Really Happened? A Validation Study of Rape Survivors’ Help-Seeking Experiences with the Legal and Medical Systems’ (2005) 20(1) *Violence and Victims* 55-68; Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Australian Institute of Criminology, 2004).

³⁶ Wagner, above n 2, 162.

³⁷ Ibid, 164.

³⁸ See Henke, above n 13; Gilmore, above n 15.

a key component of her agenda to shift the discourse of shame surrounding sexual assault away from victims and towards perpetrators. Wagner's autobiography is less a response to the men who raped her and the ensuing trauma than it is to the justice system itself. Indeed, the vast majority of the memoir concerns the trial rather than the assault, and in this sense could perhaps be described as 'post-judicial' rather than 'post-traumatic'. It not only tells the story and creates the self that aspects of the justice system sought to challenge, shut down and silence, but also critiques the adversarial system and the justice process as a whole.

The title of Wagner's memoir – *The Making of Me* – invites us to consider it as an exercise in self-creation. Approaching the text, the reader anticipates a story of personal development, climaxing in a self that is both real and whole at the memoir's conclusion. In this respect, Wagner's memoir delivers on its title. It is a journey from naivety, through self-destruction, and finally to self-knowledge and the expression of an authentic, mature selfhood, made possible by the experience of trauma. As she reflects on and interprets her experience, Wagner presents her self at the time of the assault as an unconfident and self-conscious teenager. Recognising the different selves present in the courtroom trial, she writes of watching her videoed police interview in court:

It was strange watching my fourteen-year-old self giving evidence, because I really looked like a little girl. I looked tiny. Not tiny thin, but I looked like a young kid: I had a bad fringe that I'd pulled down and bobby-pinned, and a big ponytail on top of my head, and really bad make-up, and bad clothes my nan had picked out. It was obvious how shy I was, because I had my head down and I was playing with my hands the whole time.³⁹

By the time of the trial, Wagner says, she has developed a different self: 'I wasn't that girl anymore. I'd grown up a lot in three years. The Tegan the jury saw in court was much stronger, much thinner, and a whole lot more confident than the Tegan the boys had met'.⁴⁰ Wagner argues that the presentation of these different selves in fact served her cause in the courtroom: 'You could see from the tape how young and how vulnerable I'd been, you could see how upset and traumatised I was, and most importantly, everything was still horribly fresh and clear in my mind'.⁴¹

The strong and confident Tegan who appeared in the courtroom, Wagner suggests, is the product of the sexual assault itself and its ongoing effects. Her subsequent drug addiction, bulimia and depression are reflectively interpreted in the memoir as obstacles that in fact prepare her for the greatest challenge: the trial itself, and specifically cross-examination. Wagner writes of her mental strength in the witness box: 'What if I stuffed things up? What if I blew it? ... All the stress, the anxiety, the waiting, would have been for nothing, and even worse, the boys wouldn't have been held to account for what they'd done to me. I couldn't let that happen'.⁴² Her anger is channelled into strength under cross-examination: 'instead of breaking down, I turned to look at the boys just to see if they could feel my telepathic waves of hatred. I just wanted them to know how much I despised them. I wasn't going to let them get to me. I wasn't going to cry in front of them. I was going to win'.⁴³ She was concerned that the strong self she presented in court would make the jury suspicious:

Most people think that when something bad happens to you, you should be upset and crying. At the beginning I was worried that because I wasn't an emotional wreck the jury might not believe I

³⁹ Wagner, above n 2, 155.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, 151.

⁴³ Ibid, 160.

was telling the truth. By the end of it I trusted them to have worked out that I wasn't the crying type – I was a strong girl who was standing up for herself, who wasn't lying, and who was just defending herself in a court of law.⁴⁴

In her memoir, Wagner emerges as the innocent triumphant – over both her rapists and the justice system – against all odds. She attributes the success of her appearance in the witness box to her own personal strength:

I'd come to court wanting to make the boys feel powerless, to make them feel that no matter what they tried, or what they threw at me, I was always going to be around and I was never going to let them get away with it. I was the reason they were in court, and I was the reason they were going to be made to pay for what they'd done. They'd made me feel powerless, but now I had the power, and I'd used it to bring the full weight of the law down on their heads.⁴⁵

This strength becomes the defining feature of the mature and ostensibly authentic self she presents at the memoir's conclusion: 'If this had to happen to someone, I'm glad it happened to me because I was strong enough to take it. Other people might have been completely destroyed by it, but not me. I survived. I'm strong, and I know I'm strong, because I've proved it'.⁴⁶ She attributes her healing and recovery to her seizing 'the power' and using it against her attackers: 'I was able to move on because I took the power back. I took those boys to court, I saw it through and I stared them down. It really is the best feeling, and that's why I tell every victim to come forward. Do something about it. Take back the power. Make them pay. Because once you have, you can move on'.⁴⁷

Given the conviction rates for sexual assault offences,⁴⁸ the conviction and sentencing of MSK and MAK was, indeed, against all odds. There is no doubt, as Cossins notes, that Wagner's testimony played a key role in convincing the jury of their guilt. Wagner attributes her success to the fact that she had 'truth' on her side: 'I told my version of the story, and a jury of twelve people agreed that I was telling the truth ... But I had the truth on my side. The truth, and evidence, and a fantastic team who weren't going to let the boys get away with it'.⁴⁹ Countless other sexual assault victims, no doubt, also have 'truth' on their side, and evidence, and a fantastic team, but are not successful in securing a conviction. Yet although she credits the prosecution, Wagner denies the justice process itself a role in either the conviction of MSK and MAK or in the creation of the mature, victorious self that emerges at the memoir's conclusion. Although Wagner notes 'I would have been devastated if we'd gone to court and lost',⁵⁰ she does not consider the kind of self she could or would have been able to create, had the innocent triumphant not been available because of a finding of 'not guilty'. Indeed, throughout the memoir the justice system appears on the one hand as silencing Wagner's story and on the other as providing her with a means and a power to exact revenge on her rapists. Paradoxically, the justice system that Wagner in many respects so reviles in fact creates the circumstances for the strong, empowered self she presents at the memoir's conclusion.

⁴⁴ Ibid, 168.

⁴⁵ Ibid, 169.

⁴⁶ Ibid, 239.

⁴⁷ Ibid, 242.

⁴⁸ Daly and Bouhours, above n 24, 568

⁴⁹ Wagner, above n 2, 241.

⁵⁰ Ibid.

V CONCLUDING THOUGHTS

Tegan Wagner's voices in courtroom testimony and in memoir highlight complexities and questions concerning relationships between self-creation in personal narratives and the justice system. This paper begins an inquiry into how the justice process frames the circumstances for the production of particular selves, whether externally controlled and contested, as in the courtroom, or reflective and empowered, as in the memoir. Each self is, to an extent, a fictive construct, created reflectively in text through interactions between the individual and the justice process. The ramifications of the justice system recognising the essentially constructed and inauthentic nature of the self presented in the courtroom, despite its pretensions to fact and truth, need to be explored. Life writing theory demonstrates that the process of creating a self through empowerment and reflection, as in a post-judicial memoir, can bring healing and recovery for trauma victims that is not available from the justice system itself.

“NO HOPE OF MERCY” FOR THE BORGIA OF BOTANY BAY: LOUISA MAY COLLINS, THE LAST WOMAN EXECUTED IN NSW, 1889

WENDY KUKULIES-SMITH AND SUSAN PRIEST*

Sir Henry Parkes: I believe that the women of the country would vote for her being hanged!

Mr Hassall would hurl such a slander back in the teeth of the man who uttered it. The women of Australia were not so depraved as to desire anything of the sort. He was astonished at a man like the Premier uttering such a slander on the woman of Australia.

Sir Henry Parkes: They do not approve of wives poisoning their husbands! ¹

When these words rang throughout the Colonial New South Wales Parliament on the evening of 19 December 1888,² what had initially commenced as a debate amongst parliamentary members regarding the financial estimates for the Department of Justice, instead, had become a heated exchange regarding the fate of Louisa May Collins.³ Louisa Collins was, at that time, incarcerated in Darlinghurst Gaol. She was awaiting her execution by hanging for the murder of her second husband Michael Peter Collins. Her journey through the colonial justice system had been described to Parliament that evening by the honourable member for Northumberland, Mr Melville, as ‘an unfortunate exhibition of what was called justice.’⁴

Louisa Collins had faced a series of enormous ordeals, namely, four trials for murder. The first three juries that tried her had returned as hung juries. In the fourth trial, the Crown finally secured a conviction. The jury found Louisa May Collins guilty for the wilful murder of her second husband Michael Peter Collins.⁵ Overall, Louisa had faced three trials for the alleged murder of Michael Peter Collins (her second husband) and one trial for the murder of Charles Andrews (Louisa’s first husband).

Louisa’s story, as it had unfolded in the New South Wales justice system, had been heavily reported in newspapers throughout the colony of Australia.⁶ There was fierce public debate about the evidence led in the case,⁷ the way the Crown had conducted itself in its ardent pursuit of justice, and the fact that New South Wales was set to execute a woman. This paper aims to provide a narrative about Louisa’s journey through the colonial justice system and seeks to highlight the legal processes in operation in 1888-1889.

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¹ NSW *Parliamentary Debates*, 19 December 1888, 1338 (Henry Parkes, Premier, Thomas Hassall, Minister).

² *Ibid.*

³ *Ibid.*, 1319-1343.

⁴ *Ibid.*, 1319.

⁵ ‘Louisa Collins Sentenced To Death’, *Sydney Morning Herald* (NSW), 10 December 1888, 11.

⁶ See *Search Results for Louisa Collins + NSW* (2011) National Library of Australia

<<http://trove.nla.gov.au/newspaper/result?q=louisa+collins+%2B+nsw>>.

⁷ *Ibid.*

I LOUISA MAY COLLINS: TWO INQUESTS, FOUR TRIALS AND AN APPEAL

A The Coronial inquests

On 10 July, 1888, a coronial inquest led by Sydney City Coroner, Mr Henry Shiell JP, at the South Sydney Morgue, was opened into the death of Michael Peter Collins.⁸ Michael Collins had died on 8 July 1888, in suspicious circumstances. He was Louisa Collins' second husband, a wool washer by trade and had resided with Louisa and five of her children⁹ at No 1 Popples Terrace, Botany, a Southern Sydney suburb in New South Wales.¹⁰ Coroner Shiell swore and empanelled a jury of twelve men of the colony to inquire into when, how and by what means Michael Collins came by his death.¹¹

On the first day of the inquest, Louisa Collins was sworn and gave evidence.¹¹ She was not then in custody. Dr Marshall and Dr Milford, the latter the medical practitioner who had assisted Dr Marshall with the post-mortem, also gave evidence on the same day. The Coroner then adjourned the matter until 17 July 1888, to enable a chemical analysis of the deceased's stomach.¹² On Thursday, 12 July 1888, the Government Analyst, Mr Hamlet, told the Coroner that he had completed his analysis of the deceased's stomach and had discovered a quantity of arsenic sufficient to cause death.¹³ The Coroner ordered the apprehension of Mrs Collins.¹⁴

Later that evening Louisa Collins was taken into custody, though not under a warrant,¹⁵ and held on suspicion of having caused the death of her husband.¹⁶ The police had arrived at a 'few minutes to six o'clock'.¹⁷ Louisa had been having dinner with her five children.¹⁸ Allegedly under the influence of drink, she had asked the police officers if she would be returning to her house. The officers did not reply and Louisa then 'put her hands over her face and said I know I am not coming back again.'¹⁹ Louisa was right. Her life story from this time onwards would become a unique and tragic tale about the process of criminal justice in colonial New South Wales.

Questions surrounding the conduct of Louisa had been raised in early July when Dr George Marshall, the doctor who was treating Michael Collins for a suspected cold and gastro-duodenal catarrh, spoke with his colleague Dr Thomas Martin. Dr Marshall mentioned that he

⁸ Central Criminal Court Papers, July 1888, Inquest No 786, *Regina v Louisa Collins* AONSW 9/6758 6-149; 'Coroner's Inquests. Suspicious Death of a Man at Botany' *Sydney Morning Herald* (NSW), 11 July 1888, 7.

⁹ 'Central Criminal Court Papers', above n 8, 36. It is indicated that there were five children living at home, however Louisa was the mother of 'seven children'. See the Colonial Secretary's Special Bundle AONSW 4/895.1.

¹⁰ 'Central Criminal Court Papers', above n 8, page unknown.

¹¹ *Ibid*

¹² 'Central Criminal Court Papers', above n 8, 55-60.

¹³ 'Suspicious Deaths at Botany', *The Maitland Mercury and Hunter River General Advertiser* (NSW), 17 July 1888, 6.

¹⁴ *Ibid*; 'Central Criminal Court Papers', above n 8, 60.

¹⁵ *Ibid*.

¹⁶ *Ibid*, 80.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid*, 82.

had been treating a patient named Collins at Botany.²⁰ On hearing this, Dr Martin alerted Dr Marshall to the fact that Louisa Collins had mourned the death of her first husband Charles Andrews in February 1887 following a strange illness with symptoms similar to those now present in Mr Collins.²¹ Dr Martin having previously attended Charles Andrews now harboured grave concerns for Michael Collins and shortly after this conversation they both decided it was appropriate to report ‘the matter to the police.’²²

In the evidence presented to the coronial inquest, it was clear that in his final week Michael Collins received many visitors.²³ This was not a case where a wife slowly poisoned her husband in the privacy and secrecy of the family home with attention being drawn to the household after the death. The neighbours called at the house, any time day or night, to assist in the care of Mr Collins, and the attentions of both the police and medical profession, according to archival sources, were already focused upon the married couple. If Louisa was poisoning her husband why would she initially invite doctors and neighbours into her house? Undoubtedly, if Louisa did poison her second husband then, under circumstances of such close scrutiny, she was incredibly brazen to do so.

Michael Collins had been feeling unwell with cold-like symptoms for at least the month of June and took to his bed on 3 July, 1888, with severe vomiting and pain. Louisa requested Dr Marshall to call on her husband, which he did. On the same day, Constable Jeffes of the local police constabulary was passing the house. Constable Jeffes knew the couple and had been friendly with Louisa’s first husband Charles Andrews. Constable Jeffes, aware of Michael’s illness, allegedly stopped to speak with Louisa and Michael.²⁴ Michael called Constable Jeffes up to his bedside and reported that he ‘could not keep anything down’ but that he would be ‘up in a day or two.’²⁵ Constable Jeffes left promising to call back at a later date.

The next day, 4 July 1888, Dr Marshall returned to check on his patient. He was suspicious,²⁶ so collected samples of urine and vomit and took a bottle of brandy and a medicine bottle from next to Collins’ bed. Dr Marshall conducted a rough analysis of these substances but did not detect anything suspicious.²⁷ He returned to the house on 6 July, and upon seeing that Michael Collins had not improved, he asked Louisa to take him to hospital. Louisa allegedly stated that ‘it was better for him to die at home as she believed people always died when sent to hospital.’²⁸ Dr Marshall told the coronial inquest that he said to Louisa that Michael would be well cared for and that he saw no reason to suppose he would die.²⁹

The following day, 7 July 1888, Louisa sent her son to Dr Marshall reporting that her husband was dying. At 10pm that evening Dr Marshall and Dr Martin called upon Michael Collins. At 11pm that same evening Constable Jeffes and Senior Constable Sherwood also checked upon Michael. They found him still in bed, this time complaining of pain in his left

²⁰ ‘Central Criminal Court Papers’, above n 8, 14.

²¹ *Ibid.*, 18.

²² *Ibid.*

²³ *Ibid.*, 35-51.

²⁴ *Ibid.*, 36.

²⁵ ‘Central Criminal Court Papers’, above n 8, 37.

²⁶ *Ibid.*, 23.

²⁷ *Ibid.*, 13.

²⁸ *Ibid.*, 16.

²⁹ *Ibid.*

shoulder.³⁰ At this point Senior Constable Sherwood asked Michael if he had taken any other medicine. Michael and Louisa both stated that he had not. Sherwood then asked 'if he suspected any person had given him anything to make him ill.'³¹ Michael said 'no' and stated 'I'll be up and all right in a few days'.³²

On Sunday, 8 July 1888, Senior Constable Sherwood returned to the house and put the same questions to Michael Collins again in the presence of Louisa. Michael said 'no' to both questions.³³ Dr Marshall and Dr Martin also called upon Michael on Sunday afternoon they found that he was close to death being 'quite pulseless'³⁴ with a low body temperature.³⁵ Michael Collins died later that afternoon. Constable Jeffes called upon the house within half an hour of Michael's death. Upon finding Michael dead and hearing that Dr Marshall had refused to give a certificate of death he began searching the house and collecting evidence, including a part filled glass tumbler taken from beside the bed the contents of which were later tested and found to contain arsenic.³⁶

The inquest into Michael Collins' suspicious death established that, based on the symptoms of his illness and the results of the autopsy,³⁷ Michael had died of 'arsenical poisoning'³⁸ through the administration by his wife of an arsenic rat poison known as 'Rough on Rats'.³⁹ The poison had been mixed with milk.⁴⁰

During the coronial inquest into the death of Michael, attention had also turned to the earlier passing of Charles Andrews, Louisa's first husband who had died in February 1887.⁴¹ On Saturday, 14 July 1888, the Coroner opened a second inquest and also issued a warrant to exhume the bodies of Charles Andrews and John Collins, Louisa's infant son by her second husband.⁴² Upon examination Charles Andrews' body was found to contain faint traces of arsenic. There were no traces of arsenic in the body of the child.⁴³

During the first inquest (the death of Michael Collins), Louisa gave a statement that her husband had been 'downcast for sometime'⁴⁴ and had self-administered a medication for 'a

³⁰ 'Central Criminal Court Papers', above n 8, 38.

³¹ *Ibid.*, 71.

³² *Ibid.*

³³ *Ibid.*, 72.

³⁴ *Ibid.*, 19.

³⁵ *Ibid.*, 19, 66.

³⁶ *Ibid.*, 37-45.

³⁷ 'Central Criminal Court Papers', above n 8, 1-30.

³⁸ 'Central Criminal Court Papers', above n 8, page unknown.

³⁹ *Ibid.*, 56.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 18.

⁴² 'Intercolonial (from our correspondents) New South Wales, Sydney, July 15' *The Brisbane Courier* (Qld), Monday 16 July 1888, 5; 'The Botany Poisoning Case, Second Verdict of Murder' (by electronic telegraph from our own correspondent, Sydney, August 5), *The Brisbane Courier* (Qld), 7 August 1888, 5.

⁴³ 'The Botany Poisoning Case, Second Verdict of Murder' (by electronic telegraph from our own correspondent, Sydney, August 5), *The Brisbane Courier* (Qld), 7 August 1888, 5. The report in this newspaper about the findings of the inquest on the exhumed bodies states 'the coroner summed up strongly against the prisoner, and the jury, after a short deliberation found that the child, John Collins, died from natural causes, but that Charles Andrew met his death by arsenical poisoning, and that the poison was administered by his wife, Louisa Collins, who was guilty of murder. The prisoner was then committed for trial'.

⁴⁴ 'The Botany Poisoning Case' *The Brisbane Courier* (Qld), 27 July 1888, 5.

lump in the groin'⁴⁵ that must have contained 'arsenic.'⁴⁶ The implication being made by Louisa was therefore one of suicide. However, this view was not supported by others present during the last weeks of Michael Collins' life.

The depiction of Louisa Collins throughout the coronial inquisitions is particularly telling. There was a lot of interest in Louisa's character. The main consulting doctor for the duration of Michael Collins' illness until his death, Dr Marshall, gave evidence to the Coroner that was particularly damning. He described Louisa's attitude towards her husband's care as 'apathetic'⁴⁷ and he complained that 'she did not appear to pay proper attention.'⁴⁸ He also put to Louisa in his statements before the Coroner, 'you never asked once what was the matter with your husband or what was the cause of his death.'⁴⁹ Later in the first trial, he would further allege that on the Monday after Michael's death, Louisa was 'under the influence of liquor'⁵⁰ displaying what Dr Marshall referred to as an 'excited manner',⁵¹ with her breath smelling of 'alcohol'.⁵²

Other observations on Louisa's manner put before the Coroner reveal that on the day of Michael's death Louisa smelt of drink⁵³ and tried 'two or three times'⁵⁴ to get out of the house, saying 'she was tired of her life and would not live after tomorrow.'⁵⁵ Constable Jeffes and Louisa's son, Arthur Andrews, both told the coronial court that upon being asked by her son Arthur 'What are you talking about? What's going to become of the children?' Louisa said 'I don't care about them.'⁵⁶ This allegation, raising questions with regards to Louisa's dereliction of duties as a mother had a damning impact.

Moreover, throughout the inquest Louisa Collins declined to ask the witnesses any questions or show any emotion.⁵⁷ This silent stoicism came to be the dominant representation of Louisa Collins both in the courtrooms and then retold in newspapers around the colony. Ultimately, this 'unwomanly' trait played a significant role in her resulting execution. At the conclusion of both inquisitions, the jury had found that there was sufficient evidence to establish murder. Louisa Collins, a mother of seven children⁵⁸ and thirty-nine years of age,⁵⁹ was committed to stand trial for murder on 26 July 1888.⁶⁰

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ 'Central Criminal Court Papers', above n 8, 17.

⁴⁸ Ibid.

⁴⁹ Ibid, 53.

⁵⁰ Ibid, 9.

⁵¹ Ibid.

⁵² Ibid, 10.

⁵³ Ibid, 79.

⁵⁴ Ibid, 35.

⁵⁵ Ibid.

⁵⁶ 'Central Criminal Court Papers', above n 8, 47-48, 126; 'Coroner's Inquests. The Botany Poisoning Case' *The Sydney Morning Herald* (NSW), 18 July 1888, 7.

⁵⁷ 'Central Criminal Court Papers', above n 8, 61, 63, 68, 93, 96, 104, 115, 118, 120, 149.

⁵⁸ The Colonial Secretary's Special Bundle AONSW 4/895.1, as discussed above n 9.

⁵⁹ AONSW 4335, Louisa Collins. Louisa May Collins's date of birth is recorded as 1849 (no date or month indicated) in the 'Darlinghurst Gaol Photo Description Book'. However the 'Particulars of Conviction and Prison History' prepared by the Deputy Governor of Sydney Gaol for her petition for the remission of sentence records the year of birth as 1857 (born in Scone, NSW) document dated 7 January 1889.

⁶⁰ Central Criminal Court Sydney, *Regina v Louisa Collins* AG No 114, document dated 30 July 1888.

B First trial for the murder of Michael Collins

Louisa Collin's first criminal trial was heard in the Supreme Court of New South Wales on 6 August 1888, and was presided over by Justice Foster.⁶¹ Justice Foster had only been appointed to the Supreme Court Bench in February previously having been the Attorney General for New South Wales.⁶² In the first trial, Louisa was charged with the murder of her second husband, Michael Collins. We can observe that the colonial justice system moved swiftly at this time with the coronial inquest into Michael Collins' death concluding less than a fortnight before the trial. The evidence led in the first trial was generally consistent with the evidence that had been given in the coronial inquest.

A number of neighbours known to Collins gave evidence in Court. However, only one neighbour, Charles Sayers, a grocer at Botany, gave evidence of an emotional reaction in Louisa to her husband's illness. Charles told the court that 'while he [Michael] lay sick she was crying several times when I went in.'⁶³ He later elaborated stating 'I know she has taken liquor during Collins's illness, but she was not the worse for liquor – You could tell it by her flushed face and eyes – When I saw her crying she seemed so – I knew she had a glass of drink on each occasion.'⁶⁴ These statements were underlined in the Judges' notes.

Before the court, Dr Marshall gave slightly more favourable evidence on Louisa's character than he had given before the coronial inquest. Dr Marshall stated that 'so far as I saw she was kind and attentive to her husband.'⁶⁵ However, he had also argued that her 'manner was apathetic'⁶⁶ and that she did 'not appear distressed about his dying'.⁶⁷ There was no notation in the judge's notes next to the statement regarding Louisa's kindness, however, a notation remains highlighting Louisa's apathetic manner. The statement from Marshall about Collins not being distressed was underlined with a hand written comment stating, 'she did not appear distressed on the day.'⁶⁸ On the matter of Louisa not taking Michael Collins to hospital, Dr Marshall acknowledged before the court that prejudice against going to hospital was 'tolerably common'⁶⁹ at this time.

On the cause of death, Dr Marshall stated to the court that the change in Michael was too dramatic for the natural course of a disease.⁷⁰ The other attending doctor, Dr Martin, on the other hand, stated that 'taking the symptoms only as I saw them they might have come from an ordinary attack of gastro-enteritis.'⁷¹ Nonetheless, Dr Martin qualified this by stating that if arsenic were found in the stomach he would say that Michael Collins died from arsenic

⁶¹ 'The Botany Mystery', *The Sydney Morning Herald* (NSW), 7 August 1888, 9.

⁶² Mr Foster was the Attorney General for New South Wales from 1877 to 1878 and again in 1887. See NSW Government, Mr William John FOSTER (1831 - 1909), (2011) Parliament of NSW <<http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/0/2045C87530F5BD44CA256E2B00086E36>>; NSW Government State Records, *Person Detail William John Foster* (2011) State Records Archives Investigator <<http://investigator.records.nsw.gov.au/Entity.aspx?Path=\Person\18>>.

⁶³ Central Criminal Court Papers, 'Copy Judges' Notes' for *Regina v Louisa Collins* (Supreme Court NSW, Foster J, 6 August 1888) 47.

⁶⁴ *Ibid*, 49.

⁶⁵ *Ibid*, 17.

⁶⁶ *Ibid*, 17.

⁶⁷ *Ibid*, 18.

⁶⁸ 'Central Criminal Court Papers', above n 63, 18.

⁶⁹ *Ibid*, 15.

⁷⁰ *Ibid*, 16.

⁷¹ *Ibid*, 19.

poisoning and that the symptoms would be consistent with this.⁷² The medical evidence did establish that Michael Collins had at least two grams of arsenic in his body and arsenic was also found in samples of Michael's vomit.⁷³ The tumbler of milk taken by Constable Jeffes was found to contain 1/10 of a gram of arsenic.⁷⁴ The police searched the house but found no arsenic.⁷⁵ Louisa had stated throughout the trial that she had given her husband some vomiting powder purchased from a Chemist at Botany Road. The chemists in area of Botany were all searched for arsenic and enquires were also made of any purchases of arsenic by anyone in the area. All of these enquires were unsuccessful.⁷⁶

Louisa's 11 year-old daughter, May Andrews, also took the stand. May had not given a statement to the coronial inquest. May told the court that on the night of Michael Collins' death she was dusting in the kitchen and noticed a box was missing on the shelf that had been there the week before Michael died.⁷⁷ She graphically described the box to the court including that there were pictures of rats on it and it was 'Rough on Rats.'⁷⁸ She spelt out 'Rough on Rats' to the jury.⁷⁹ May had apparently drawn the box to her mother's attention and was uncertain that night whether she herself had misplaced the box. She told the Court that 'Mother did not take it — I forgot what I did with it'.⁸⁰ Perhaps naively unaware of what the implications of her comments, May further stated:

I would know a box like it — I had seen one like it before, when we lived in the paddock ... It was before my own father took sick — I saw the box first on the very top-shelf in the house, when we lived in the paddock about a year ago.⁸¹

This was new evidence in the case and it was particularly detrimental for her mother, Louisa.

The common law at the time required the jury to deliver a unanimous verdict either as to the prisoner's guilt or in order to acquit.⁸² The case came to a close late on the evening of 7 August, 1888; the judge recorded in his notes that it was 6.45 pm when the defence addressed the jury. By 9 pm the jury asked Foster J if they could stop, feeling that they would be better able to consider the evidence tomorrow.⁸³ The case resumed at 9:30 am, it appears from the record that Justice Foster summed up the case until 1 pm and then the jury retired to consider their verdict. At 4:25 pm the jury returned to the Court stating that they could not agree. Justice Foster did not accept this and the jury agreed to be locked up until 9 am the following morning. On Thursday 9 August, 1888, the foreman informed the court 'there is no probability of an agreement — they are nearly equal.'⁸⁴ Unable to reach a verdict, Justice Foster discharged the jury.

⁷² Ibid.

⁷³ Ibid, 25.

⁷⁴ Ibid.

⁷⁵ Ibid, 44.

⁷⁶ Ibid.

⁷⁷ 'Central Criminal Court Papers', above n 63, 56.

⁷⁸ Ibid, 56.

⁷⁹ Ibid, 57.

⁸⁰ Ibid, 56.

⁸¹ Ibid, 56-57.

⁸² Sir Mathew Hale, *History of the Common Law of England* (1713) cited in New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986) [9.2].

⁸³ 'Central Criminal Court Papers', above n 63, 63.

⁸⁴ Ibid, 64.

C The second trial for the murder of Michael Collins

The second trial began just three months later (5 November 1888)⁸⁵ and was presided over by Justice Windeyer.⁸⁶ Justice Windeyer had significant public notoriety in the colony at this time for being tough in sentencing, having sentenced nine men to death in the Mount Rennie Rape Case.⁸⁷ On 8 November the case concluded. At 9:30 pm that evening the juryman reported that the jury were not agreed.⁸⁸ The jury were locked up for the night.⁸⁹ The following morning the juryman told the court 'that there was no probability of them agreeing upon a verdict.'⁹⁰ Once again a jury had failed to agree that Michael Collins had died of poisoning at the hands of his wife and were discharged.⁹¹

There was a great deal of uncertainty surrounding the case and these issues were being reported in the colonial newspapers.⁹² Perhaps Michael Collins committed suicide,⁹³ he had been unemployed at the time of his illness and the family was said to be in financial difficulty. Perhaps the presence of arsenic in his body had nothing to do with his illness at all. It was known that wool washing could expose workers to green and dry sheepskins that were, from time to time, treated with arsenic by farmers.⁹⁴ Michael Collins may therefore have been exposed to arsenic from his previous employment. Medications in this era were also known to contain arsenic. So there was some uncertainty as to whether the medication Michael had purchased and taken for his early symptoms had contained arsenic or whether there was arsenic in the medication that Louisa purchased from the chemist.

On the other hand, it was argued that Louisa was a cold and ruthless woman, known as the 'Borgia'⁹⁵ of Botany Bay, who had had an affair with Michael Collins when he had initially been a boarder in the family home when Louisa was married to Andrews. So, a rumour persisted that Louisa poisoned her first husband Charles Andrews, received his death benefit and married Michael Collins within a month. When newly married, the couple, who favoured a drink,⁹⁶ got into financial difficulties and it was alleged that Louisa then decided to poison her second husband, being tired of him.

⁸⁵ 'Intercolonial. New South Wales', *The Brisbane Courier* (QLD), 6 November 1888, 5.

⁸⁶ 'The Alleged Murder at Botany', *The Sydney Morning Herald* (NSW), 6 November 1888, 11.

⁸⁷ D Walker, 'Youth On Trial: The Mt Rennie Case' (1986) 48-51(50) *Labour History* 28.

⁸⁸ 'The Botany Poisoning Case', *The Brisbane Courier* (QLD), 9 November 1888, 5.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*; see also 'The Alleged Murder At Botany', *The Sydney Morning Herald* (NSW), 9 November 1888, 4.

⁹² See *Search Results*, above n 6.

⁹³ 'The Alleged Murder at Botany', *The Sydney Morning Herald* (NSW) 8 November 1888, 6.

⁹⁴ *Ibid.*

⁹⁵ Mr Walker likened Louisa's crime to Lady Macbeth and Lucrezia Borgia stating in NSW parliament that 'there was no character more sublimely or more fiendish, than that of Lucrezia Borgia'. See NSW *Parliamentary Debates*, 19 December 1888, 1325. (Thomas Walker, Member for Northumberland); The idea of Louisa being the Borgia of Botany Bay is also apparent in 19th century papers see further SLNSW 042P61, 'The Botany Poisoning Case', author unknown.

⁹⁶ A Sharpe, *Crimes That Shocked Australia* (Currawong Press, 1982) chapter 14; N Cushing, 'Woman As Murderer: The Defence Of Louisa Collins' (1996) 1(2) *Journal of Interdisciplinary Gender Studies* 147.

D Trial for the murder of Charles Andrews

Quickly after the second trial, the Crown proceeded with a third trial (commencing on 19 November 1888),⁹⁷ but this time Louisa stood before Justice Innes for the murder of her first husband, Charles Andrews.⁹⁸ Louisa Collins had earlier been committed for trial for the murder of her first husband Charles Andrews following the inquest into Charles Andrews and John Collins's deaths on 6 August 1888.⁹⁹ According to convention, when two juries disagreed the Crown would abandon prosecution.¹⁰⁰ Perhaps this was the reason the Crown had not commenced a third trial against Louisa for the murder of Michael Collins at this time and instead charged Louisa with the murder of Charles Andrews and commenced prosecution.¹⁰¹

Charles Andrews had worked as a 'master butcher.'¹⁰² Once again, Mr Lusk for the defence argued that there was exposure to arsenic because of his trade.¹⁰³ The defence also argued that the Crown could not establish beyond reasonable doubt that the arsenic had entered the body of Charles Andrews prior to his death. The traces of arsenic found in the remains may have come from the soil or materials of the coffin.¹⁰⁴ As only small traces of arsenic were found in Andrews' body when it had been exhumed it was difficult for the Crown to establish that Andrews had been deliberately poisoned. Therefore, a unanimous finding that Louisa was responsible for murder by arsenic poisoning once again proved to be an impossible task for the jury. In striking similarity to the previous two trials, the jury reported that they were unable to agree and were locked up overnight.¹⁰⁵ The following morning the foreman could do little but state to the Court that 'the jury had not agreed upon a verdict, and ... there was no chance of a verdict being agreed upon.'¹⁰⁶ As a consequence, the jury was discharged. This time the case against Louisa Collins for the murder of her first husband (Charles Andrews) was abandoned by the State.¹⁰⁷

Louisa Collins had now faced three trials; one trial for the murder of her first husband and two trials for the murder of her second husband. All three trials had resulted in hung juries. As mentioned earlier in this paper, there was a well-established convention that following two trials which had resulted in hung juries the prosecution would abandon its prosecution of the case. The case against Louisa Collins for the murder of Michael Collins should therefore have been abandoned by the Crown. Although each jury had not agreed upon a verdict of not guilty, as a matter of common sense (rather than a principle of law) two hung juries were indicative of reasonable doubt as to Louisa's guilt. Underlying this was the convention

⁹⁷ 'Central Criminal Court Monday. The Alleged Murder at Botany', *The Sydney Morning Herald* (NSW), 20 November 1888, 3.

⁹⁸ Charles Andrews had died on 2 February 1887. 'The Alleged Murder at Botany', *The Sydney Morning Herald* (NSW), 20 November 1888, 3.

⁹⁹ 'The Poisoning case in Sydney. Second Verdict of Murder against Mrs Collins (By Special Wire)', *The Argus* (Vic), 6 August 1888, 8; 'The Botany Mystery. Verdict of Wilful Murder against Louisa Collins', *The Sydney Morning Herald* (NSW), 6 August 1888, 9.

¹⁰⁰ *NSW Parliamentary Debates* 19 December 1888, 1320 (Ninian Melville, Minister).

¹⁰¹ 'Intercolonial. Supposed Poisoning Case', *The Western Australian* (WA), 15 November 1888, 3.

¹⁰² J Holleridge, *Australia's Wicked Women* (Horwitz Publications, 1963) 80.

¹⁰³ 'Central Criminal Court – Wednesday. The Alleged Murder At Botany', *The Sydney Morning Herald* (NSW), 22 November 1888, 6.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ 'The Alleged Murder at Botany', *The Sydney Morning Herald* (NSW) 23 November 1888, 4.

¹⁰⁷ *Ibid.*

directing that the Crown should not relentlessly peruse a case against an accused where juries had repeatedly been unable to agree upon a verdict. While the case against Louisa Collins of the murder of Charles Andrew could have proceeded to a second trial, with only small trace amounts of arsenic found in the exhumed body of Mr Andrews in this matter there was no likelihood of establishing murder by arsenic poisoning at the hands of Louisa Collins beyond reasonable doubt.

E The third trial for the murder of Michael Collins

In extraordinary circumstances, a fourth trial was ordered. The Crown returned to its original case and Louisa was tried for the third time for the wilful murder of her second husband Michael Collins. The fourth trial commenced on 6 December 1888 and was held before the Chief Justice of New South Wales, Fredrick Darley.¹⁰⁸ This time, two hours deliberation was sufficient for the jury to reach a unanimous verdict of guilty.¹⁰⁹

In this trial, it was claimed that the suspicious circumstances surrounding the death of Louisa's second husband were made particularly clear by the Crown Prosecutor, and, unlike the earlier trials, it was successfully established during the trial that no arsenic was used in the day-to-day work in which Michael Collins had previously been employed.¹¹⁰ The jury found that Michael Collins had died of arsenical poisoning and that the prisoner had administered the arsenic,¹¹¹ and on 8 December 1888,¹¹² Chief Justice Darley delivered his sentence. In addressing the prisoner he stated:

Louisa Collins, after a most careful trial, after being defended with much skill and ability, you have been found guilty of murder of your husband, Michael Peter Collins. ... no other verdict could be arrived at by a body of intelligent men such as those who have so carefully attended to this case throughout. The murder you have committed is one of peculiar atrocity. You were day by day giving poison to the man whom above all others you were bound to cherish and attend. You watched his slow torture and painful death, and this apparently without a moment's remorse. You were indifferent to his pain, and gained his confidence by your simulated affection. There is too much reason to fear that your first husband Andrews also met his death at your hands: that he, too, you watched to the end – saw his torture day after day, and added to its horror this crime. I hold out no hope of mercy to you on earth ... The sentence of the Court is that you be taken to the place from whence you came, and on a day hereafter to be named by the Governor in Council, that you be taken to the place of execution, and there be hanged by your neck until you are dead: and may the Lord have mercy on your soul.¹¹³

Chief Justice Darley's judgment was not only a reproach upon the prisoner it was also a carefully constructed statement to the Executive. The attentions of the colony were already focused upon the operation of the colonial justice system and demand for an appropriate administration of justice was apparent. There was public awareness of Louisa's inability to pay for legal counsel and concern for justice to be seen to be done in this case. Mr Lusk, a member of local legal profession, had represented Louisa at all four trials pro bono.¹¹⁴ However, there was still disquietude that Mr Lusk was under a considerable disadvantage

¹⁰⁸ 'The Alleged Murder at Botany', *The Sydney Morning Herald* (NSW) 6 December 1888, 6.

¹⁰⁹ 'The Case of Louisa Collins', *The Daily Telegraph* (NSW), 10 December 1888, 6.

¹¹⁰ 'Central Criminal Court – Thursday', *The Sydney Morning Herald* (NSW), 7 December 1888, 4.

¹¹¹ 'The Botany Poisoning Case' *The Brisbane Courier* (Qld) 11 December 1888, 5.

¹¹² It is interesting to note that this important judgment was delivered on a Saturday morning in the New South Wales Supreme Court.

¹¹³ 'The Botany Murder. Louisa Collins Sentenced to Death' *Sydney Morning Herald* (NSW) 10 December 1888, 11.

¹¹⁴ NSW *Parliamentary Debates*, 19 December 1888, 1320 (Ninian Melville, Minister).

with no funds to support Louisa's defence. The mood was so apparent that Henry Parkes had personally 'put close questions to his Honour the Chief Justice as to whether the prisoner had been ably defended.'¹¹⁵ The Chief Justice believed that she had and these sentiments can be seen clearly expressed at the outset of his judgment.

Henry Parkes was also keen to know of the Chief Justice's opinion as to whether the Executive Council should take a merciful view in this case.¹¹⁶ The Chief Justice held that there were no grounds for mercy and again this is clearly expressed in his judgment. Interestingly, Chief Justice Darley's harsh statement regarding mercy was recorded in the Prison records. In the Darlinghurst Goal Photo Description book, under the heading 'Remarks', the following hand written comment appears 'Executed 8th January 1889 His Honour the Chief Justice Darley said, 'I hold out no hope for mercy for you on earth!!!'¹¹⁷ The Chief Justice of New South Wales had delivered a careful, deliberate and powerful judgment but the case had so captured the colony's attention that it was not to be the end of the matter.

Chief Justice Darley's decision was reported in newspapers throughout the colony.¹¹⁸ Despite the finality in the case, which the Chief Justice had expressed, there were immediate rumblings for an appeal. On 20 December 1888, the honourable member for Mudgee, Mr Haynes, asked the Colonial Secretary in the New South Wales Parliament whether he would provide Louisa Collins legal counsel if she desired to appeal to the Full Court.¹¹⁹ Mr Haynes noted that it was 'usual in capital cases for the Crown to assign counsel to a prisoner who is unable to obtain legal assistance.'¹²⁰ Sir Henry Parkes agreed that counsel would be paid, adding:

[i]n any case whatever where any attempt may be made to place the conduct of this unhappy woman in a better light, or to serve the ends of justice in her favour, the Government will render every conceivable assistance.¹²¹

The Government was clearly still under great pressure to ensure that justice be seen to be done in the Louisa Collins case.¹²²

F The appeal

The appeal was heard on 28 December 1888, just three days after Christmas.¹²³ The Full Court consisted of three judges who had all previously presided over her earlier trials: Foster J (first trial), Windeyer J (second trial) and Chief Justice Darley (fourth trial and having delivering a pejorative judgment at that time). There was no challenge to the composition of the bench. In particular the colonial newspapers, the Executive and Louisa's defence did not query the fact that Chief Justice Darley was hearing a case on appeal against a woman he had convicted; hearing an appeal against a case upon which you presided was clearly not

¹¹⁵ Ibid, 1321 (Henry Parkes, Premier).

¹¹⁶ Ibid.

¹¹⁷ AONSW 4335, Louisa Collins, above n 59.

¹¹⁸ See *Search Results*, above n 6.

¹¹⁹ NSW *Parliamentary Debates*, 20 December 1888, 1386 (John Haynes, Minister)

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ 'Law Report. Regina v Louisa Collins', The Sydney Morning Herald (NSW), 29 December 1888, 8.

controversial at the time. The appeal to set aside Louisa's conviction failed.¹²⁴ Chief Justice Darley and Justices Foster and Windeyer held it was not sufficient grounds for appeal to argue that evidence regarding the death of Charles Andrews should not have been admitted in the trial for the murder of Michael Collins. The second ground for appeal concerned a telegram that had been delivered to a jury member during the fourth trial, the Court held that the telegram was unopened and therefore could not have any prejudicial effect on the verdict.¹²⁵ The Court confirmed the original findings to be correct and delivered their decision; 'no case against a prisoner could have been clearer.'¹²⁶

II THE EXECUTIVE COUNCIL

A Governor Charles Robert Carrington

At the time of Louisa's four trials, Governor Charles Robert Carrington, the Marquess of Lincolnshire, had been in office for almost four years.¹²⁷ While Carrington's legacy is documented as being 'able and tactful'¹²⁸ in his dealings and as fulfilling his social role with 'warmth and generosity',¹²⁹ Carrington faced a difficult period throughout the Louisa Collins trials.

Public sentiment within the colony was now running high. By the beginning of January 1889, widespread public debate had arisen over the decision to condemn Louisa Collins to a death by hanging. The newspapers were literally flooded with correspondence arguing both for and against a reprieve on her behalf and advertisements for petitions to the Governor of New South Wales pleading for mercy on behalf of Louisa appeared in classified columns around Australia.¹³⁰

There were a number of large petitions sent directly to the Governor of New South Wales in respect of the Louisa Collins case. Some of these petitions were made up of hundreds of signatures from the women and men of the colony.¹³¹ These petitions, one of which came from the 'Citizens of Sydney and Colonists of New South Wales',¹³² pleaded that 'mercy ... be extended to the prisoner' because there was 'no positive proof of the prisoner's guilt'¹³³ based on the uncertainty of three juries, '36 men of intelligence'.¹³⁴ Another, signed by over '1000 citizens',¹³⁵ asked for a reprieve on the grounds of 'hereditary moral incompatibility and insanity',¹³⁶ while a third, used the 'festive season and ... the beginning of our second

¹²⁴ Ibid; 'Supreme Court Proceedings', *The Town and Country Journal* (NSW) 5 January 1889, 12.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ AW Martin, *Carrington Charles Robert {Marquess of Lincolnshire} (1843-1928)* (2011) Australian Dictionary of Biography <<http://www.adb.online.anu.edu.au/biogs/A030334b.htm>>.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ For example see 'Meetings. The Case of Louisa Collins', *The Sydney Morning Herald* (NSW), 4 January 1889, 10. See further *Search Results*, above n 6.

¹³¹ The Colonial Secretary's Special Bundle AONSW 4/895.1, above n 9, page numbers unknown.

¹³² Ibid. Petition dated 4 January 1889.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid. Petition dated 7 January 1889.

¹³⁶ Ibid. This may have referred to the phrenological and physiognomical aspects of Louisa Collins which were explored at the time of her incarceration: above n 95.

Centennial year¹³⁷ to ‘cry out for the life of this wretched woman’¹³⁸ and that effective justice ‘to be effective, must be tempered with mercy ... by the exercise of ... Royal Prerogative.’¹³⁹

On 12 January 1889, four days after the execution of Louisa Collins,¹⁴⁰ Carrington became the subject of a particularly shocking and graphic front page cartoon in *The Bulletin*, entitled ‘The Yawning Guv’nah and the Yawning Grave.’¹⁴¹ The sketch portrayed Governor Carrington yawning while holding a reel of petitions for Louisa’s life in his hand. In the foreground Louisa Collins hangs from a gallows and the young men of the Mount Rennie Rape Case are also depicted, four hanging from gallows and a fifth being whipped.

As disturbing as the picture is, it also drew public attention to another aspect associated with Louisa’s tragic circumstances: Governor Carrington’s speech made to a deputation begging for a reprieve for Louisa’s life.¹⁴² Targeting Carrington’s words from this address, which in essence had suggested that if he had known it was to be his duty to decide on the fate of an individual’s life then, ‘no power on earth would have induced him to come to the Colony.’¹⁴³ The newspaper offered its own translation for the reading public stating: ‘I had no idea I should ever be called upon to do anything responsible. I thought the position was to be purely ornamental – *Translation of the gubernatorial remarks aforesaid.*’¹⁴⁴ As the *Bulletin* had so graphically pointed out, the Governor’s post was not a position for the faint hearted and Governor Robert Carrington was certainly not the individual for the job.

At the time of Louisa’s incarceration, section 12 of the royal instructions issued to the Governor, set out the course to be taken in extending or withholding a reprieve to an offender. The prerogative of mercy was to be exercised by the Governor.¹⁴⁵ Section 12 stated that the decision was to be made ‘according to his own deliberate judgement.’¹⁴⁶ However, such a decision was to be reached upon the advice of the ‘Executive Council’¹⁴⁷ and with regard to a written report from the judge who presided over the trial.¹⁴⁸ Chief Justice Darley in his address to the Court, when sentencing Collins to death in her final trial, said that there were no grounds for merciful consideration in the Louisa Collins case.

B Premier Henry Parkes

Henry Parkes, the then Premier of New South Wales, claimed to be opposed to capital punishment believing that ‘the deterrent effect of any kind of punishment was small.’¹⁴⁹ In December 1886 and again in early January 1887, Parkes had appealed to Governor

¹³⁷ Ibid. Petition undated.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ ‘The Execution of Louisa Collins’, *Sydney Mail* (NSW), 12 January 1889, 77.

¹⁴¹ ‘THE YAWNING GUV’NAH and the YAWNING GRAVE’, *The Bulletin* (Sydney) 12 January 1889, 1.

¹⁴² ‘The Case of Louisa Collins Deputation To The Governor’, *The Daily Telegraph* (NSW) 4 January 1889, 6.

¹⁴³ ‘THE YAWNING GUV’NAH and the YAWNING GRAVE’, above n 53, 1.

¹⁴⁴ Ibid.

¹⁴⁵ Also known at this time as the ‘prerogative of pardon’.

¹⁴⁶ *NSW Parliamentary Debates*, 19 December 1888, 1322, (Henry Parkes, Premier).

¹⁴⁷ Ibid.

¹⁴⁸ The Governor even had power to summon the judge to the meeting of the Executive Council and to produce his trial notes. See the 12th section of the royal instructions reported in *NSW Parliamentary Debates*, 19 December 1888, 1322 (Henry Parkes, Premier).

¹⁴⁹ Ibid, 1322.

Carrington to exercise the prerogative of mercy upon five of the youths sentenced in the Mount Rennie Rape Case.¹⁵⁰ Henry Parkes claimed to have been greatly influenced by powerful friends, including the Archbishop and was concerned by the spectacle and damage to the country that would arise from hanging nine young men. However, as the opening words of this article revealed, he was unmoved by the circumstances of Louisa Collins.¹⁵¹

Parkes firmly held that Louisa had received a fair and just trial and everything had been done in her defence that could be done. In this matter the Premier was unyielding in his view that there were no grounds for merciful consideration.¹⁵² When the debate over the Louisa Collins case took place in the NSW Parliament on 19 December 1888, he had retorted to Parliament:

There is nothing more abhorrent to my sense of feeling than the strangling of a woman. A woman! from whose breast the nurture of life is drawn by the human family; a woman! who presides over the paths of our little children; a woman! who is the very centre of everything that is gentle and lovable in social life.¹⁵³

Parkes argued firmly that the law made no distinction because of gender. It is clear from his comments that the law *would* judge Louisa against a carefully constructed concept of womanhood that expected a wife to take care of her husband and children.

As a female found guilty of poisoning her husband, Louisa threatened the fabric of the colony.¹⁵⁴ As a result, it was impossible to state as a mere matter of sentiment that because the prisoner was a woman her life should be spared, here she had acted against her sacred vows to 'love and cherish'.¹⁵⁵ It would seem that in Parkes' eyes there was no spectacle or damage to the country from hanging this unfortunate woman instead equality of justice must be seen to be done. In his words:

if we believed that she had committed this diabolical murder ... if we came to that conclusion, why should she, woman as she is, not suffer death as well as a person who happened to be of the opposite sex.¹⁵⁶

Thus, any notion that because Louisa was female she should be treated more leniently was not going to be nor would it be, a persuasive argument before this Executive Council of colonial New South Wales.

III CONCLUSION

Less than two days before her execution Louisa Collins wrote to Governor Carrington on official blue prison paper in her 'Prison's Application or Statement'.¹⁵⁷ Her words to this day are moving:

Oh my Lord. Pray have mercy and pity on me and spare my life. I beg and implore you ... have mercy on me for my child's sake. I have seven children ... spare me my Lord for their sake ... Oh

¹⁵⁰ Ibid, 1335 - 1336. In the Mount Rennie rape case nine youths were sentenced to be executed in January 1887.

¹⁵¹ Ibid, 1336.

¹⁵² NSW *Parliamentary Debates*, 19 December 1888, 1334, (Henry Parkes, Premier).

¹⁵³ Ibid.

¹⁵⁴ C Smart, *Women, Crime and Criminology A Feminist Critique* (Routledge and Kegan Paul, 1976); R Helfield, 'Female Poisoners of the Nineteenth Century: A Study of Gender Bias in the Application of the Law' (1990) 28(1) *Osgoode Hall Law Journal* 53; L Zedner, *Women, Crime and Custody in Victorian England* (Clarendon Press, 1991).

¹⁵⁵ NSW *Parliamentary Debates*, 19 December 1888, 1335, (Henry Parkes, Premier),

¹⁵⁶ Ibid, 1323.

¹⁵⁷ The Colonial Secretary's Special Bundle AONSW 4/895.1, above n 9.

my Lord my life is in your hands. I once again implore and humbly beg you to spare me my life
...¹⁵⁸

Louisa May Collins was executed just after 9 am on 8 January, 1889, at Darlinghurst Gaol.¹⁵⁹ Her unfortunate journey, at the hands of an early colonial criminal justice system, had ended. The Darlinghurst and Long Bay Goal Death Register records the cause of death was fractures of the neck and trachea, death instantaneous.¹⁶⁰

This paper has told the story of Louisa Collins' journey through the colonial justice system and in its retelling it raises more questions than it answers. In extraordinary circumstances, even for the time, she faced four trials for murder and an unsuccessful appeal. The case against Louisa rose no higher than circumstantial evidence and unsurprisingly the first three trials had resulted in hung juries. In conclusion, the story of Louisa May Collins set in motion a movement against capital punishment which saw that no other woman was again executed in New South Wales.

¹⁵⁸ Ibid.

¹⁵⁹ 'The Execution of Louisa Collins', above n 128.

¹⁶⁰ AONSW 'Darlinghurst and Long Bay Goal Death Register 1867-1926, Obituary 1889'.

LESSONS FROM THE RECENT RESOURCE RENT TAX EXPERIENCE IN AUSTRALIA

JOHN PASSANT*

ABSTRACT

This paper argues that the left must be involved in tax debates and controversies to provide an alternative analysis to the neoliberalism and neoliberal Keynesianism that pervades tax discussion and expresses the interests of the ruling elite. This should be, not as part of speaking power's truth, but as part of the wider struggle against an undemocratic and exploitative system. To explore this further the paper looks at the recent experience in Australia of the Labor Government's attempts to introduce a Resource Super Profits Tax (RSPT). It argues that tax policy and tax law are a reflection of the balance of class forces and their combativeness at any time in any given society. The paper examines the changing nature of social democracy in Australia and the possibility that, in light of the Labor Government's back down over the RSPT, Labor now rules for specific sections of capital rather than capital in general. The paper argues that the left should be involved in the debates and battles over tax and tax policy as part of the wider struggle for a new society in which production is organised democratically to satisfy human need.

I INTRODUCTION

This paper argues that the left should be involved in tax debates and battles as it should be in any controversies to build a better world in the there and now and for the future. To do this the paper looks at the recent experience in Australia of the Labor Government's attempts to introduce a Resource Super Profits Tax (RSPT). It argues that tax policy and law is an outcome dependent on the level of struggle or lack of it in society. The paper looks at the nature of social democracy in Australia and raises as a possibility the argument that, in light of the Labor Government's back down over the RSPT, Labor now rules for specific sections of capital rather than capital in general. It concludes that it only through a reinvigoration of the struggle in Australia that more just tax outcomes can be won.

Part II of this paper examines the reasons why the left, broadly defined, should be interested in tax and justice. It argues that the level of political and economic struggle in a country sets the framework for what can and can't be won in terms of tax and other forms of justice. Part III examines theories of economic rent to determine the

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possible attractions such a tax might have for social democratic parties and others concerned about delivering social justice.

In Part IV the paper looks at the experience in Australia of attempts to introduce a broad resource rent tax and the role of the Labor Party as a capitalist workers' party.¹ Part V continues that discussion and suggests that the Labor Government's back down on the RSPT raises questions about the role of social democracy in Australia and the continuing viability of its traditional role of ruling in the interests of capital. In Part VI the paper concludes, based on the Australian experience, that the struggle for tax justice, in this particular case in the form of a resource rent tax, is a challenging one and can only really succeed if there is a strong mass movement pushing for change – in a nutshell struggle and change from below.²

II TAX AND JUSTICE

The left should be involved in tax debates and struggles³ to win reforms for workers but also to build the struggle for a new world.⁴ Falling somewhere between reform and revolution Martin McIvor puts the case in these terms:

The implication, I think, is that making real headway on reducing tax evasion and avoidance will be dependent on attacking these pinnacles of power and privilege from a number of directions at once, developing campaigns and institutions that can hold them to account, and redirecting our economy in ways that disperse wealth and power more widely and evenly. That would mean strengthening unions and reducing pay differentials; building up the role of cooperatives and the public sector; cleaning up politics and deepening democracy; suppressing speculation, and ensuring our financial system serves instead to support socially useful and ecologically sustainable production.⁵

We on the Left should not shy from helping to build that better world through our work and in our writing.⁶

A Tax and the Left

Depending on your political or philosophical position, it may or may not seem strange talking about tax in a symposium on justice, but the two are inextricably linked.⁷ This

¹ Rick Kuhn 'State of NSW: Labor reaps what it sows after attacking the working class' *The Conversation* (online), 23 March 2011 <<http://theconversation.edu.au/state-of-nsw-labor-reaps-what-it-sows-after-attacking-the-working-class-329>>.

² Dorothy Smith 'Making change from below' (2007) 3(2) *Socialist Studies/Études socialistes* <<http://journals.sfu.ca/sss/index.php/sss/article/viewArticle/14>>.

³ Martin McIvor, 'Tax Justice: A View from the Left' (2009) 5(2) *Tax Justice Focus* 8.

⁴ See David Solnit (ed), *Globalize Liberation: How to Uproot the System and Build a Better World* (City Light Books, 2004).

⁵ Above n 3, 9.

⁶ This is not to adopt Western Marxism's prescription of intellectual thought as class struggle, or the idea of theory as praxis, but rather to recognise that without theory there can be no practice and that an audience for left-wing ideas has to be provided with anti-capitalist analysis. Of course the consequences of 'helping build this better world through our work and in our writings' are or can be a constant stream of rejection or vilification, often based on the incorrect idea that law is an area of study separate from politics and economics, themselves expressions of the capitalist mode of production. As to the totality of thought, see, eg, Cliff Slaughter, 'Marxist Theory and Class Consciousness' in Cliff Slaughter, *Marxism and the Class Struggle* (New Park Publications, 1975) <<http://www.marxists.org/reference/subject/philosophy/works/en/slaughte.htm>>.

is especially so in the minds of reformers who want to create a better, kinder capitalism or a more equitable society. As Clive Hamilton put it ‘For most thinkers of the Left, lack of justice remains the defining characteristic of modern capitalist society, and the central focus of political activity in order to achieve a better society is to overcome injustice.’⁸ That sense of a lack of justice flows into the tax arena as a cry for equity and in some cases ‘making the rich pay’. Hamilton for example describes the progressive tax system as well as the welfare state as the two great legacies of social democracy.⁹

Tax is or can be a redistributive tool for justice but the problem is it can be redistributive both up and down the wealth spectrum.¹⁰ Further it is almost passé to say that a social democratic vision of justice and equity often entails spending programs,¹¹ and those spending programs must be funded.¹² Because taxes are ‘compulsory, unrequited transfers to the general government sector’,¹³ and because many taxpayers see tax as being an extraction from their money,¹⁴ rather than what we pay for civilised society,¹⁵ the levying of tax and the rates at which it is levied are often contestable and contested. While much of this contestation occurs at the taxpayer level – evasion and avoidance activity for example¹⁶ – the battle is also fought out at the political level. Certainly in recent Australian history tax has been and continues to be an important part of the political debate. The 1993 and 1999 elections were for example fought out mainly over Coalition proposals for a consumption tax. The large recent demonstrations in Australia for and against a carbon tax,¹⁷ although not specifically framed in class terms, are arguably about which class bears the burden of climate change and in the case of the carbon tax which class or classes pay the

⁷ See, eg. Liam Murphy and Thomas Nagel *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2002).

⁸ Clive Hamilton, ‘What’s Left? The Death of Social Democracy’ in *4 Classic Quarterly Essays on Australian Politics* (Black Inc 2007) 1, 36. Hamilton in fact (at 36) thinks that ‘the defining problem of modern industrial society is not injustice but alienation, and that the central task of progressive politics is to achieve not equality, but liberation.’ I would agree, but my views of alienation and liberation are I suspect far removed from Hamilton’s.

⁹ *Ibid.*, 8. Hamilton also argues (p 9) that sustained increases in living standards have altered social conditions and rendered social democracy irrelevant. This was written before the global financial crisis of 2008 and its possible Mark II in 2011.

¹⁰ See Murphy and Nagel, above n 7.

¹¹ Alexander M Hicks *Social Democracy & Welfare Capitalism: A Century of Income Security Politics* (Cornell University Press, 1999). See also Clive Hamilton, above n 8, 8.

¹² James O’Connor *The Fiscal Crisis of the State* (St. Martin’s Press, 1973)

¹³ Peter Harper, Australian Bureau of Statistics, ‘Australian System of Government Finance Statistics: Concepts, Sources and Methods’ (Cat. No 5514.0, Australian Bureau of Statistics, September 2005).

¹⁴ See, eg. V. Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Tax Evasion* (Ashgate Publishing, 2003.)

¹⁵ Justice Oliver Wendell Holmes *Compania General De Tabacos, De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100.

¹⁶ Braithwaite, above n 14.

¹⁷ In Sydney in early April 2011 there were pro and anti-carbon tax demonstrations each drawing around 4000 people. Miles Godfrey and Chi Tranter, ‘Thousands Demonstrate for and Against Carbon Tax’, *The Sydney Morning Herald* (online), 2 April 2011 <<http://www.smh.com.au/environment/climate-change/thousands-demonstrate-for-and-against-carbon-tax-20110402-1cs36.html>>.

immediate costs of the tax through increased prices and/or job losses.¹⁸ Certainly social demographer David Chalke told the *Herald Sun* newspaper that some people will ‘smell in this [carbon tax] something of a class war.’¹⁹ The recent intervention of unions into this debate has in fact injected an element of class into the carbon tax discussion with some union leaders rejecting the tax if it were to cost just one job.²⁰

It may seem strange to some that this paper is in part about resource rent taxes. Yet there is logic to this. For reformers with a vision of a just world, rent taxes may be the perfect solution to the crises of state funding²¹ and the welfare state under social democracy²² that decades of ‘fiscal discipline, tight monetary policy, limiting taxes on the wealthy, restraining trade unions through ‘labour market flexibility,’ divesting the state of public ownership of private enterprises, a general commitment to small government, and removing restrictions on the free flow of goods and service’²³ and a seemingly narrowing tax base have produced. They might also be an answer to the conservatives’ cry of ‘where’s the money coming from?’ In the words of Ergas, Harrison and Pincus a rent tax is ‘[a] bit like the magic pudding: the government takes its cut, but the pudding of investment and economic activity remains unaffected.’²⁴

While they meant it as a criticism, certainly in a more nuanced form that was the view, although not the wording, of Australia’s Future Tax System Review²⁵ when it argued that ‘a well-designed rent-based resource tax is less likely to distort investment and production decisions. This is because rent-based taxes do not apply to the normal rate of return to investment in projects.’²⁶ In brief taxes on economic rent tax only ‘super’ profits. These are the profits over and above the rate of return required to ensure investment in the project.²⁷ It is the taxation of ‘the excess profit or supernormal profit, and is equal to revenue less costs where costs include normal

¹⁸ John Passant, ‘Carbon Tax Will Make Working Families Pay for Problems Markets Created *The Conversation* (online) 12 July 2011 <<http://theconversation.edu.au/carbon-tax-will-make-working-families-pay-for-problems-markets-created-2242>>.

¹⁹ Shannon Deery, ‘Gillard’s Carbon Tax: It Hits Australia’s Fair Go Spirit’ *Herald Sun* (online) 12 July 2011 <<http://www.heraldsun.com.au/news/more-news/carbon-tax-puts-hazelwood-in-the-gun-peter-ryan/story-fn7x8me2-1226092711113>>.

²⁰ Ben Packham, ‘Gillard Government under Growing Pressure over Fears of Job Losses under Carbon Tax’, *The Australian* (online), 15 April 2011 <<http://www.theaustralian.com.au/national-affairs/key-union-puts-gillard-on-notice/story-fn59niix-1226039566855>>. Later events show it was a shallow threat.

²¹ James O’Connor, above n 12.

²² Clive Hamilton, above n 8, 1.

²³ Clive Hamilton, ‘The Third Way and the End of Politics?’ (2001) 2(2) *The Drawing Board: An Australian Review of Public Affairs* 89, 96.

²⁴ Henry Ergas, Mark Harrison and Jonathan Pincus, ‘Some Economics of Mining Taxation’ (2010) 29(4) *Economics Papers: A Journal of Applied Economics and Policy* 369, 369.

²⁵ Ken Henry et al, *Australia’s Future Tax System: Report to the Treasurer* (Commonwealth of Australia, 2009) (‘The Henry Tax Review’). Online at *Australia’s Future Tax System* (2010) <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm> (‘The Henry Tax Review’).

²⁶ *Ibid*, Part 2 *Detailed Analysis Volume 1*, 221. Online at *Chapter C: Land and Resources Tax* (2010) *Australia’s Future Tax System* <http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/Papers/Final_Report_Part_2/chapter_c1-1.htm>.

²⁷ W.H. Wessel, ‘A Note on Economic Rent’ (1967) 57(4) *American Economic Review*, 873.

profit or a 'normal' rate of return to capital.'²⁸ Since excess profits do not influence investment decisions, the impact of any rent at a rate less than 100% is likely to be minimal.²⁹ Indeed, Treasury analysis of the Rudd Labor Government's proposed Resource Super Profits Tax, (RSPT), based on the Henry Tax Review proposals, showed the benefits of the RSPT through encouraging more exploration and the impacts of both the associated tax cuts for business and infrastructure spending would be to increase GDP by 0.7%.³⁰

While some argue that a resource rent tax is 'primarily a mechanism for fiscal stabilisation',³¹ rather than a revenue raiser in the long term, certainly in light of the sustained mining boom,³² rent taxes may offer a magic funding pudding³³ for those social democrats and others who do want to address inequality, poverty and injustice. As pointed out above, Clive Hamilton says that for most left wing thinkers' lack of justice is 'the defining characteristic of modern capitalist society.'³⁴

B Justice and the Left

Why should the left be interested in debates about justice and tax? After all, it is almost de rigeur for socialists to ask how there can be justice in a world based on 'socioeconomic injustice.'³⁵ That injustice arises from the exploitative relationship between capital and labour. The left, or sections of it, argue that surplus value comes from labour,³⁶ and that this surplus – what becomes the basis for profit, rent, interest, dividends and tax revenue – is expropriated by the tiny minority who own or control the means of production.³⁷ Without the overthrow of those social relations injustice – exploitation – is embedded at the very heart of production. Thus, in *Wages, Price and Profit*, Marx says:

To clamour for equal or even equitable retribution on the basis of the wages system is the same as to clamour for freedom on the basis of the slavery system. What you think just or

²⁸ Lindsay Hogan and Brenton Goldsworthy, 'International Mineral Taxation: Experience and Issues' in Philip Daniel, Michael Keen and Charles McPherson (eds), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (Routledge, 2010) 135.

²⁹ Robin Broadway and Michael Keen, 'Theoretical Perspectives on Resource Design' in Philip Dean, Michael Broadway and Charles McPherson (eds), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (Routledge, 2010) 9.

³⁰ Wayne Swan, *Treasurer's Economic Note No 21* (30 May 2010) Treasury Minister's Portal <<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=economicnotes/2010/021.htm&pageID=000&min=wms&Year=&DocType=>>.

³¹ Ian McCauley 'The Price of Civilisation' (Autumn/Winter 2011) 35 *Dissent* 45.

³² *Australian Bureau of Agricultural and Resource Economics and Sciences Australian Commodities 2011* (Canberra, 2011) 127

<http://www.abares.gov.au/publications_remote_content/publication_details?fid=pe_abares99001790.xml>.

³³ John Passant, 'Economic Rent Ripe for Tax', *The Australian Financial Review*, 12 January 2011, 46.

³⁴ Hamilton, above n 8.

³⁵ Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' in Cynthia Willett (ed) *Theorizing Multiculturalism: A Guide to the Current Debate* (Blackwell, 1998) 19, 21.

³⁶ This is commonly called the labour theory of value. See, eg, Chris Harman, *Zombie Capitalism: Global Crisis and the Relevance of Marx* (Bookmarks, 2009) 28-33.

³⁷ Alex Callinicos, 'Marxism and Politics' in Adrian Leftwich (ed), *What is Politics?* (Polity Press, 2004) 53. The means of production are the machines, mines, buildings, factories and offices etc used to produce the wealth of society.

equitable is out of the question. The question is: What is necessary and unavoidable with a given system of production?³⁸

And yet, this is only a partial answer to the question of why the left should be concerned about justice. We cannot divorce justice and what can be won under the banner of justice from the society in which the demands of the exploited and oppressed arise and the level of struggle or lack of it for those demands. As Michael Lowy puts it, when seen from the perspective of the working class ‘... values like “justice” are reinterpreted: their concrete meanings differ according to the situation and interests of different classes.’³⁹ Echoing this theme in a tax context, and tying tax injustice to wider conceptions of justice Martin McIvor argues that ‘... tax evasion and avoidance must be treated not as an anomaly within a liberal democratic society, but as a symptom of an unjust, unaccountable and fundamentally unbalanced economy.’ The point is to fundamentally change that economy. As Marx and Engels argued ‘revolution [is] the driving force of history’⁴⁰ and it is through the day to day economic and political struggles that the possibility of a just world arises.⁴¹

It is the struggles of the oppressed and exploited against injustice in all its manifestations – economic, political, and social - which determine the nature of justice in any given society.

C It’s the struggle, stupid

The *struggle* for justice in the here and now is vitally important, even in the context of the capitalist system. To quote Marx and Engels: ‘The history of all hitherto existing class society is the history of class struggles.’⁴² The economic and political struggles, the struggles for better wages or the struggles against individual instances of the system’s brutality, its inherent inequity, inequality and injustice in specific cases, open up the possibility of generalising the struggle to become one against capitalism, not just the particular manifestation of political or social injustice wrong doing or economic exploitation being fought against.⁴³ That generalisation of struggle only has a chance of success if it challenges both the economic and political injustices the system is built upon.⁴⁴ This for example appears to be one of the lessons of the ongoing Egyptian revolution in 2011.⁴⁵ Removing Mubarak does not guarantee a job or justice; it does not deliver freedom and food. The struggle continues.⁴⁶

³⁸ Karl Marx *Wages, Price and Profit* (Foreign Language Press, 5th ed, 1975) 46.

³⁹ Michael Lowy, *Marx, Weber and the Critique of Capitalism* (2011) International Viewpoint <<http://www.internationalviewpoint.org/spip.php?article1106>>.

⁴⁰ Karl Marx and Friedrich Engels, *The German Ideology: Part One with selections from Part Two and Three and Supplementary Texts edited, with an Introduction by CJ Arthur* (International Publishers, 2004) 59.

⁴¹ See, eg, Paul D’Amato, ‘Lenin’s Unique Contribution to Marxism: The Birth of Bolshevism’ (2004) 33 *International Socialist Review* (online) <<http://www.isreview.org/issues/33/bolshevism.shtml>>.

⁴² Karl Marx and Frederick Engels, *The Communist Manifesto* (Chicago, Haymarket Books, 2005) 1.

⁴³ Rosa Luxemburg *The Mass Strike: with an introduction by Tony Cliff* (London Bookmarks 1968).

⁴⁴ *Ibid.*

⁴⁵ Hossam el-Hamalawy ‘The Workers, Middle Class, Military Junta and the Permanent Revolution’, 3 *Arabawy* (online), 12 February 2011 <<http://www.arabawy.org/2011/02/12/permanent-revolution/>>.

⁴⁶ Tom Bramble ‘Egyptian Socialists Debate a Way Forward for the Revolution’, *Socialist Alternative* (online) 26 May 2011,

It is in the struggle – whether it be in Egypt, or Europe or the US or Australia – that the possibility of a new world based on the democratic organisation of production to satisfy human need arises.⁴⁷ David Harvey describes this as class struggle over different perceptions of justice.⁴⁸ While that locus is within a capitalist framework, it is this contradiction which contains the possibilities of the negation of capitalism, of the negation of injustice. As Marx and Engels put it in the *Communist Manifesto*, a socialist fights ‘... for the attainment of the immediate aims, for the enforcement of the momentary interests of the working class; but in the movement of the present, they also represent and take care of the future of that movement.’⁴⁹ Translated to Australia, the lack of political and economic struggle here at the moment, in particular of a class conscious and combative working class,⁵⁰ enabled the mining companies to threaten the Labor Government with annihilation at the forthcoming elections, depose a Prime Minister and win the battle against major resource taxation reform in Australia. The fact of disclosure in that context becomes part of the wider struggle.

D The desire for a better world

Reformism, the idea that fundamental injustice can be addressed here and now, is born of the social relations between labour and capital.⁵¹ Even when there is no material base for the provision of reforms, the desire for reforms will still exist in the minds of workers as a consequence of their position in the productive process.⁵² There is a present reality, the reality of a life lived through the exploitative relationship between capital and labour, a life to keep the kids fed, the car going and the house paid off. This is a life that sells its labour power for wages,⁵³ a life that wants good human relationships, enough to pay for all of those basics like food, housing and clothing, a future for their children and longs for a good education system, decent hospitals and a public transport system that actually transports the public. The Henry Tax Review responds to this when it says:

Australians are also expecting better community living standards over time. In addition to the rising demand for health, aged care services and disability support and services, there is pressure to increase spending on child care, housing and education.⁵⁴

<http://www.sa.org.au/index.php?option=com_k2&view=item&id=6913:egyptian-socialists-debate-a-way-forward-for-the-revolution&Itemid=386&tmpl=component&print=1>.

⁴⁷ Cliff Slaughter, ‘Marxist Theory and Class Consciousness’ in his *Marxism and the Class Struggle* (New Park Publications, 1975) (online)

<<http://www.marxists.org/reference/subject/philosophy/works/en/slaughte.htm>>.

⁴⁸ David Harvey, ‘Class Relations, Social Justice and the Politics of Difference’ in Michael Keith and Steve Pile (eds), *Place and the Politics of Identity* (Routledge, 1993) 53.

⁴⁹ Marx and Engels, above n 42, 29.

⁵⁰ Tom Bramble, ‘Does the Australian Working Class Have the Power to Change Society?’ 2011(2) *Marxist Left Review* (online)

<http://marxistleftreview.org/index.php?option=com_content&view=article&id=59:does-the-australian-working-class-have-the-power-to-change-society&catid=39:number-2-autumn-2011&Itemid=78>.

⁵¹ Cliff Slaughter, above n 47.

⁵² Tony Cliff ‘The Economic Roots of Reformism’ (1957) 6(9) *Socialist Review*

<<http://www.marxists.org/archive/cliff/works/1957/06/rootsref.htm>>.

⁵³ ‘Wages therefore are only a special name for the price of labour-power ...’ Karl Marx, *Wage Labour and Capital Chapter 2* <<http://www.marxists.org/archive/marx/works/1847/wage-labour/ch02.htm>>

⁵⁴ The Henry Tax Review, above n 25, 5.

The left cannot ignore those day to day struggles, or in a time when the old mole⁵⁵ of class struggle is well and truly buried deep within the earth of the system,⁵⁶ the Left cannot stand aside from the rising demand and pressure for certain benefits, as Henry puts it,⁵⁷ for it is out of those economic and political battles that the revolutionary process can begin.⁵⁸ But it is not only the dreams of revolution that inspire the Left's support for struggles.

A fight for sexual or gender equality, for better pay, for equal pay for equal work, for refugees, in defence of jobs, against racism, for freedom of association, if successful, has the capacity to improve the lives of ordinary workers by improving their economic, social and political position under capitalism. Such improvement may be fleeting as the forces of capital reimpose their relentless logic of exploitation, competition and accumulation on human relationships, but for that moment higher pay does mean having the ability to buy steak instead of mince, equal pay for equal work does mean a new self-respect and improved economic position for women,⁵⁹ the defeat of homophobia and racism do mean better lives for gays and lesbians and for Indigenous and black people and Muslims. There is a tension then between reform and revolution and a dialectical relationship which cannot be overcome merely by wishing it were so. It is to the struggle that the left turns not only because of the material improvements struggle can provide but because it plants the seeds for a new society. To sum up, in the words of William Keach it was 'Rosa Luxemburg's great argument [JP – in Reform or Revolution?] that revolutionaries make the best fighters for reforms because they see them as coming from below and contributing to a fundamental transformation of society.'⁶⁰ Lenin captured the sentiment well when he said:

Unlike the anarchists, the Marxists recognise struggle for reforms, ie, for measures that improve the conditions of the working people without destroying the power of the ruling class. At the same time, however, the Marxists wage a most resolute struggle against the reformists, who, directly or indirectly, restrict the aims and activities of the working class to the winning of reforms. Reformism is bourgeois deception of the workers, who, despite individual improvements, will always remain wage-slaves, as long as there is the domination of capital.⁶¹

And tax, as the Australian experience shows, is a site for class struggle in the sense that it is a battle between labour and capital as to which class bears the burden of taxation, mediated through the capitalist state.⁶² That struggle is fought out at the political level in Australia today, in the realm of ideas and sometimes when filling out tax returns. When class struggle returns that will change and tax will become part of that wider struggle against an undemocratic and fundamentally unjust and exploitative system.

⁵⁵ Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (1852)

<<http://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch07.htm>>.

⁵⁶ Rick Kuhn, *Class and Struggle in Australia* (Pearson Education Australia, 2005).

⁵⁷ The Henry Tax Review, above n 54.

⁵⁸ Luxemburg, above n 43.

⁵⁹ And their working class male loved ones.

⁶⁰ William Keach, 'Rise like Lions? Shelly and the Revolutionary Left' (1997) 75 *International Socialism* (online) <<http://pubs.socialistreviewindex.org.uk/isj75/keach.htm>>.

⁶¹ V I Lenin, 'Marxism and Reformism' in Lenin *Collected Works Volume 19* (1977) 372.

⁶² Chris Harman *Zombie Capitalism: Global Crisis and the Relevance of Marx* (2009) 113.

The as yet incomplete revolutions⁶³ in the Middle East vindicate the argument Marxists have made for 160 years that it is through struggle that people truly change their world and themselves.⁶⁴ While in Australia minor taxes like the Resource Super Profits Tax get rolled by the big miners, in Egypt a vision or possibility of a new society is developing where people run society in their interests, not those of capital.⁶⁵ Although not the focus of this paper, the developments in Egypt and the Middle East more generally offer lessons for working people in Australia concerned about justice, in particular tax justice. To paraphrase an old union saying: ‘If you don’t fight, you lose.’

III TAX, EQUITY AND ECONOMIC RENT

In Australia part of the debate about tax and justice has developed around the taxation of resource rents. To understand that debate we need to turn first to the question of what economic rent is since resource rents are but one example of economic rent.⁶⁶

A What is economic rent?

Economic rent is that return over and above the return necessary for the activity to take place.⁶⁷ The following comment from Robin Broadway and Michael Keen is a good description of economic rent, and an argument in favour of taxing it. They say:

Economic rent is the amount by which the payment received in return for some action – bringing to market a barrel of oil, for instance – exceeds the minimum required for it to be undertaken. The attraction of such rents for tax design is clear: they can be taxed at up to (just less than) 100 percent without causing any change of behaviour, providing the economist’s ideal of a non-distorting tax.⁶⁸

The Henry Tax Review echoes this and applies the general logic of economic rent to the specifics of minerals. Thus it says:

The finite supply of non-renewable resources allows their owners to earn above-normal profits (economic rents) from exploitation. Rents exist where the proceeds from the sale of resources exceed the cost of exploration and extraction, including a required rate of return to compensate factors of production (labour and capital). In most other sectors of the economy, the existence of economic rents would attract new firms, increasing supply and decreasing prices and reducing the value of the rent. However, economic rents can persist in the resource sector because of the finite supply of non-renewable resources. These rents are referred to as resource rent.⁶⁹

⁶³ Tariq Ali, ‘Who will Reshape the Arab World: Its People, or the US?’ *The Guardian* (online) 29 April 2011 <<http://www.guardian.co.uk/commentisfree/2011/apr/29/arab-politics-democracy-intervention>>.

⁶⁴ Sandra Bloodworth, ‘Marxism and the Arab Revolutions’ (2011) 2 *Marxist Left Review* 1, 1-2, and 3-4.

⁶⁵ Tariq Ali, above n 63.

⁶⁶ Adam Smith is the intellectual father of taxing economic rent. See for example Ross Garnaut and Anthony Clunies Ross, *Taxation of Mineral Rents* (1983 Clarendon Press).

⁶⁷ Wessel, above n 27 at 873.

⁶⁸ Robin Broadway and Michael Keen, ‘Theoretical Perspectives on Resource Design’ in Philip Dean, Michael Broadway and Charles McPherson (eds), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (Routledge, 2010) 9.

⁶⁹ The Henry Tax Review, above n 26, 218.

However, as Henry recognises,⁷⁰ it is not just the minerals sector which profits from economic rents. There appears no reason in logic to limit the economic rent analysis to resources since the overriding consideration is above-normal profits. As Garnaut and Clunies Ross put it: ‘The term ‘rent’ can be applied to any profits of any kind of enterprise that exceed those whose prospect the investor would have required to induce him to invest in the enterprise.’⁷¹ For resources the reason for that above normal rate of return is, according to Henry, the finite supply of non-renewable resources.⁷² Yet monopoly or oligopoly can create the same above average rates of return⁷³ and arguably should be taxed in a similar fashion.⁷⁴ Indeed, these conditions might actually reflect something even deeper – arguably economic rent arises not from monopoly per se but from monopolised property relations, ie private property.⁷⁵ Thus Garnaut and Clunies Ross say that most discussion of economic rent talks about windfall profits, barriers to entry and transfer rents but that these terms are inadequate. For them, however, ‘... [windfall] profits do not come necessarily as a surprise.’⁷⁶ Further:

The ‘barrier to entry’ that gives rise to what might appear to be transfer rent is the institution of property rights itself. Exclusive property rights are necessary to the emergence of mineral rent in the same way as they are to land rent.⁷⁷

This is true too of business monopolies or oligopolies. Exclusive property rights are the ultimate legal expression of monopoly either expressly, through for example ownership of particular property or indirectly through the lack of competition elevating the particular property rights to a level of exclusivity or near exclusivity for as long as the monopoly exists. Thus, to summarise, the argument is that certain factors, such as monopoly or rapidly dwindling finite resources, create the conditions for rates of return over and above those rates that are necessary to attract investment into that productive process.

An example might help us understand economic rent. A Productivity Commission paper in 1998 argued that for medium (average) risk the rate of return should be in the order of 5% above the long term bond rate.⁷⁸ The current long term bond rate is just under 6%. For high risk activity, which includes mining, the Productivity Commission puts the figure at 7% above the long term bond rate,⁷⁹ the figure the Government adopted for its MRRT uplift factor. If for example the rate of return necessary to

⁷⁰ Ibid.

⁷¹ Ross Garnaut and Anthony Clunies Ross, *Taxation of Mineral Rents* (Clarendon Press, 1983) 33.

⁷² The Henry Tax Review, above n 69.

⁷³ This is at the expense of other capitalists since what is happening is a reallocation of surplus value from all sectors of capital to the monopoly and/or finite resource sectors.

⁷⁴ See, eg, apart from the Henry Tax Review, above n 69, and Garnaut and Clunies Ross, above n 71, Donald Dewey ‘Getting Straight on Monopoly and Rent: A Dissent from Wellington and Gallo’ (1994) 9 *Review of Industrial Organization* 227.

⁷⁵ An even deeper question that these debates raise is where profits come from, what produces them?

⁷⁶ Garnaut and Clunies Ross, above n 71, 34.

⁷⁷ Ibid. This wouldn’t change with nationalisation by the capitalist state since this merely replaces one rent seeker – private enterprise – with another – the capitalist state. This capitalist monopolisation – the merger of state and capital – reached its apogee in the state capitalism of the Stalinist regimes. See for example Tony Cliff, *State Capitalism in Russia* (Pluto Press, 1974).

⁷⁸ Commonwealth Competitive Neutrality Complaints Office, ‘Rate of Return Issues’ (CCNCO Research Paper, Productivity Commission, December 1998) Table 2.3 (online)

<www.pc.gov.au/__data/assets/pdf_file/0014/5414/cnror.pdf>.

⁷⁹ Ibid.

induce investment in high risk mining activity were thus 13% (6% risk free plus the 7% risk premium) and the rate of return on certain mining investment is higher than that then taxing the 'excess' return to reduce it to 13% or somewhere close to it will not impact on the investment.

A more popular example might help explain the issue. What does it take to induce a 'supermodel' to work? Linda Evangelista once told *Vogue* that 'we don't wake up for less than \$10,000 a day.' While the example is hardly scientific, for the purposes of explanation it is appropriate. If a supermodel were paid anything more than that, and they are, it is economic rent. So a government could tax almost all of that excess without affecting a supermodel's decisions to work or not work. They would still go to work even if the economic rent tax reduced the return to just \$10,000 a day.⁸⁰

IV RESOURCE RENT TAX – THE AUSTRALIAN EXPERIENCE

In this part of the paper the back down on a resource super profits tax is explained.

A Long, long ago in a land far, far away

Despite all the recent mining industry opposition to a resource rent tax, Australia has had a form of resource rent tax in place since 1988.⁸¹ According to the Department of Resources, Environment and Tourism:

The Petroleum Resource Rent Tax (PRRT) is a profit based tax which is levied on a petroleum project. PRRT is applied to the recovery of all petroleum products from Australian Government waters (including crude oil, natural gas, LPG condensate and ethane), except for petroleum products extracted from the North West Shelf project and the Joint Petroleum Development Area, and value added products such as LNG. The PRRT provides, through its key features (below), a fiscal regime that encourages the exploration and production of petroleum while ensuring an adequate return to the community.⁸²

Its key features might sound very familiar to those conversant with the current debates about resource rent taxes. The rate of PRRT is 40% of a project's resource rent profit. This is 'the project's income after all project and "other" exploration expenditures, including a compounded amount for carried forward expenditures, have been deducted from all assessable receipts.'⁸³ In addition, the PRRT is deductible against income tax. In other words the PRRT taxes profits over and above the rate of return necessary for investment to occur in the project.

⁸⁰ John Passant and John McLaren, 'The 'Henry' Review of Australia's Future Tax System: Implications for Local Government' (Working paper No 3, Australian Centre of Excellence for Local Government, University of Technology, Sydney, 2011) 20 <<http://www.acelg.org.au/news-detail.php?id=154>>.

⁸¹ *The History of the Petroleum Resources Rent Tax (PRRT)* (2011) Australian Government Department of Resources, Energy and Tourism <[http://www.ret.gov.au/resources/enhancing/taxation/prrt/Pages/TheHistoryofPetroleumResourceRentTax\(PRRT\).aspx](http://www.ret.gov.au/resources/enhancing/taxation/prrt/Pages/TheHistoryofPetroleumResourceRentTax(PRRT).aspx)>.

⁸² *Ibid.*

⁸³ *Ibid.*

The then John Howard-led Liberal Opposition and impacted sections of the mining industry were initially vehemently opposed to the PRRT.⁸⁴ John Howard even predicted the collapse of offshore exploration.⁸⁵ However, once in place, the mining industry realised the benefits of a profits based and efficient tax as opposed to a cumbersome and inefficient royalties' regime taxing production rather than profits. When elected in 1996 John Howard made some cosmetic changes but kept the tax in place. The revenue of over a billion dollars a year,⁸⁶ the fact that it is an efficient tax accepted by industry and that it '... encourages the exploration and production of petroleum while ensuring an adequate return to the community'⁸⁷ no doubt helped him decide to keep it.

B The recent past – or how Labor surrendered to the mining industry

On 2 May, 2010, the Rudd Labor Government released the Henry Tax Review and adopted its recommendation to impose a rent tax on resources, a tax the government called a Resource Super Profits Tax.⁸⁸ As the Government's announcement at the time put it, the key points were that the tax would be neutral, having little impact on investment and production decisions, that the rate would be 40% and the tax would deductible for income tax purposes.⁸⁹ State royalties would be creditable.⁹⁰ The Government was going to provide a guaranteed tax credit for all expenditure.⁹¹ But because of the likely possible major fluctuations in expenditure and hence hits on revenue, the Government decided, instead of recognising expenditure at the time it was incurred, to defer deductibility - until such time as there was an income flow - through depreciation and loss carry forward arrangements.⁹² There would then be an uplift factor to compensate for the delay.⁹³ For projects which ended without utilising all of the expenditure deductions there would be a refund. In effect the Government adopted the Clunies-Ross Garnaut version of a Brown tax, one that allows the adjusted deduction against income once income arises and not before or refunds uplifted expenditure for projects which collapse.⁹⁴

Because of the government support for investment – according to some commentary effectively leading to a quasi-nationalisation of 40% of mining projects⁹⁵ but more

⁸⁴ Craig Emerson, 'Iron-clad Case for Revamped Resources Tax' *The Australian* (online), 3 July 2010 <<http://www.theaustralian.com.au/news/opinion/iron-clad-case-for-revamped-resources-tax/story-e6frg6zo-1225887311621>>; Richard Heaney, 'The Resources Tax: Back to the Future', *The Conversation* (online), 30 March 2011 <<http://theconversation.edu.au/articles/the-resources-tax-back-to-the-future-541>>.

⁸⁵ Richard Heaney, above n 84.

⁸⁶ The PRRT collected \$1.9B in 2007-2008 and \$1.6B in 2008-2009. Heaney above n 84.

⁸⁷ Australian Government, Department of Resources, Energy and Tourism, above n 81.

⁸⁸ *The Resource Super Profits Tax: A Fair Return to the Nation* (2010) Commonwealth of Australia, Department of Education, Employment and Workplace Relations <<http://www.deewr.gov.au/Department/Documents/Files/Announcement%20document.pdf>>.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Garnaut and Clunies Ross, above n 71; The Henry Tax Review, above n 6.

⁹⁵ Tim Colebatch, 'Resource Rent Tax Amounts to 40% Nationalisation of the Mines', *The Age* (online) 8 June 2010 <<http://www.theage.com.au/opinion/politics/resource-tax-amounts-to-40-nationalisation-of-the-mines-20100607-xqn0.html>>.

appropriately described as a joint venture in which government would bear 40% of the risk and receive 40% of the return⁹⁶ – the uplift factor was going to be the long term bond rate, currently just below 6% in Australia. The government guarantee about refunds effectively reduced the risk factor to that rate, so the Rudd Government argued.

Australia has many of the key minerals for an expanding global economy. Here is how the Government put it in its case for an RSPT:

Australia has large endowments of non-renewable resources, including the world's largest economically demonstrated reserves of brown coal, lead, mineral sands (rutile and zircon), nickel, silver, uranium and zinc; and the second largest reserves of bauxite, copper, gold and iron ore (Geoscience Australia 2009). Australia's proven oil reserves are the 26th largest in the world. Australia's natural gas reserves are the 14th largest in the world under current production rates, and could continue to be exploited for the next 65 years (BP 2009).⁹⁷

The proposed RSPT was launched against a background of increasing demand for Australian resources, driven mainly by the growth of the Chinese and Indian economies. The resource sector is booming. According to the Australian Bureau of Agricultural and Resource Economics and Sciences 'Australia's export earnings from energy and mineral commodities in 2010 were a record \$165 billion, 25% higher than in 2009.'⁹⁸ In 2006–07, 'the minerals and petroleum industries produced over 8% of Australia's GDP and accounted for 63% of Australia's merchandise export earnings.'⁹⁹ Yet, during this boom, as the Government argued, 'the effective resource charge has almost halved from an average rate of 34% in the first half of this decade to less than 14% in 2008-09, due to unresponsive royalty regimes.'¹⁰⁰ The proposed RSPT was about reclaiming some of that lost revenue under the guise of efficiency, nationalism and nation building. The nationalism relates to the claim that mineral resources belong to all Australians¹⁰¹ and the nation building relates to the use the revenue from the tax – estimated to be \$12 billion a year¹⁰² – would be put. Those uses included a cut in the company tax rate for small and then big business and increased infrastructure spending especially in the resource states and for resource projects.¹⁰³ A small amount was earmarked to increase superannuation contribution caps.¹⁰⁴

⁹⁶ Craig Emerson, above n 84.

⁹⁷ The Henry Tax Review, above n 26, 217.

⁹⁸ Australian Government, Australian Bureau of Agricultural and Resource Economics and Sciences, 'Australian Mineral Statistics 2011 December Quarter 2010' (Commonwealth of Australia Canberra 2011) 1.

⁹⁹ *About Australia: Resources Sector* (2008) Australian Government Department of Foreign Affairs and Trade <http://www.dfat.gov.au/facts/resources_sector.html>.

¹⁰⁰ Commonwealth of Australia: 'The Resource Super Profits Tax: A Fair Return to the Nation' (Canberra 2010) 24.

¹⁰¹ Colleen Ricci, 'Resource Super Profits Tax', *The Age Education Resource Centre* (online) 17 May 2010 <<http://education.theage.com.au/cmspage.php?intid=135&intversion=310>>.

¹⁰² Commonwealth of Australia, above n 88.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

The principle effect of the RSPT was to be a ‘... redistribution of more of the economic rent from the mine operator to the government’¹⁰⁵ and then to the rest of business through the proposed company tax cuts. In other words it is a redistribution of surplus value from one section of capital to all capital in Australia.¹⁰⁶ The Rudd government was proposing to take some of the surplus arising from the monopoly property relationships mining companies have over finite resources to give to other businesses in finance, manufacturing, retail and the like through general company tax cuts. The Government also tried to win over small business not just with earlier tax cuts but with accelerated depreciation concessions.¹⁰⁷ The Government further proposed to spend some of the tax revenue on improving infrastructure, mainly for the miners, so they could get their products more seamlessly to China.¹⁰⁸ It saves those businesses the costs of doing so.

The mining industry opposed the RSPT ferociously.¹⁰⁹ It launched a \$22 million advertising campaign against it.¹¹⁰ Billionaires even demonstrated in Perth against the proposed tax.¹¹¹ In response, and in the run up to an election due later in 2010, the Rudd Government tried to find a compromise. The mining industry feared not only possibly paying more tax, but being taxed on their super profits. Lurking at the back of their minds may have been another fear, the fear that if the tax were successful other countries might follow Australia’s lead and impose their own version of an RSPT. That fear may be well founded. According to Ernst and Young resource nationalism is the biggest threat to the mining industry globally and last year 25 countries increased or proposed to increase taxes on mining companies.¹¹²

This was essentially a battle between the state and mining capital over the distribution of part of the social surplus, a surplus seemingly arising from the finite nature of the resources and flowing to mining capital because of what Garnaut and Clunies Ross describe as exclusive property rights and their absolute necessity for the emergence of mineral rents.¹¹³ Mining capital won.¹¹⁴ The Labor Party deposed Kevin Rudd as Prime Minister and the new Prime Minister, Julia Gillard, and her deputy and continuing Treasurer, Wayne Swan, announced negotiations with the big three mining

¹⁰⁵ John Freebairn and John Quiggin, ‘Special Taxation of the Mining Industry’ (2010) 29 *Economic Papers: A Journal of Applied Economics and Policy* 384, 389.

¹⁰⁶ Tom Bramble and Rick Kuhn ‘When Labour is a Better Friend to Business than the Liberals’, *Socialist Alternative* (online), 27 May 2010 <http://www.sa.org.au/index.php?option=com_k2&view=item&id=4775:when-labor-is-a-better-friend-to-business-than-the-liberals&Itemid=395>.

¹⁰⁷ Commonwealth of Australia, above n 88.

¹⁰⁸ *Ibid.*

¹⁰⁹ See, eg, Matthew Stevens, ‘Xstrata stunned by Wayne Swan's committee’, *The Australian* (online), 13 May 2010 <<http://www.theaustralian.com.au/business/xstrata-stunned-by-wayne-swans-committee/story-e6frg8zx-1225865738215>>.

¹¹⁰ Mark Davis, ‘A Snip at \$22m to get Rid of PM’, *The Sydney Morning Herald* (online), 2 February 2011 <<http://www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html>>.

¹¹¹ Rachel Hewitt, ‘Axe the Tax, Says Protest Crowd’, *Herald Sun* (online), 10 June 2010 <<http://www.heraldsun.com.au/business/axe-the-tax-says-protest-crowd/story-e6frfh4f-1225877792392>>.

¹¹² Top of Form. Sarah-Jane Tasker ‘Resource Nationalism “Top Risk” Facing Miners’, *The Australian* (online), 8 August 2011 <<http://www.theaustralian.com.au/business/news/resource-nationalism-top-risk-facing-miners/story-e6frg906-1226110466317>>.

¹¹³ Above n 71, 34.

¹¹⁴ Heaney, above n 85.

companies to settle a compromise. The Labor Party was mindful of the fact that an election was due in the remaining months of 2010 and that the campaign against the RSPT would translate into a campaign against the party in the forthcoming elections. The mining industry was careful to couch its misinformation¹¹⁵ about the RSPT in terms that would appeal to workers and so talked in terms of jobs and investment. This disguised the reality of what was being argued over – economic rents arising from the monopoly over land and the finite nature of the resources. The jobs argument was always a furphy but it had real traction with workers, despite the efforts of some unions to rebut it. The Amalgamated Metal Workers' Union argued for example that the RSPT aimed 'to increase investment, employment and employment by changing from a flat tax to a progressive tax.'¹¹⁶ As mentioned previously Treasury analysis was that the tax and the tax cuts would add 0.7% to GDP over time a fact which would have increased employment.¹¹⁷ However such is the low level of class struggle and class consciousness in Australia and the dominance of bourgeois ideas – the ruling ideas are the ideas of the ruling class¹¹⁸ – that the misinformation struck a chord with many workers still concerned about jobs.

This is not surprising given the impact on jobs globally and in Australia that the GFC had. Australia's unemployment rate went from 4.1% in August 2008 to 5.9% in May and June 2009.¹¹⁹ It stayed around there for a few months and then began to fall so that today unemployment is 4.9%.¹²⁰ These figures do not tell the whole story. Australia has one of the highest underemployment rates in the OECD.¹²¹ This is the number of people who want to work longer hours but cannot. During the GFC there was a large increase in the number of people working, or forced to work, less hours. According to the Australian Bureau of Statistics in 'May 2010, there were 837,000 underemployed workers and 610,000 unemployed people. The underemployment rate was 7.2% compared with the [then] unemployment rate of 5.2%.¹²² For the September quarter 2010 there were 733,000 workers underemployed.¹²³ Given the levels of underemployment workers were reluctant to take action in defence of jobs and were susceptible to misinformation. This contributed to the final result. The miners won their battle against the Australian Labor Party (ALP) and its mild RSPT. Arguably the nature of social democracy in Australia is changing.

¹¹⁵ Fred Argy et al, 'Statement by 20 Leading Economists'

<<http://www.scribd.com/doc/31959942/Economists-Statement>>.

¹¹⁶ Dave Oliver, 'Australia Now Gets Half the Share of Profits from our Resources that We Got 10 Years Ago' (AMWU National Secretary pamphlet), Personal copy.

¹¹⁷ Wayne Swan, above n 30.

¹¹⁸ Karl Marx, *The German Ideology* (online)

<<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01b.htm>>.

¹¹⁹ *Global Financial Crisis Special Coverage Charts Unemployment* (2011) ABC News

<<http://www.abc.net.au/news/events/financialcrisis/charts/unemployment.htm>>.

¹²⁰ Ibid.

¹²¹ *Employment Outlook 2010 - 'How Does Australia Compare?'* (2010) Organisation for Economic Cooperation and Development (OECD) <<http://www.oecd.org/dataoecd/14/38/45603025.pdf>>.

¹²² Australian Government, Australian Bureau of Statistics, *Australian Social Trends, June 2010* (Commonwealth of Australia, 2010)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features60Jun+2010>>.

¹²³ Ibid.

V SOCIAL DEMOCRACY – RULING NOW FOR CAPITALISTS RATHER THAN CAPITAL?

This part of the paper looks at the traditional role of Labor and asks if the backdown of the ALP government in Australia over resource rents indicates a fundamental change of role for Labor in power.

A A golden age of Labor?

There is a myth among Labor members and supporters that there was a golden age of Labor.¹²⁴ Every generation the supporters of the latest iteration of social democracy look back in fondness to some halcyon by-gone days, whether it be Whitlam and his moderate social program to fix 23 years of conservative rule, including infrastructure and other modernisation failures,¹²⁵ or Chifley and his oft quoted but little understood Light on the Hill speech.¹²⁶ These days the disappointments supporters have with the Gillard Labor Government, apart from entrenching a significant minority of support for the Greens,¹²⁷ have seen the myth making turn its focus to the Hawke¹²⁸ and Keating Governments¹²⁹ as epitomes of a better Labor Party in power, amid the constant search for a magic formula to reinvigorate current day Labor.¹³⁰

B A capitalist workers' party

There is a reason for this cycle of despair – the Australian Labor Party is a capitalist workers' party.¹³¹ In this context the worker component has to be understood through the prism of the trade union bureaucracy, the social group which sustains the ALP.¹³² The members of this social group are not members of the working class but depend

¹²⁴ Tom Bramble, 'A Marxist History of the Labor Party, 1. The Birth of the ALP' *Socialist Alternative* (online) May 2006 <http://www.sa.org.au/index.php?option=com_k2&view=item&id=5397:a-marxist-history-of-the-labor-party-1-the-birth-of-the-alp>.

¹²⁵ Vashti Kenway, 'The Myth of Gough Whitlam's Radicalism', *Socialist Alternative* (online), 23 September 2010 <http://www.sa.org.au/index.php?option=com_k2&view=item&id=4343:the-myth-of-gough-whitlams-radicalism&Itemid=395>.

¹²⁶ Adrian Jones 'Which Light on Which Hill?' (1993) 31 *Overland* 19; John Passant 'Rhetoric and Reality', 18 *Workers Online* (online), 18 June 1999 <http://workers.labor.net.au/18/print_index.html>.

¹²⁷ Ben Hillier, 'A Marxist Critique of the Australian Greens' (2010) 1 *Marxist Left Review* (online) <http://marxistleftreview.org/index.php?option=com_content&view=article&id=46:a-marxist-critique-of-the-australian-greens&catid=34:issue-1-spring-2010&Itemid=77>.

¹²⁸ Rick Kuhn, 'Bob Hawke: Ruling Class Hero', *Socialist Alternative* (online), 19 July 2010 <http://www.sa.org.au/index.php?option=com_k2&view=item&id=4312:bob-hawke-ruling-class-hero&Itemid=395>.

¹²⁹ Tom Bramble 'The Politics of Labor in Government', *Socialist Alternative*, December 2007 <http://www.sa.org.au/index.php?option=com_k2&view=item&id=6472:the-politics-of-labor-in-government>.

¹³⁰ The latest version of this search for the Holy Grail has been the recently released 'wise men's' review of Labor's poor 2010 election result when it managed to form a minority Government with the support of two independents and a green member of the House of Representatives, and the Greens in the Senate. The Greens hold the balance of power in the Senate from 1 July 2011. See Steve Bracks, John Faulkner, Bob Carr, *National Review 2010* (2010) <www.alp.org.au/getattachment/3cf99afc-d393-4be3-b33c.../review2010/>.

¹³¹ Tom Bramble and Rick Kuhn, *Labor's Conflict: Big Business, Workers and the Politics of Class* (Cambridge University Press, 2011) 17.

¹³² Mick Armstrong, 'Origins of the Australian Labor Party', *Socialist Alternative* (online), 2003 <www.comcen.com.au/~marcn/redflag/archive/alp.doc>.

for it on their existence.¹³³ They are bargaining agents for labour with capital over the price of labour power.¹³⁴ It is this contradiction between capital and the de-classed working class elements and through them the working class which helps explain the shifts of Labor and the internal battles ever since its inception. This attempt to reconcile the irreconcilable, through the agency of declassed elements, makes the party a capitalist workers' party¹³⁵ reinforcing the exploitative relationship as being in the material interests of the trade union bureaucracy and the political Labor group. This capitalist workers' party is in a process of constant change as its contradictions battle, adapting to the various economic and political challenges that capitalism throws up and setting the parameters for some of those challenges. All things are in motion or change and at the moment the ALP seems more capitalist than worker. Is it about to break its Hegelian strictures? No. The imbroglio over the RSPT helps us understand just where Labor is positioned in its move from capitalist workers' party to CAPITALIST workers' party, albeit one with the reminders of the working class lingering like stale odours from last night's party. These fluctuations, the unity of opposites,¹³⁶ are normal for Labor, recognising that its role is to manage capitalism even if it is a party still with indirect links to the working class through the trade union bureaucracy.¹³⁷

The RSPT would have raised in the order of at least \$12 billion over two years,¹³⁸ although the Treasurer later conceded this could have been as high as \$24 billion a year.¹³⁹ The MRRT was estimated at the time to bring in over \$10 billion.¹⁴⁰ Later Treasury figures tell a very different story and estimate the difference in collections between the two taxes would have been much greater – about \$100 billion over ten years or on average \$10 billion a year.¹⁴¹ The estimated extra \$10 billion a year on average from the RSPT would have helped wipe out the Budget deficit and fund extra spending on public health, education, transport and renewable energy, or deliver a big company tax cut, depending on the Labor Government priorities. Instead the Gillard Labor Government backed down on the RSPT and developed an even milder tax on resources, the MRRT. The Government warned of a horror Budget¹⁴² and the Prime

¹³³ Bramble and Kuhn, above n 131, 18-19.

¹³⁴ Tom Bramble, 'Managers of Discontent: Problems with Labour Leadership', in Rick Kuhn and Tom O'Lincoln (eds), *Class and Class Conflict in Australia* (Longman Australia, 1996).

¹³⁵ Bramble and Kuhn, above n 131.

¹³⁶ Noel Pearson, 'Failed Party in Search of a Purpose', *The Australian* (online), 4 September 2010 <<http://www.theaustralian.com.au/news/opinion/failed-party-in-search-of-a-purpose/story-e6frg6zo-1225914025908>>.

¹³⁷ Diane Fieldes, 'NSW Labor Learns Nothing', *Socialist Alternative* (online), 28 March 2011 <http://www.sa.org.au/index.php?option=com_k2&view=item&id=6837:nsw-labor-learns-nothing&Itemid=395&tmpl=component&print=1>.

¹³⁸ Kali Sanyal and Paige Darby, 'Budget Review 2010-2011 Index: Taxation Resource Super Profits Tax', Parliament of Australia Parliamentary Library, 2011 <<http://www.aph.gov.au/library/pubs/RP/BudgetReview2010-11/TaxationRSPTax.htm>>.

¹³⁹ Joe Kelly, 'Prices Boom Hides Mining Tax Shortfall after Backdown Over Super-Profits Levy', *The Australian* (online), 14 July 2010 <<http://www.theaustralian.com.au/politics/prices-boom-hides-mining-tax-shortfall-after-super-profits-levy-backdown/story-e6frgczf-1225891697261>>.

¹⁴⁰ Ibid.

¹⁴¹ 'Mining Tax to Regain Spotlight', *Sky News* (online), 21 March 2011 <<http://www.skynews.com.au/topstories/article.aspx?id=591468&vId=>>>.

¹⁴² Michael Harvey, 'Disaster-Hit Budget Lies Ahead: Swan', *The Herald Sun* (online), 15 April 2011 <<http://www.heraldsun.com.au/ipad/disaster-hit-budget-lies-ahead-swan/story-fn6bfkm6-1226027007577>>.

Minister foreshadowed attacks on the unemployed,¹⁴³ those on disability pensions,¹⁴⁴ teenage mothers,¹⁴⁵ and public servants to name a few plus the usual scapegoating of refugees to divert attention away from its regressive social policies.¹⁴⁶

The magnitude of the back down can best be understood in the context of mining profits today. According to Patrick Durkin ‘four mining companies last year generated almost half the profits of Australia’s 50 largest listed companies ...’¹⁴⁷ It is a case of what might have been if the Labor government had had an ounce of courage in the face of a predictable backlash from mining capital. The mining tax back down may be a turning point for Labor and a rejection by it of its traditional role of ruling for capital, not capitalists.¹⁴⁸ Ross Garnaut put it this way:

The Budget and the resource tax have drawn a powerful negative response from businesses in the resources sector. There is nothing unexpected about that. What we do not yet know, is whether this episode will confirm the descent of Australian political culture into a North Atlantic malaise, or represent a revival of the capacity of the Australian polity to take positions in the national interest, independently of sectional pressures.¹⁴⁹

‘The national interest’ is code for the interests of the ruling class.¹⁵⁰ As Garnaut is hinting, the mining tax backdown highlights the changing nature of the role of social democracy in Australia from social democracy with reforms to a group now captured by specific and powerful interest groups.¹⁵¹ The main function of the RSPT and the MRRT was and is to redistribute social surplus from the mining sector to other capital, through company tax cuts. Labor couldn’t even manage to deliver a mild tax to underpin a transfer of some value from mining capital to other less profitable sections of capital. It was unable and unwilling to enforce its traditional systemic role of ruling for capital.

C Profit rates

The pressure to redistribute from one very profitable section of capital to less profitable sections comes from stagnating profit rates. Since the early 70s there has been a global tendency, bought about by investment in capital being at a greater rate than investment in labour, for profit rates in developed countries to decline and then

¹⁴³ *Gillard Vows Welfare Shake-Up* (2011) ABC News
<<http://www.abc.net.au/news/stories/2011/04/13/3190877.htm>>.

¹⁴⁴ *Ibid.*

¹⁴⁵ Bramble and Kuhn, above n 106; Heaney, above n 85.

¹⁴⁶ Rebecca Barrigos, ‘Labor Continues to Bash Refugees’, *Socialist Alternative* (online), 7 April 2011
<http://www.sa.org.au/index.php?option=com_k2&view=item&id=6848:labor-continues-to-bash-refugees&Itemid=453>.

¹⁴⁷ Patrick Durkin, ‘Miner’s Take the Lion’s Share of Profits’, *The Australian Financial Review*, 27 April 2011, 3.

¹⁴⁸ Bramble and Kuhn, above n 131.

¹⁴⁹ Ross Garnaut, ‘The New Australian Resource Rent Tax’, *The Sydney Morning Herald* (online), 21 May 2010 <<http://www.smh.com.au/business/the-new-australian-resource-rent-tax-20100520-vqlk.html>>. See also John Passant, *The Mining Barons Run the Country* (2010) En Passant with John Passant <<http://enpassant.com.au/?p=7608>>.

¹⁵⁰ V I Lenin, *Draft These on the National and Colonial Questions* (Beijing, 1975) 22.

¹⁵¹ Rick Kuhn and Tom Bramble, ‘The Business End of Labor’, *Canberra Times* (Canberra), 24 September 2010, 19.

stagnate.¹⁵² The collapse of the Keynesian consensus faced with the crisis of profitability in the early 1970s saw the philosophy and practice of neoliberalism – the free market cures all¹⁵³ – rise from the dead as cover for policies to address falling profit rates. Those policies to be implemented must first of all involve destroying the collective organisation of workers as possible agents of resistance. For this reason Pierre Bourdieu calls neoliberalism ‘a programme for destroying collective structures which may impede the pure market logic.’¹⁵⁴ The policies developed to address falling profit rates include shifting income and wealth from labour to capital,¹⁵⁵ lengthening the working day,¹⁵⁶ wanting to cut real wages,¹⁵⁷ forcing workers to do more with less in the name of increasing productivity¹⁵⁸ and shifting the tax burden further from capital to labour,¹⁵⁹ arguably the defining element of the Henry Tax Review recommendations.¹⁶⁰

D Better lives

People want better lives for themselves and their children.¹⁶¹ These expectations have come up against less social surplus globally as a consequence of the tendency of the

¹⁵² Chris Harman, ‘The Rate of Profit and the World Today’ (2007) 115 *International Socialism Journal* (online) <<http://www.isj.org.uk/index.php?id=340&issue=115>>.

¹⁵³ Chris Harman, ‘Theorising Neoliberalism’ (2007) 117 *International Socialism Journal* (online) <<http://www.isj.org.uk/?id=399>>. See also David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) where he argues that contrary to neoliberal dogma in fact the free unrestrained market needs to be built, and that this role of construction falls to the capitalist state.

¹⁵⁴ Pierre Bourdieu, *Utopia of Endless Exploitation: The Essence of Neoliberalism* (1998) *Le Monde Diplomatique* <<http://mondediplo.com/1998/12/08bourdieu>>.

¹⁵⁵ As Federal Labor MP Andrew Leigh points out in his book *Mind the Gap*, in ‘2007 the top 1% had 10% of household income, double the share in 1980’. The position for the top 0.1% is even starker. Leigh writes, ‘... by 2007, the richest 0.001 of all Australians again had 4% of household income’. According to the ACTU Economic Bulletin Issue 3, 1 October 2010, ‘the profit share of national income is now near the record highs it reached in 2008, while the wages share of income is the lowest since 1964’.

¹⁵⁶ Brigid Van Wanrooy, *When Do We Stop? Achieving Maximum Weekly Working Hours in Australia* (2011) Workplace Research Centre University of Sydney <<http://wrc.org.au/achieving-maximum-weekly-working-hours.php>>.

¹⁵⁷ Successfully in the US, and at least restraining wages growth in Australia so that the shift of wealth has been to capital. See ACTU Economic Bulletin, above n 155.

¹⁵⁸ John Quiggin debunks the idea that the seemingly large productivity increases of the 1990s – the ‘productivity surge’ – in Australia were actual productivity increases. He says the gains were the result of ‘the increase in the pace and intensity of work’. John Quiggin, ‘No Hard and Fast Rule for Employees’, *The Australian Financial Review*, 18 August 2011, 63. In other words the productivity increases were built on longer days and doing more with less or to use the bosses’ euphemism, ‘working smarter’.

¹⁵⁹ R. Avi-Yonah, ‘Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State’ (2000) 113(7) *Harvard Law Review* 157.

¹⁶⁰ John Freebairn puts it slightly less dramatically. He says ‘As Australia becomes more and more integrated into the global economy, the Henry Review argues that there are large productivity gains for Australian workers and their take-home pay by reducing the tax burden on the internationally mobile input capital and shifting the initial tax burden to immobile land and other natural resources, and to a lesser extent labour and consumption.’ John Freebairn ‘Put Henry Review Reforms Back on Political Agenda’, *The Conversation* (online), 6 April 2011 <<http://theconversation.edu.au/put-henry-review-reforms-back-on-political-agenda-33>>.

¹⁶¹ *Development as a Security Strategy* (2011) 3D Security <http://www.3dsecurity.org/development_as_strategy>.

rate of profit to fall and the failure of the countervailing tendencies,¹⁶² in particular the failure of governments to countenance Schumpeterian creative destruction of companies too big to fail.¹⁶³ Further the pressure from competition on various clusters and concentrations of capital is to reinvest what surplus does exist to keep their motor of capitalism ticking over.¹⁶⁴ The crisis ridden nature of the system can send people not just into poverty but starvation. For example the Global Financial Crisis and, in 2010 and 2011, higher food prices, have pushed over 100 million into starvation or malnourishment.¹⁶⁵ Almost one billion are now starving and another one billion are malnourished.¹⁶⁶

In relation to Australia and the dreams of ordinary working people for a better life,¹⁶⁷ the *Henry Tax Review* recognises that there is a desire to improve ‘... living standards, support for the needy, fairness, social advancement, security and protection of the environment.’¹⁶⁸ In light of efforts around the globe to dismantle the post-war welfare state settlement between capital and labour,¹⁶⁹ the welfare state looks decidedly anachronistic, or perhaps more accurately will do so in future years in Australia as the grand compromise in Europe¹⁷⁰ and elsewhere unravels completely. In Australia it means that the essential Keynesian neoliberalism¹⁷¹ of the *Henry Tax Review* may give way to a ruthless political Thatcherism in years to come. Certainly the rise of the Tea Party and other figures on the right of the Republican movement in the United States, the actions in practice of the Obama administration and the attacks by conservative and social democratic governments across Europe on welfare systems,

¹⁶² Alex Callinicos, *Imperialism and Global Political Economy* (2009) 28-34. See also Alex Callinicos, *Bonfire of Illusions: the Twin Crises of the Liberal World* (Polity Press, 2010); Chris Harman, *Zombie Capitalism: Global Crisis and the Relevance of Marx* (Bookmarks, 2009).

¹⁶³ *Ibid.*

¹⁶⁴ ‘Accumulate, accumulate! That is Moses and the prophets!’ Karl Marx, *Capital Vol 1* (Lawrence and Wishart, 1974) 588.

¹⁶⁵ Sixty million of that 100 million can be attributed to the GFC – ‘World Bank Says GFC Drove Millions to Poverty’, *International Business Times* (online), 22 July 2010 <<http://au.ibtimes.com/articles/37409/20100722/world-bank-wb-gfc-poverty-fragile-recovery-uncertainty-latin-america-mexico-education-infrastructure.htm>> and 44 million because of higher food prices – ‘Food Prices Push 44 m into Poverty: World Bank’, *The Sydney Morning Herald* (online), 16 February 2011 <<http://news.smh.com.au/breaking-news-world/food-prices-push-44-mn-into-poverty-world-bank-20110216-1avcp.html>>.

¹⁶⁶ Frank Mulder, ‘Food Empires Creating Agricultural Crisis’, World Social Forum (online) 18 October 2010 <<http://www.ips.org/TV/wsf/food-empires-creating-agricultural-crisis/>>.

¹⁶⁷ These dreams arise from the place workers have in the productive process as the producers of wealth but not its possessors.

¹⁶⁸ The Henry Tax Review, above n 25, xvii.

¹⁶⁹ Paul Pierson, *Dismantling the Welfare State: Reagan, Thatcher and the Politics of Retrenchment* (Cambridge University Press, 1994) 3; Paul Pierson, ‘Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies’ (2002) 43(2) *Revue Francaise de Sociologie* 369.

¹⁷⁰ Ian Taylor, ‘New World Orders Without End? An Intellectual History of Post-War North–South Relations’ (2001-2002) 9&10 *Afrika Zamani* 1, 7 <<http://www.codesria.org/IMG/pdf/taylor.pdf>>.

¹⁷¹ Keynesian neoliberalism has been described as ‘government intervention to save the free market’. See John Passant, Submission No 10 to the Senate Select Committee, *Senate Select Committee on the Scrutiny of New Taxes* <http://www.aph.gov.au/senate/committee/scrutinynewtaxes_ctte/national_mining_taxes/submissions.htm> As La Vie Urbaine puts it in relation to urban development but in doing so makes a point applying in my view more generally: ‘Simultaneously, Keynesian impulses are reformulated into the neoliberal urban development projects and neoliberal characteristics back onto the Keynesian project.’: *Troubling the Keynesian-Neoliberal Periodization on the Flats* (2008) La Vie Urbaine <<http://vivesaintbobo.blogspot.com/2008/08/troubling-keynesian-neoliberal.html>>.

public services and living standards support this. The Australian Prime Minister's recent pre-Budget speech attacking the unemployed and those on disability pensions as effectively being workshy is one part of this grand narrative of Australian neoliberalism.¹⁷² Her attacks on teenage mothers continue that narrative.¹⁷³

The Henry Tax Review attempted to balance two competing views of the way forward for capitalism. The Final Report contains within it the seeds of both social democracy and neoliberalism, what I have called Keynesian neoliberalism.¹⁷⁴ In fact much of the thrust of the Review is in designing a future tax system in which the burden of tax moves further and further on to so called fixed assets, in the main labour.¹⁷⁵ Yet the tendency of the rate of profit to fall, reinforced by the very tax changes Henry suggests, will of necessity force Governments to attack public services.¹⁷⁶ The Keynesian heart meets the neoliberal reality. Taxing economic rent becomes a desperate ploy to address falling profit rates and keep the vision if not the reality of the New Jerusalem alive. It is part of social democracy's adoption of neoliberalism with a Keynesian tint.¹⁷⁷

In this conflict between the old economics and the older economics and their contradictory and intertwined relationships, governments globally may be tempted by what they see as the magic pudding of rent taxes. They also might be tempted by nationalisations – ie state capitalist control of the mining industry. Certainly *the Henry Tax Review* raised nationalisation as a possibility if the inefficiencies of government control were not too great. Such temptations have to be understood in the context of the desire for improved living standards, and mass mobilisations or their lack of them to pursue reforming programmes.

On nationalisations, the Henry Tax Review said:

Public production allows the government to control exploration and production expenditure, but may lower the return to the community if public enterprise is less efficient at resource exploration and production due to a lack of expertise and market discipline.¹⁷⁸

The efficiency argument can be easily answered. If the nationalisation is under workers' control efficiency and creativity will rapidly increase.¹⁷⁹ As we progress,

¹⁷² Julia Gillard, 'The Dignity of Work': Address to the Sydney Institute Annual Dinner 13 April 2011 (2011) Prime Minister of Australia <<http://www.pm.gov.au/press-office/dignity-work-address-sydney-institute-annual-dinner>>.

¹⁷³ Bramble and Kuhn, above n 106; Heaney, above n 85.

¹⁷⁴ See John Passant, above n 171.

¹⁷⁵ Ibid.

¹⁷⁶ O'Connor, above n 12.

¹⁷⁷ For example at a speech delivered at the International Conference on the Global Crisis and Hegemonic Dilemmas (New Delhi, Nov.8-10) Boris Kagarlitsky, the Director of the Institute of Globalization and Social Movements in Moscow, said 'The economic elites are turning to a neoliberal Keynesianism to save the crisis of capitalism, which is doomed to fail because it does not address its root causes.': *Emerging Powers: Allies or Rivals* (2011) Transnational Institute <<http://www.tni.org/multimedia/video-emerging-powers-allies-or-rivals>>.

¹⁷⁸ The Henry Tax Review, above n 26, 219.

¹⁷⁹ Leon Trotsky, 'Workers' Control of Production' (1931) 24 *Bulletin of the Opposition* (online) <<http://www.marxists.org/archive/trotsky/germany/1931/310820.htm>>.

production under workers' control challenges the bourgeois state and an alternative democratic state arises.¹⁸⁰

The key to any democratic model of production is struggle from below. In Australia three decades of class collaboration¹⁸¹ – what is good for the boss is good for workers, with the trade union bureaucracy leading the charge, first through the Accord¹⁸² and then through acquiescence in practice to the Howard agenda¹⁸³ – have driven class struggle underground. In resource rich developing countries, given the low level of institutional development and the drive to neoliberalism over the past decades in most countries, nationalisations are not an option, unless driven by a fear of working class revolution.¹⁸⁴ In Australia the quietude of the working class¹⁸⁵ means a resource rent tax was driven by the needs of capital in general, as viewed through the eyes of the Labor Government rather than any attempt at tax justice. If the furious reaction of mining capital in Australia to a fairly innocuous rent tax, the RSPT, is any guide – and it will be as each individual capitalist and sector of capitalism attempts to protect their patch of profits – it is unlikely in the extreme that governments in developed or developing countries will challenge the power of western mining capital or Chinese state capitalism, unless driven to by revolutionary movements from below.

VI CONCLUSION

This paper has looked at the reasons why the left should be involved in debates about and struggles over tax and justice. It argues that it is out the struggle of ideas and more importantly of action that progressive change can arise. In Australia that battle has been joined around resource rent taxes. The paper then looked at the nature of the ALP as a capitalist workers' party. It examined the Labor Government's attempts to introduce a resource profits tax and the backlash from mining capital which removed a Prime Minister and rolled back the main aspects of the tax. It argued that the back down on the RSPT is an example of a party in transition. This capitulation of Labor raises questions about the role of social democracy in the face of a dwindling social surplus and the shift in social democracy's role from systemic management of capitalism to governing for sectional interests of capital.

The paper suggests that the battle for a just society suffered a setback in Australia when the RSPT was defeated. It offered the potential for the revenue to be used, contrary to Labor's wishes, on socially progressive programmes and the possibility of the expansion of such a tax to all super profits. Its defeat meant the battle over the distribution of the revenue was not joined. The intransigence of mining capital in Australia and its resistance to a mild mining tax could have been met with a struggle from below for 'tax justice'. It was not. The struggles from below in places like Egypt

¹⁸⁰ Ibid.

¹⁸¹ Bramble, above n 50. See also Tom Bramble 'Thirteen Wasted Years? Labor in Power (1983-96) and its Accord with the Unions' *Marxist Interventions* (online) <<http://www.anu.edu.au/polsci/marx/interventions/accord.htm>>.

¹⁸² Rick Kuhn above n 128.

¹⁸³ Tom Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide* (Cambridge University Press, 2008).

¹⁸⁴ Cihan Aksan & Jon Bailes 'Revolution Stalled? Venezuela and Bolivia: An Interview with Mike Gonzalez', *State of Nature* (online), Summer 2010 <<http://www.stateofnature.org/mikeGonzalez.html>>.

¹⁸⁵ Bramble, above n 183.

show that the most intransigent of entrenched political figures and their views can be removed with real ongoing struggle. It is a lesson that Australian workers, facing Budget attacks on their jobs and living standards, and job uncertainty, could learn. If they did they could push for a more equitable and just tax system. It is only through struggle that justice can be won and that is as true of tax justice in Australia as it of any other form of justice.